CONTEMPT BY PUBLICATION IN NINETEENTH CENTURY AMERICA

by

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ABSTRACT

The American legal system and the American press had a complex relationship during the Nineteenth Century. Perhaps nothing complicated that relationship more than the concept of contempt by publication. Judges could fine and jail publishers and editors whose publications questioned a court's authority or integrity. The concept placed two of America's most valued ideals – a free press and an independent judiciary – squarely at odds. How else could the judicial system protect its integrity when unruly publishers flagrantly abused the judicial system? How could the press truly be free if a judge had the power to fine and jail publishers at will?

Contempt by publication received considerable review in state (and a few federal) courts throughout the Nineteenth Century. Even though dozens of decisions established competing standards regarding a journalist's ability to report and comment on judicial proceedings, the number of cases suggests that this friction between the judiciary's perceived inherent power and the concept of press freedom was important enough to journalists and judges to warrant significant examination. The conflict between the courts, which reserved the right to punish for contempt any publication deemed disrespectful or prejudicial, and the concept of freedom of the press, which promised anyone the right to publish without fear of government reprisals, represented an important struggle in America's development of a legal tradition for journalism.

CHAPTER ONE

CONTEMPT REVIEWED

The year was 1893. Charles Shortridge, publisher of the San Jose *Mercury* in California, had defied a judicial order by publishing an account of a divorce proceeding.[1] The judge presiding over the dispute before the Superior Court of Santa Clara County was concerned that some of the testimony would be "filthy," so he prohibited its publication.[2] Shortridge, however, disregarded the order. When he was called before the court to explain himself, he said he was simply exercising his free press rights. The judge, considering how Shortridge had so flagrantly defied a judicial order, cited him with contempt of court.[3] Believing he had been wronged, Shortridge appealed to the Supreme Court of California, and the contempt citation was overturned.[4]

In some respects, Charles Shortridge got lucky. He faced one of the judiciary's most powerful corrective tools – contempt – and ultimately emerged victorious. Many of his contemporary colleagues who faced similar "corrective" action did not fare as well. His and dozens of other stories are examples of the complex relationship that existed between the American legal system and the American press during the Nineteenth Century. Perhaps nothing complicated that relationship more than the concept of contempt by publication. It placed two of America's most valued ideals – a free press and

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[1] *In re Shortridge*, 1893 Cal. LEXIS 706. I have used case files stored in LEXIS for the majority of cases included in this dissertation. For each of these cases, I will include the LEXIS case citation and the corresponding LEXIS page number.
[2] Ibid., 3.
[3] Ibid., 4.
[4] Ibid., 18.

an independent judiciary – squarely at odds. How else could the judicial system protect its integrity when unruly publishers flagrantly abused the judicial system? How could the press truly be free if a judge had the power to fine and jail publishers at will?

Contempt by publication received considerable review in state (and a few federal) courts throughout the Nineteenth Century. Even though dozens of decisions established competing standards regarding a journalist's ability to report and comment on judicial proceedings, the number of cases suggests this friction between the judiciary's perceived inherent power and the concept of press freedom was important enough to journalists and judges to warrant significant examination. The conflict between the courts, which reserved the right to punish for contempt any publication deemed disrespectful or prejudicial, and the concept of freedom of the press, which promised anyone the right to publish without fear of government reprisals, represented an important struggle in America's development of a legal tradition for journalism.

Significance of Study

There have been differences of opinion regarding the significance of the judiciary's relationship with the press during the Nineteenth Century. It was not a very noteworthy time for the courts and the idea of freedom of the press, according to one view. Until recently, the topic had been largely ignored in journalism history journals, books, and texts.[5] An explanation for this lack of historical study is that America's judicial system spent little time examining press freedoms during these years because judges chose to attend to more pressing needs affecting the development of the country. During the Nineteenth Century, according to the legal historian Thomas Emerson, the

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[5] Timothy W. Gleason, "Historians and Freedom of the Press Since 1800," *American Journalism* 5:4 (1988): 230.

judicial branch took a relatively narrow role in directly protecting freedom of expression.[6] He believed such freedom was not so much a deliberate articulation and enforcement of legal doctrine as it was a byproduct of the country's economic and political system.[7]

The amount of judicial activity concerning press rights and restrictions during the Nineteenth Century suggests that Emerson's assessment is not accurate, and another viewpoint recognizes the period as a critically important time for legal developments concerning freedom of the press in America.[8] Media historian Timothy Gleason described the history of free press law in this era as a history of litigation where legal protections were won in the heat of courtroom battles.[9] Hundreds of decisions affecting contempt by publication and other press issues can be found in court records and digests from this period. These court decisions are evidence that America's judicial system was very active in examining free press issues. These cases helped provide the framework of rights and restrictions by which a Nineteenth Century reporter, and generations of future journalists, would have to abide.

Contempt by publication is one of the legal frontiers still worthy of exploration in American media history. On one side of the issue, publishers, editors, and journalists from all parts of the country consistently asserted their free press rights when charged with contempt. On another side of the issue, judicial decisions built a considerable amount of seemingly contradictory case law on the subject. Legal historians Walter

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[6] Thomas I. Emerson, *Toward a General Theory of the First Amendment* (New York: Random House, 1966), 35.
[7] Ibid, 36.
[8] Timothy W. Gleason, "19th Century Legal Practice and Freedom of the Press: An Introduction to an Unfamiliar Terrain," *Journalism History* 14:1 (Spring 1987): 26.
[9] Timothy W. Gleason, *The Watchdog Concept: The Press and the Courts in Nineteenth-Century America* (Ames, Iowa: Iowa State University Press, 1990), viii.

Nelles and Carol Weiss King even concluded that "its development in the United States has been spasmodic."[10] There is also the matter of historical research itself. Many works have devoted a few sentences or paragraphs to the results of particular contempt by publication cases. However, few studies have provided a thorough review of a case, and those that have usually limited the study to one or a few high-profile cases. Other works have included simple lists of contempt by publication cases or the authors' opinions on the topic. This dissertation attempts to include all recorded Nineteenth Century contempt by publication cases in America that involved newspaper reporting and publishing, particularly those that were appealed to superior courts. Several aspects of each case – the nature of the offending publication, the people and arguments involved, and the ultimate outcome – will be explained. The dissertation also will consider how state and federal contempt statues influenced contempt by publication cases and why this was an area of the law that was largely left to the states to determine. This research will take a chronological approach and follow contempt by publication litigation as it progressed through the century. Cases from the final two decades of the century also will be organized into two general categories within their respective time periods – those that upheld a court's unrestricted right to use the contempt authority and those that supported legislative curtailment of the power.

Literature Review

There is quite a bit of uniformity among scholars concerning the actions that triggered contempt by publication. There were two basic kinds of contempt during the

[10] Walter Nelles and Carol Weiss King, "Contempt by Publication in the United States: To the Federal Contempt Statute," 28 *Columbia Law Review* 401 (1928): 401.

Nineteenth Century.[11] Actions taking place during a legal proceeding, and in the presence of the judge, were often referred to as direct contempts. Actions occurring outside of the courtroom – newspaper publications, for instance – were referred to as implied, indirect, or constructive contempts. "Constructive contempt," as journalism law scholar Robert Jones defined it, "is the performance of some act, outside the court room, which interferes with the administration of justice or tends to intimidate the court or to influence litigants, witnesses, jurors or officers of the court and thus obstruct justice."[12] Joel Prentiss Bishop, another legal scholar, described it this way:

> Any publication, whether by parties or strangers, which concerns a case pending in court, and has a tendency to prejudice the public concerning its merits, or to corrupt the administration of justice; or which reflects on the tribunal or its proceedings, or on the parties, the jurors, the witnesses, or the counsel; may be visited as a contempt.[13]

William Hale, who researched legal issues and the media, considered it to be "well-established law that any one who thus intrudes himself on the due and orderly administration of justice is guilty of contempt of court and may be called before the court and subjected to summary punishment."[14] Constitutional scholar Donald Gillmor used the following passage to explain the process:

> On the appointed day, the hapless editor, having sworn affidavits explaining, excusing or justifying the publication in question, appears in court and through his counsel offers the most abject apologies or attempts to show by argument that no contempt has, in fact, been committed. If the court disagrees, the editor goes to jail and remains there until he can convince the court that he has learned his lesson. Or the court can impose a fine; or both a fine and imprisonment. If the

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[11] Frank Thayer, *Legal Control of the Press: Concerning Libel, Privacy, Contempt, Copyright, Regulation of Advertising and Postal Laws*, 4th ed. (Brooklyn, New York: The Foundation Press, Inc., 1962), 545.
[12] Robert W. Jones, *The Law of Journalism* (Washington, D.C.: Washington Law Book Co., 1940), 181.
[13] Joel Prentiss Bishop, *Commentaries on the Criminal Law*, 4th ed., 2 vols. (Boston: Little, Brown and Company, 1868), 2: 150-51.
[14] William G. Hale, *The Law of the Press: Text, Statutes, and Cases* (St. Paul, Minn.: West Publishing Co., 1923), 256.

> court is convinced that no contempt has been committed, the editor is discharged.[15]

The chance of receiving some degree of punishment was great. The judge had sole authority to level a charge of contempt, determine guilt or innocence, and administer punishment, if necessary. There was no trial or jury, and the sentence usually was carried out immediately.

Scholars have debated three major questions concerning the judiciary's contempt power: was it an inherent component of the legal system? Did America's Founding Fathers intend for America's judiciary to wield such power? Was contempt necessary to protect the judicial process, or was it an unchecked power that threatened an individual's civil liberties? Consider first the historical nature of the contempt authority. "Contempt of Court (*contemptus curiae*) has been a recognized phrase in English law from the twelfth century to the present time," wrote Sir John Fox, an historian of British law. The legal development of contempt continued "until by the fourteenth century the principles upon which punishment was inflicted to restrain ... acts which tend to obstruct the course of justice, had become firmly established."[16] Historian Stephen Krause wrote that early contempt law was based in the common law.[17] Perhaps the most influential authority on contempt law was English legal scholar Sir William Blackstone. He published his authoritative *Commentaries on the Laws of England* in 1769 and ascribed an immemorial nature to contempt, calling it as old as the laws themselves.[18] He concluded that "the process by attachment in general appears to be extremely ancient" and by "long and

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[15] Donald M. Gillmor, *Free Press and Fair Trial* (Washington, D.C.: Public Affairs Press, 1966), 160.
[16] Sir John C. Fox, *The History of Contempt of Court: The Form of Trial and the Mode of Punishment* (Oxford: Clarendon Press, 1927; reprint ed., London: Professional Books Limited, 1972), 1.
[17] Stephen J. Krause, "Punishing the Press: Using Contempt of Court to Secure the Right to a Fair Trial," 76 *Boston University Law Review* 537 (June 1996): 539.
[18] William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765-1769, Of Public Wrongs* (1769), 4 vols. (Chicago: The University of Chicago Press, 1979), 4: 282.

immemorial usage" had become the law of England.[19] Blackstone's *Commentaries* helped solidify the contempt power's place among judicial privileges and sanctioned its use to enforce the will of the court.

There have been other scholars who supported Blackstone's assertion of the contempt power's innate existence within the law. "What is the source of this inherent power to punish for contempt?" legal scholar Edward Dangel asked. "The power of contempt was never given to the court by the people, by constitutional delegation or otherwise, nor did it come from the early Common Law."[20] Enforcement of legal discipline "is inherent in the administration of justice," wrote Frank Thayer, a media law specialist. "Without some means of enforcing their judgments, decrees, or orders, courts would be powerless."[21] Thayer suggested there is ample historical support for the theory that courts have an inherent power to punish for out-of-court contempts.[22] Robert Jones, also a media law scholar, concluded the court's power to punish for contempt "originated in its inherent right to discipline those individuals whose unseemly behavior inside the court room tended to interfere with the orderly conduct of business ... or to prejudice a jury...." It was a natural next step, he believed, "for the court to punish those whose unseemly behavior outside the court room tended to constitute an interruption or interference."[23] Perhaps the greatest proponents of the inherent nature of contempt were the courts themselves. "Cases in England and the United States which treat the contempt power all assume that the order of society's affairs dictates that this power is inherent in

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[19] Ibid., 285.
[20] Edward M. Dangel, *National Lawyers' Manual: Contempt* (Boston: National Lawyers' Manual Company, 1939), 19c.
[21] Thayer, *Legal Control of the Press: Concerning Libel, Privacy, Contempt, Copyright, Regulation of Advertising and Postal Laws*, 543.
[22] Ibid., 545-46.
[23] Jones, *The Law of Journalism*, 184.

the very nature of governmental bodies," legal historian Ronald Goldfarb wrote, "and that all individuals figuratively sacrifice some portion of their civil liberties to this needed expedient when they adopt their social contract."[24] Numerous decisions concluded that courts had what legal scholar Harold Sullivan described as "an 'inherent' or 'super-statutory right' of almost mystical origin and indispensable necessity...."[25]

Other scholars have disagreed that the use of the contempt power to punish actions away from the courtroom was a natural component of judicial authority. Press historian Edward Gerald described the idea as "fictitious."[26] Fredrick Seaton Siebert, who studied both American and English press issues, noted that "studies in this field have disclosed that the remedy in these cases was unknown to the common law before the seventeenth century."[27] He was referring specifically to research by Sir John Fox. While examining English cases of contempt by publication, Fox discovered what seemed to be a modern interpretation for using the contempt power to punish publications. He noted the following:

> In *Re Read and Huggonson and the St. James's Evening Post* (1742, 2 Atk. 469) Lord Hardwicke, in deciding that it was a contempt to libel persons in connexion [sic] with a cause in Chancery to which they were parties, referred to 'scandalizing the Court' as one form of contempt....[28]

Fox concluded that "Lord Hardwicke does not here refer to the jurisdiction to punish libels summarily as contempts as firmly established, but rather seems to treat the point as

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[24] Ronald L. Goldfarb, *The Contempt Power* (New York: Columbia University Press, 1963), 2.
[25] Harold W. Sullivan, *Contempts by Publication: The Law of Trial by Newspaper*, 3rd ed. (Littleton, Colorado: Fred B. Rothman & Co., 1980), 172.
[26] J. Edward Gerald, *The Press and the Constitution, 1931-1947* (Minneapolis: University of Minnesota Press, 1948), 6.
[27] Fredrick Seaton Siebert, *The Rights and Privileges of the Press* (New York: Appleton-Century-Crofts, 1934), footnote 3, 283-84.
[28] John Charles Fox, "The King v. Almon," 24 *Law Quarterly Review* 184 (1908): 189.

a new one."[29] As historian Zechariah Chafee, Jr. noted, the Blackstonian theory of contempt's immemorial nature "dies hard, but it ought to be knocked on the head once for all."[30]

Blackstone's legal theory was practically unassailable for a time, and that contributed to a serious debate about whether America's Founding Fathers intended for the country's judicial branch to exercise the contempt power. By the end of the Eighteenth Century, contempt was so firmly established as an inherent power that legal historian Herman Pritchett suggested America's framers believed it was unnecessary to write it into the Constitution.[31] "Although the Constitution itself does not mention the contempt power," Gerald concurred, "it has been developed in this country as necessary and proper to carrying on the judicial power."[32] However, Chafee – and others – believed America's founding fathers intended the First Amendment to overthrow the English common law – including judicial contempt – as formulated by Blackstone.[33] Nelles and King argued that

> if freedom was a fact of American life as well as an ornament of patriotic declamation, a discretionary power of judges to annex society at large to the judicial precincts and curtail outside expressions of human interests because such expressions might affect a pending law suit was more than inexpedient. It was impossible.[34]

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[29] Ibid., 189-90.
[30] Zechariah Chafee, Jr., *Free Speech in the United States* (Cambridge, Mass.: Harvard University Press, 1967), 9.
[31] C. Herman Pritchett, *Constitutional Law of the Federal System* (Englewood Cliffs, New Jersey: Prentice-Hall, 1984), 190.
[32] Gerald, *The Press and the Constitution, 1931-1947*, 29.
[33] David M. Rabban, *Free Speech in Its Forgotten Years* (New York: Cambridge University Press, 1997), 5.
[34] Walter Nelles and Carol Weiss King, "Contempt by Publication in the United States: Since the Federal Contempt Statute," 28 *Columbia Law Review* 525 (1928): 533.

Nelles and King considered this "supposed English common law power" as inapplicable to American conditions.[35] Thomas Cooley, the renowned legal scholar and justice of the Michigan Supreme Court, conceded that press freedom "does not imply complete exemption from responsibility for every thing a citizen may say or publish...."[36] However, he argued that "the mere exemption from previous restraints cannot be all that is secured by the constitutional provisions," and he concluded that the idea of press liberty would be rendered a mockery if anyone could freely publish his views but was subject to punishment for it afterward.[37] "A man who may be whipped and jailed for what he says or prints," historian Leonard Levy wrote, "is not likely to feel free to express his opinions even if he does not need a government license to do so."[38] The framers of the Constitution sought to move away from this definition, according to Levy, and chose to adopt a broader legal standard, one that would allow "rasping, corrosive, and offensive discussions on all topics of public interest."[39] After much debate, the framers crafted the First Amendment to create a constitutional guarantee of press freedom in the United States. Levy was not convinced, however, that the framers intended to protect the press from all forms of government intervention. Read literally, the First Amendment prohibited Congress from abridging the freedom of the press, but it did not necessarily limit the entire federal government, thus creating the possibility that the executive and judicial branches would be able to restrict press freedoms.[40] The First Amendment was considered applicable to the federal government only; states vested their free press

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[35] Ibid.
[36] Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union*, 7th ed. (Boston: Little, Brown, and Company, 1903), 603.
[37] Ibid., 603-04.
[38] Leonard Levy, *Emergence of a Free Press* (New York: Oxford University Press, 1985), 13.
[39] Ibid., 272.
[40] Ibid., 274-75.

guarantees in their own constitutions. This, and the existing common law, left enough room for the power of judicial contempt to grow and flourish in America's judicial systems.

The third major scholastic argument concerns the conflict between contempt as a tool to protect the administration of justice from an overzealous press and contempt as a tool of suppression. "No court of justice could accomplish the objects of its existence unless it could in some way preserve order, and enforce its mandates and decrees," Joel Prentiss Bishop wrote. As far as he was concerned, the only effectual method a court had of accomplishing these goals was through the contempt process, which was "incident to every judicial tribunal, derived from its very constitution, without any express statutory aid."[41] In fact, there were times, according to Robert Jones, when "many such rulings are provoked by an intemperate attitude of the newspaper involved."[42] Zechariah Chafee, Jr., believed the administration of justice "can easily be warped by improper publications in the press."[43] He even suggested that editors and publishers had only themselves to blame. Early American newspapers were "unscrupulous vehicles of political partisanship," he wrote. "Judges refused to become targets for the streams of abuse they saw constantly directed against legislators and officeholders."[44] The press, according to one view, displayed a tendency to be a bit of a brat. "Freedom of the press is an ungrateful child," Harold Sullivan observed. "All that it is, and all that it may ever hope to be in this country, it owes to the courts."[45] He was concerned about the idea of trial by newspaper,

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[41] Bishop, *Commentaries on the Criminal Law*, 142.
[42] Jones, *The Law of Journalism*, 203.
[43] Zechariah Chafee, Jr., *Government and Mass Communications: A Report from the Commission on Freedom of the Press* (Hamden, Conn.: Archon Books, 1965), 384.
[44] Ibid., 432.
[45] Sullivan, *Contempts by Publication: The Law of Trial by Newspaper*, vii.

which occurred when the press tried and convicted a defendant in the court of public opinion. "Trial by Newspaper," he was certain, "would be stopped dead in its tracks the very moment the Judiciary awakens and becomes more interested in vindicating the majesty of the law and protecting its great constitutional guarantees."[46] Contempt by publication was not about freedom of the press, Sullivan argued. "The real freedom involved is the freedom of the courts – freedom to function without damaging interference by the press, which cannot be justified on any ground of interest involved on the part of the press," he said.[47] In the eyes of Nineteenth Century jurists, according to Gleason, "the institutional press all too often practiced 'trial by newspaper,' and judges refused to give up their power to exercise some control over the press's [sic] treatment of the legal process."[48]

The contempt power was supposed to involve an intricate balance of authority and restraint. "One of the most delicate tests of all comes when the courts have to weigh their own integrity against the rights of others as expressed in the Constitution," Edward Gerald argued. "Such an occasion arises when a newspaper criticizes a court and is required to answer charges of interference with the processes of justice."[49] Gerald, as have others who have studied contempt by publication, also recognized another problem. "The high purpose for which the contempt power allegedly was conceived and for which it is applied is not always discernible," he said.[50] He accused judges of using the power arbitrarily, and "just where the curative power is to be applied has been the bone of

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[46] Ibid., ix.
[47] Ibid., 144.
[48] Gleason, *The Watchdog Concept*, 97.
[49] Gerald, *The Press and the Constitution, 1931-1947*, 5.
[50] Ibid., 29.

contention since time immemorial."[51] He criticized the procedure for violating the spirit of American civil liberties, particularly because the judge essentially presided over his own case without a jury. "The general agreement that a judge does not need the advice of a jury in maintaining order in his own courtroom," he wrote, "has been allowed to excuse the real wrong involved in handling indirect contempt without a jury."[52] Edward Dangel considered this practice to be a direct threat to freedom. "The fact that the courts act as the accusers, the prosecutors, and the judges," he suggested, "creates a situation fraught with danger."[53] Dangel even accused America's judicial system of operating under a double standard, arguing that great latitude is given for criticism of the other two branches of government. "If the legislature attempted to exert a power of contempt for criticism during its deliberations, the courts would lend protection to the public and safeguard this right to criticize," he argued. "If the President attempted to stifle criticism he would be labeled a dictator. Yet the judiciary insists that no such right exists as to itself."[54]

The judicial branch has been persistently criticized for viewing itself as unassailable. The true reason for extending contempt by publication charges to editors and publishers, legal scholar Henry Schofield wrote, was that "scandalized judges do not like to meet their critics face to face before a jury on the footing of the ... 'qualified privilege' to publish defamatory falsehood on matters of public concern with good motives, for justifiable ends." The qualified privilege to criticize authority apparently was

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[51] Ibid., 35.
[52] Ibid., 30-31.
[53] Dangel, *National Lawyers' Manual: Contempt*, Preface.
[54] Ibid., 19c.

"good enough for other people's officers, but not for judges."[55] He flatly rejected contempt by publication and criticized it "as re-establishing the jurisdiction of the Star Chamber in violation of the constitutional right of liberty of the press and the constitutional right of trial by jury in criminal cases."[56] The proceeding for contempt "is definitely a control of the press," wrote press law scholar Frank Thayer. "When the claim of freedom of the press comes into conflict with the contempt power, the former may emerge from the contest second best."[57] That was especially true when considering direct contempt. However, for indirect, or out-of-court, contempt, "the conflict between freedom of the press and the orderly administration of justice becomes more difficult to resolve." The push and pull between the two powers "has shown now one, now the other in the ascendancy."[58]

There is one other debate scholars have recognized. It involves the struggle between the judicial and legislative branches over which one of them controls the contempt authority. Both branches of government have expressed competing perspectives concerning the ability to limit a judge's contempt power. The increasing frequency of contempt citations caused serious concerns among members of the legislative branches of government during the early years of the Nineteenth Century, and lawmakers began to respond to the potential constitutional crisis. "Public opinion demanded a greater respect for the young American press than that shown in England," wrote Ronald Goldfarb, and "several states enacted statutes confining the summary power of contempt to official

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[55] Henry Schofield, *Essays on Constitutional Law and Equity and Other Subjects*, 2 vols. (Union, New Jersey: The Lawbook Exchange, Ltd., 2002), 2: 563.
[56] Ibid., 559-60.
[57] Thayer, *Legal Control of the Press: Concerning Libel, Privacy, Contempt, Copyright, Regulation of Advertising and Postal Laws*, 550.
[58] Ibid., 554.

misconduct of court officers, disobedience of process, and misbehavior in the presence of the court which obstructs the administration of justice...."[59] In 1809, Pennsylvania passed the first statute that limited a judge's contempt power. The law confined judges' summary contempt power to punishment of direct contempts and explicitly removed judicial power of contempt by publication.[60] After a series of cases in New York, that state passed similar restrictions in 1829. Donald Gillmor wrote that the reaction against the English common law method of dealing with constructive contempt reached its zenith in the impeachment trial of Judge James Peck before the United States Senate in 1830 and 1831.[61] Afterward, Congress established a geographic restriction on the use of contempt, limiting punishment to contempts committed in and around the courtroom.

However, this genuinely American interpretation of the contempt power, according to Gerald, "withered during the Civil War, and in its place arose the doctrine that any publication was contemptuous which was held to have a reasonable tendency to interfere with the processes of justice."[62] In fact, judges were loath to submit their authority to legislative oversight. Thayer suggested that the independence of the courts to protect their own interests was well ingrained in judicial thought. "Even in states where there is a strict definition of what constitutes contempt," he wrote, "it would seem that under special circumstances there is precedent for the court's considering its inherent power above the legislative enactment."[63] Another perspective recognized the contempt doctrine as always superior to any statutory restriction, as the following passage suggests:

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[59] Goldfarb, *The Contempt Power*, 90.
[60] Gleason, *The Watchdog Concept*, 85.
[61] Gillmor, *Free Press and Fair Trial*, 143.
[62] Gerald, *The Press and the Constitution, 1931-1947*, 41.
[63] Thayer, *Legal Control of the Press: Concerning Libel, Privacy, Contempt, Copyright, Regulation of Advertising and Postal Laws*, 547-48.

> This doctrine has been asserted in all its rigor by the courts. It is founded upon the principle that this power is coeval with the existence of the courts, and as necessary as the right of self-protection ... and is necessary to maintain its dignity if not its very existence. *It exists independently of statutes.*[64]

This perspective, however, was not generally shared by the legislative branches of state governments. By 1860, twenty-three of the thirty-three states had enacted limitations on the power to punish for contempt.[65] By the end of the Nineteenth Century, thirty-four of the forty-five states had statutes restricting the use of judicial contempt.[66]

Contempt Process

There are several legal terms that are commonly found in contempt by publication decisions, and knowing their definitions will be helpful for understanding the cases outlined in the following chapters. *Ex parte* is a Latin term meaning "for one party" and referred to motions, hearings, or orders granted for the benefit of one party only.[67] *In re* is shorthand for "in regard to" or "concerning." It identified the subject matter and was often used in legal actions in which only one party was involved. *Ex rel.* is an abbreviation for the Latin term *ex relatione*, which means "upon being related." This term was often used in case titles filed on behalf of the government. *Habeas corpus* was an order requiring a prisoner to appear in court so the judge could determine if the prisoner was being held legally. Many journalists convicted of contempt by publication and sentenced to jail used this process to petition appeals court judges to hear their cases. An attachment was the seizing of the defendant's money or property before a judgment, usually under the assumption that the plaintiff would win the case, so that the money or

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[64] Dangel, *National Lawyers' Manual: Contempt*, 19b.
[65] Nelles and King, "Contempt by Publication in the United States: Since the Federal Contempt Statute," 533.
[66] Gleason, *The Watchdog Concept*, 85.
[67] Law.com Dictionary, http://dictionary.law.com. All of the following legal definitions come from this source.

property would be available to satisfy the judgment. In contempt by publication cases, the attachment was issued against the publishers or editors, who were brought into court to answer the charges against them. An affidavit was a written document in which the signer swore under oath that the statements in the document were true. Editors and publishers often used an affidavit to answer the contempt charges against them. A summary judgment was a decision that concluded that no other factual issues remained to be considered, so the legal matter could be decided upon certain facts without a trial. Contempt by publication cases were always decided by the presiding judge, not a jury.

Though judges alone had the authority to cite publishers and editors with contempt of court, in the Nineteenth Century they did not always initiate the process. A lawyer often requested a judge to hold an editor or publisher in contempt. Prosecutors tended to notify a judge if they believed a publication reflected poorly on the court or its officers (which included the prosecutors) or threatened to obstruct the judicial process. Defense attorneys typically requested a contempt citation if they believed a publication would damage their clients' chances to receive a fair trial. These cases primarily were heard at the local court level because those systems were usually the ones targeted in the newspaper reports. The judge would order the person to appear before the court and defend himself against the contempt charges. Editors and publishers usually appeared with one or more defense attorneys, who argued on their clients' behalf against the contempt charge. A prosecuting attorney often argued on behalf of the court's interests. A host of variables determined the final decisions, including the language used in the publication, the defendant's answers to the charges, the prosecuting attorney's arguments, the judge's interpretation of previous decisions or state statutes concerning contempt, or

the judge's personal feelings on the matter. Convictions were almost universally appealed to the state's highest court.

Contempt by Publication Before 1800

This dissertation primarily concerns American cases of contempt by publication during the Nineteenth Century. However, there are two cases worth exploring – one English and one American – that occurred near the end of the Eighteenth Century. Both cases are credited with influencing the course of America's legal development on this issue. Scholars, however, have discovered an historical mystery concerning the first case. It appears that its influence on America's contempt law may not have been as direct as originally perceived.

Sir John Fox describes the 1765 English case of *The King v. Almon* (also called *Almon's Case*) as "the root of the present practice in cases of criminal contempt."[68] The King's representatives had charged John Almon, a bookseller, with publishing a libel against the Chief Justice of the Court of Common Pleas, Lord Mansfield. The libel for which Almon was accused of printing was found in a pamphlet that had been published the previous year, titled *An Enquiry into the doctrine lately propagated concerning Libels, Warrants and the Seizure of Papers . . . in a Letter to Mr. Almon from the Father of Candor?* It charged Lord Mansfield with "officiously, arbitrarily and illegally making, out of court, an order to amend an information against John Wilkes" and with intending to "deprive the subject of the benefit of the *Habeas Corpus* Act...."[69] According to Fox, Almon's counsel, Serjeant Glynn, and a man described only as Mr. Dunning, made three objections on Almon's behalf: it had not been proven that Almon actually published the

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[68] Fox, *The History of Contempt of Court*, 5.
[69] Ibid., 5-6.

pamphlet; it had not been demonstrated that the libel applied to either the Court or Chief Justice, Lord Mansfield; and the summary procedure by attachment was inapplicable.[70]

The court overruled the first two objections. On their third point, Almon's representatives argued the current proceeding "should have been by indictment...."[71] Applying to this case an action of *Scandalum magnatum*, which was established to enforce obedience to the commands of courts of justice, would have extended the power beyond its original limits, they said.[72] Glynn and Dunning argued that "a constructive contempt was a thing never heard of," and even if that possibility existed, "it would involve such an increase of power in the Judges that no one would be safe." In Almon's case, they believed, "the Court would exercise the province of party, judge, evidence and jury."[73] Sir John Eardley Wilmot prepared the following judgment:

> The power which the courts in Westminster Hall have of vindicating their own authority is coeval with their first foundation and institution; it is a necessary incident to every court of justice, whether of record or not, to fine and imprison for a contempt to the court, acted in the face of it ... and the issuing of attachments by the supreme courts of justice in Westminster Hall for contempts out of court stands upon the same immemorial usage as supports the whole fabric of the common law....[74]

Furthermore, Justice Wilmot indicated that he had researched the issue of contempt thoroughly before making his decision, and he explained his decision through the following passage:

> I have examined very carefully to see if I could find out any vestiges or traces of its introduction but can find none. It is as ancient as any other part of the common law; there is no priority or posteriority [sic] to be discovered about it and therefore [it] cannot be said to invade the common law but to act in an alliance

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[70] Ibid., 7. Fox uses the spelling "Serjeant" in *The History of Contempt of Court* but uses "Sergeant" in "The King v. Almon."
[71] Ibid.
[72] The Free Dictionary defines *scandalum magnatum* as a legal term for "defamatory speech or writing published to the injury of a person of dignity," http://www.thefreedictionary.com/Scandalum+magnatum.
[73] Fox, *The History of Contempt of Court*, 7.
[74] Fox, "The King v. Almon," 185-86.

> and friendly conjunction with every other provision which the wisdom of our ancestors has established for the general good of society. And though I do not mean to compare and contrast attachments with trials by jury, yet truth compels me to say that the mode of proceeding by attachment stands upon the very same foundation and basis as trials by jury do – immemorial usage and practice....[75]

As for the issue of judges presiding in their own cases without a jury, Wilmot believed that the legal system had to be considered on the whole. "The Trial by Jury is one part of that system; the punishing contempts of the Court by Attachment is another," he wrote. "We are as much bound to execute this part of the system as any other; for we must take the whole system together, and consider all the several parts as supporting one another...."[76]

When the decision was prepared for delivery, the judges discovered that the document had been erroneously titled "The King v. Wilkes" instead of "The King v. Almon." Justice Wilmot asked Almon's attorney, Serjeant Glynn, "'as a gentleman' to consent to an amendment, to which [he] replied that 'as a man of honour [sic]' he could not."[77] The proceeding had to be abandoned, and while the court prepared new documents, the case was delayed until the next judicial term. During that time, however, "the ministry resigned and the new ministers decided to proceed no further in the matter."[78] Even though there was an endorsement on the case "that the other Judges would have agreed in granting the Attachment," the decision was never announced in court and was not an official part of English legal history.[79] In fact, the decision was first made public in Wilmot's *Notes of Opinions and Judgments*, which was prepared by his

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[75] Ibid., 186.
[76] John Eardley Wilmot, *Memoirs of the life of the Right Honorable Sir John Eardley Wilmot*, 2nd ed. (London: J. Nichols and Son, 1811), 78, reproduced in The Making of Modern Law, Legal Treatises 1800-1926, accessible at http://www.library.law.ua.edu.
[77] Fox, *The History of Contempt of Court*, 5.
[78] Fox, "The King v. Almon," 184.
[79] Wilmot, *Memoirs of the life of the Right Honorable Sir John Eardley Wilmot*, 80.

son. The book was published in 1802, a decade after the judge's death and 37 years after *Almon's Case*.[80] As Fox noted, "this extra-judicial opinion did not possess the binding effect of a decision," but because of Wilmot's reputation, the ruling "acquired the singular distinction of becoming a leading authority by citation and approval in subsequent cases, the earliest of which was decided fifty-six years after the opinion was written."[81]

This is where the historical mystery surrounding this case begins. Wilmot's decision in *The King v. Almon* has been credited as being the progenitor of contempt by publication law in England and, subsequently, America. "It may be that if the doctrine of *Almon's Case* was part of the common law of England when the American Constitution was established," Fox wrote, "it became the common law of the United States and part of the 'judicial power' which Congress was authorized to confer upon the Courts...."[82] Fox concluded, though, that it is very doubtful that the case was even known about at the time America's constitution was adopted. So far as it was known, he wrote, the case was not cited in an English court until 1811, and an English court did not cite it with approval until 1821. Therefore, the case could not possibly have been part of the English common law, Fox suggested, until after the establishment of the American Constitution. Instead, William Blackstone's *Commentaries* was the likely source of legal doctrine on this topic. As noted earlier in this chapter, he recognized a judge's power to use contempt to punish out-of-court publications, and Blackstone was a personal friend of Justice Wilmot.[83] It is likely that he took Wilmot's legal reasoning in *Almon's Case*, long before it was ever

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[80] Fox, *The History of Contempt of Court*, 6.
[81] Ibid., 8.
[82] Ibid., 207.
[83] Gleason, *The Watchdog Concept*, 83.

published, and included it in his *Commentaries*. What became known as the Wilmot Doctrine "was incorporated into the law of the colonies," wrote Donald Gillmor, "and even in the period immediately after the Revolution, the courts made no effort to reshape the English law of contempt."[84]

America's first contempt by publication punishment occurred in Pennsylvania in 1788.[85] The case of *Respublica v. Oswald* established that it was a contempt of court to publish remarks that tended to prejudice the public's mind concerning a legal case or issue.[86] Eleazer Oswald was printer and publisher of the *Independent Gazetteer* in Philadelphia. Born in England, he left for New York City around 1770 (at the age of fifteen) and became a printer's apprentice.[87] Perhaps seeking a bit more adventure, he joined the military and earned a reputation as a skilled soldier and officer. After a few years of service, he resigned and joined a printing business in Baltimore, where he stayed until 1781. He then moved to Philadelphia, and the following year he founded the *Independent Gazetteer*. The newspaper was heavily involved in Pennsylvania politics and had a reputation for testing the state's statutory commitments to press freedom. In 1782, Pennsylvania Chief Justice Thomas McKean charged Oswald with libeling him. A jury refused to indict Oswald and even reprimanded McKean for his behavior in the matter.

Chief Justice McKean was neither the first nor last public official to suffer Oswald's printed darts, but that episode helped set the stage for Oswald's 1788 contempt trial.[88] It was during that year that Oswald was yet again accused of publishing

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[84] Gillmor, *Free Press and Fair Trial*, 143.
[85] Nelles and King, "Contempt by Publication in the United States: To the Federal Contempt Statute," 409.
[86] *Respublica v. Oswald*, 10 Am. Dig. Cent. Ed. 2392 (Pa. 1788).
[87] Dwight L. Teeter, "Oswald, Eleazer," *American National Biography Online* (Feb. 2000), www.anb.org. This report is the source for Eleazer Oswald's biographical information.
[88] *Respublica v. Oswald*, 1788 U.S. LEXIS 529. The information pertaining to the trial was originally published by William Spotswood, a printer in Philadelphia.

anonymous – and negative – reports about a well-known local resident. When the offended subject demanded that Oswald reveal the author or authors, Oswald refused and was subsequently arrested and charged with libel.[89] Oswald was discharged on common bail to await trial. On July 1, 1788, he published an address to the public which included information about his trial and a general plea to the public. He claimed he was being violently attacked "under the pretext of justice" and published this observation:

> I am now emboldened to trespass on the public patience, and must solicit the indulgence of my friends and customers, while I present to their notice, an account of the steps lately exercised with me; from which it will appear that my situation as a printer, and the rights of the press and of freemen, are fundamentally struck at; and an earnest endeavour [sic] is on the carpet to involve me in difficulties to please the malicious dispositions of old and permanent enemies.[90]

Oswald's diatribe continued for several more paragraphs. Near his conclusion, he advocated the rejection of libel law and the protection of press freedom in America, particularly in Pennsylvania. He issued the following suggestions:

> The doctrine of libels being a doctrine incompatible with law and liberty, and at once destructive of the privileges of a free country in the communication of our thoughts, has not hitherto gained any footing in Pennsylvania: and the vile measures formerly taken to lay me by the heels on this subject only brought down obloquy upon the conductors themselves. I may well suppose the same love of liberty yet pervades my fellow citizens, and that they will not allow the freedom of the press to be violated upon any refined pretence [sic], which oppressive ingenuity or courtly study can invent.[91]

William Lewis, a respected Philadelphia lawyer, responded to the publication, urging the court to charge Oswald with contempt. He said Oswald's address to the public "manifestly tended to interrupt the course of justice," was an attempt "to prejudice the

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[89] Ibid., 1.
[90] Ibid., 2.
[91] Ibid., 4.

minds of the people in a cause then depending," and essentially stigmatized the judges.[92] "There could be no doubt," Lewis said, "that it amounted to a contempt of the court," and he cited English legal precedent to support his claim.[93] The court agreed and summoned Oswald to answer for his actions. When he came before the court to defend himself against charges of contempt, his attorney argued that English law "could not avail in Pennsylvania," saying the state's constitution allowed for activities that were prohibited in England. "Here the press is laid open to the inspection of every citizen, who wishes to examine the proceedings of the government," his lawyer noted, "of which the judicial authority is certainly to be considered as a branch."[94] Oswald's attorney crafted an argument that Pennsylvania's Bill of Rights guaranteed that a contempt committed away from the court required a trial by jury, and as the accused, Oswald was also to be protected from testifying against himself.[95] Allowing a judge to determine Oswald guilty of contempt would violate both guarantees, he said. Furthermore, "contempts which are committed in the face of a court stand upon a very different ground," he suggested, "and the reason arises from the necessity that every jurisdiction should be competent to protect itself from immediate violence and interruption." However, Oswald's attorney argued that "contempts which are alleged to have been committed out of doors, are not within this reason" and should be considered as a criminal offense requiring a trial by jury.[96] The prosecuting attorney disagreed, arguing that "neither the bill of rights nor the constitution extended to the case of contempts." Even though both documents protected free

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[92] Ibid., 7-8. The case record only identifies the prosecuting attorney as "Mr. Lewis," but a search of legal and legislative records from this time in Pennsylvania history suggests this is William Lewis, a well-known attorney and member of the Pennsylvania Assembly.
[93] Ibid., 8.
[94] Ibid., 9. The case record refers to Oswald's court representative by the name "Sergeant" only.
[95] Ibid., 10.
[96] Ibid., 11.

expression, they did not "authorize wanton attacks upon private reputation, or to deprive the court of a power essential to its own existence, and to the due administration of justice...."[97]

Pennsylvania Chief Justice Thomas McKean delivered the decision. While he believed Oswald's assertions were "certainly calculated to defeat and discredit the administration of justice," he said it was the court's duty to determine whether Oswald's actions should be considered as a contempt of the court and, furthermore, whether he should be punished.[98] "The true liberty of the press is amply secured by permitting every man to publish his opinions," he said, "but it is due to the peace and dignity of society to enquire into the motives of such publications, and to distinguish between those which are meant for use and reformation, and with an eye solely to the public good, and those which are intended merely to delude and defame."[99] Such publications of the latter sort, McKean observed, should not be allowed protection and impunity from the law, and he cited the following reasons:

> If, then, the liberty of the press is regulated by any just principle, there can be little doubt, that he, who attempts to raise a prejudice against his antagonist, in the minds of those that must ultimately determine the dispute between them; who, for that purpose, represents himself as a persecuted man, and asserts that his judges are influenced by passion and prejudice, – wilfully [sic] seeks to corrupt the source, and to dishonor the administration of justice.[100]

According to Chief Justice McKean, that was exactly Oswald's intent, and McKean determined he was guilty of contempt. The second issue remaining to determine was whether Oswald could be punished by the sole authority of the judge. "It is certain that the proceeding by attachment is as old as the law itself," he stated, "and no act of the

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[97] Ibid., 13.
[98] Ibid., 14-15.
[99] Ibid., 18.
[100] Ibid., 18-19.

legislature, or section of the constitution, has interposed to alter or suspend it."[101] Concerning the issue before the court, McKean argued that simply inspecting Oswald's paper was enough to convince him of his guilt, and any delays in punishment would be detrimental to the entire judicial process. He posed the following question:

> Being a contempt, if it is not punished immediately, how shall the mischief be corrected? Leave it to the customary forms of a trial by jury, and the cause may be continued long in suspense, while the party perseveres in his misconduct. The injurious consequences might then be justly imputed to the court, for refusing to exercise their legal power in preventing them.[102]

Oswald's attorney asked the judge for a delay of one day to allow Oswald to further prepare his responses, and McKean agreed.[103] The next day, July 15, a different attorney represented Oswald, but he, too, had little success.[104] McKean ruled that the court could punish out-of-court publications because "without this power no court could possibly exist."[105] The legal doctrine on the subject was "of immemorial antiquity; and there is not any period when it can be said to have ceased, or discontinued," he ruled.[106] The court sentenced Oswald to pay a fine and spend from July 15 to August 15 in prison (or longer if his fine was not paid by then).

Oswald Requests Legislative Review

After serving his time, but still incensed about his battle with Pennsylvania's judicial branch, Oswald took his fight to the legislative branch of government. On September 5, 1788, he presented his case to the Pennsylvania General Assembly and asked lawmakers to consider "whether the Judges did not infringe the constitution in

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[101] Ibid., 20.
[102] Ibid., 21.
[103] Ibid., 23.
[104] Oswald's new representative is referred to by the name "Bankson" only.
[105] Ibid., 26.
[106] Ibid., 27.

direct terms in the sentence they had pronounced; and whether, of course, they had not made themselves proper objects of impeachment."[107] The Assembly formed a committee of the whole to hear evidence and spent three days speaking with witnesses.

William Lewis, who tried Oswald's case, was also a member of the General Assembly and issued a vigorous defense of the judges' actions. "The right of publication, like every other right, has its natural and necessary boundary," he declared, saying that censuring licentious material actually maintained the liberty of the press.[108] "On the one hand, it is not subject to the tyranny of previous restraints," Lewis argued, "and, on the other, it affords no sanction to ribaldry and slander."[109] He reiterated how there could be no doubt that Oswald's publication was meant to interfere with the orderly administration of justice and to embarrass the judges themselves.

A fellow Assembly member, however, thought it was unnecessary "to explore the dark and distant periods of juridical history."[110] Pennsylvania's constitution was the only proper criterion that should have been used in this matter, he said. According to that document, a citizen of Pennsylvania was afforded the right to a trial by a jury of his peers.[111] In Oswald's case, he said, the court circumvented this requirement by exercising complete authority when punishing him for contempt. The Assembly member recognized that there were cases in which a judge should exercise summary authority for an immediate remedy, especially if the offending acts were committed in the presence of the court.[112] However, he argued that this privilege did not extend to the case of constructive

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[107] Ibid., 28.
[108] Ibid., 30.
[109] Ibid., 32.
[110] Ibid., 43.
[111] Ibid., 45.
[112] Ibid., 46-47.

contempts, which included acts that were committed away from the court.[113] He concluded by reiterating his belief that every man had the right to publish his thoughts on public proceedings, and it would set a dangerous precedent to allow judges the sole authority to punish for offenses against them.[114] After several other proposals on the matter were rejected, he offered the following resolution:

> That the proceedings of the supreme court against Mr. Eleazer Oswald, in punishing him by fine and imprisonment, at their discretion, for a constructive or implied contempt, not committed in the presence of the court, nor against any officer, or order thereof, but for writing and publishing improperly, or indecently, respecting a cause depending before the supreme court, and respecting some of the judges of said court, was an unconstitutional exercise of judicial power, and sets an alarming precedent, of the most dangerous consequence, to the citizens of this commonwealth.[115]

The resolution also recommended that the Pennsylvania General Assembly define the nature and extent of contempts and how they should be punished. After much debate, the motions "were lost by a considerable majority," and the Assembly concluded that there was insufficient evidence to impeach the justices of the Pennsylvania Supreme Court.[116] It represented Oswald's final defeat on the matter.

Conclusion

Respublica v. Oswald was a significant case for several reasons. It is considered to be the first recorded American case of contempt by publication, and it was important for the ideas it established. The record is clear that arguments promoting a free press – and preserving judicial power – were present at the very beginning of America's contempt by publication debate. The Pennsylvania Supreme Court established that the state's court system reserved the power to punish publications as contempts of court. It

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[113] Ibid., 47.
[114] Ibid., 48.
[115] Ibid., 50.
[116] Ibid., 51.

concluded that the state's free press guarantees did not provide publishers with immunity from legal actions taken after an article's publication. The court's decision reflected British legal precedent, but it also recognized the United States' more liberal attitude toward press freedom. Oswald centered his arguments on that attitude. He argued fervently that he should be free to comment on the activities of Pennsylvania's court system without suffering judicial sanctions, and he cited the state's constitution and its promise of a free press. These same arguments occurred in the legislative debate that followed the Supreme Court's decision, but the outcome was the same. Pennsylvania's editors and publishers were free to print their views as they saw fit, but they were still subject to punishment for the "abuse" of that liberty.

At the time *Respublica v. Oswald* was decided, contempt by publication was strictly a state issue. The First Amendment did not officially exist until 1791, and even then it was applicable only to the federal government. *Oswald* also was decided a year before the United States Congress passed the Judiciary Act of 1789, which recognized federal contempt power in America. The act gave the federal courts the power "to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same." Section Seventeen also gave federal courts authority to "make and establish all necessary rules for the orderly conducting [of] business in the said courts" while restricting the judiciary to establishing rules that were "not repugnant to the laws of the United States."[117] Judges in state systems had already determined that the contempt power resided within such limits, and they were willing to punish publishers and editors for publications that they believed would threaten the integrity of the judicial

[117] Judiciary Act of 1789, full text cited in Daniel J. Meltzer and David L. Shapiro, *The Judicial Code and Rules of Procedure in the Federal Courts* (New York: Foundation Press, 2001), 721.

system. The Nineteenth Century would present America's judges with many opportunities to exercise their contempt authority over the press.

CHAPTER TWO

JUDICIARY ASSERTS CONTROL, 1800-1829

The first three decades of the Nineteenth Century witnessed the beginning of a three-sided struggle over judicial contempt. Editors and publishers, the American judiciary, and the state and federal legislative branches all had something at stake. Editors and publishers risked a fine or jail term whenever they dared to cover – or comment on – a trial or legal issue, despite their claims of press freedom. Judges jealously guarded contempt as a near sacred authority that they considered to be an inherent component of any legal system. The legislative branch of government feared a struggle between two fundamental American ideals – a free press and an independent judiciary – and soon sought to strike a balance between the two. By the 1830s, all three of these interests would converge.

This was a developmental period in which America had significant difficulties to overcome as it tried to distance itself from England's legal ideologies. Many colonial judges had never received formal legal training, and American lawyers were considered to be generalists, needing skills in several legal arenas whereas British lawyers were able to practice in specific areas.[1] There was also the force of English common law, which had a considerable influence on the development of America's Constitution and judiciary. Historian Perry Miller, though, suggested that very early in the life of the new republic,

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[1]Perry Miller, *The Life of the Mind in America: From the Revolution to the Civil War* (New York: Harcourt, Brace & World, Inc., 1965), 134-35.

American lawyers had discovered a deep hostility to the use of English common law.[2] Americans believed they had broken free of England and should not be subjected to the vestiges of its legal system. Simply rejecting the common law, however, was neither a prudent nor a viable option for a new country with little legal history of its own. The legal community recognized this and adjusted the common law to fit the needs of America's legal system. "Unlike the judges of England," Miller suggested, "the Americans were not bound to ancient precedents, since they could arbitrarily decide which of them had relevance to America."[3] Contempt was among those judicial powers to survive the transition from English to American jurisprudence.

The Sedition Act must be considered as influential during the first two years of the Nineteenth Century. In effect from 1798 to 1801, it threatened a maximum $2,000 fine and up to two years in prison for anyone convicted of writing, printing, uttering, or publishing "scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States" with the intent to defame them or "bring them ... into contempt or disrepute...."[4] The first three decades of the century also marked the period of the Party Press in America. Successful and influential newspapers were ideologically – and financially – connected to political parties, and their content often reflected the party line. Editors routinely lambasted competing publications and attacked members of rival political parties, including judges and their decisions. It was during these times, according to media law expert Robert Jones, that many contempt rulings were "provoked

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[2]Ibid., 105.
[3]Ibid., 128.
[4] "An act for the punishment of certain crimes against the United States," *Statutes at Large*, Fifth Congress, Second Session, Chap. 74, Sect. 2, 596. Reproduced in A Century of Lawmaking for a New Nation: U.S Congressional Documents and Debates, 1774-1873, http://memory.loc.gov/ammem/amlaw/lawhome.html.

by an intemperate attitude of the newspaper involved."[5] Legal scholar Zechariah Chafee, Jr., argued that it was natural for early Nineteenth Century judges to take umbrage at critical reports because "most newspapers were unscrupulous vehicles of political partisanship. Judges refused to become targets for the streams of abuse they saw constantly directed against legislators and officeholders."[6]

Nineteenth Century Beginnings

Pennsylvania emerged as an early battleground for contempt-by-publication litigation. America's first three major cases were decided there, but the focus soon shifted to New York, where several more cases were considered. There were also a few scattered cases worth noting from other states. All of them put editors and publishers on notice that the judiciary was quite willing to use its power to keep the press in line. The show of force also set up a showdown with the legislatures of both Pennsylvania and New York, resulting in two of the country's earliest attempts to curtail contempt through statutory control.

The 1801 federal case of *United States v. Duane* from Pennsylvania established that any publication that reflected upon a court, or anyone else involved in a legal proceeding, could – in the minds of judges – influence the final decision on the matter, and the publication could be punished for contempt. Thirteen years after Eleazer Oswald was convicted of contempt by publication in 1788, another Philadelphia publisher found himself in a similar predicament. William Duane, publisher of the *Aurora*, had faced a libel suit from Levi Hollingsworth and had lost.[7] As Chief Judge William Tilghman of

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[5] Robert W. Jones, *The Law of Journalism* (Washington, D.C.: Washington Law Book Co., 1940), 203.
[6] Zechariah Chafee, Jr., *Government and Mass Communications: A Report from the Commission on Freedom of the Press* (Hamden, Conn.: Archon Books, 1965), 432.
[7] *United States v. Duane*, 1801 U.S. App. LEXIS 278.

the Circuit Court of Pennsylvania noted in the contempt case record, Duane had argued in the libel case that both he and Hollingsworth "were citizens of the state of Pennsylvania, and therefore the circuit court of the United States had no jurisdiction" in the matter.[8] Hollingsworth, however, argued that Duane was not a citizen of Pennsylvania but rather still a subject of the King of Great Britain. A jury agreed, and Duane was subsequently found guilty of libel.

However, the court allowed for the damages to be considered by a special jury during the next judicial term, at which time Duane would have "liberty to offer any evidence in mitigation of damages...."[9] While the sentencing phase remained unresolved, he published an account of the trial, and the circuit court later expressed deep displeasure with his description of Hollingsworth. Judge Tilghman said that Duane had "endeavored to draw public odium on the plaintiff, by representing him as a man who had been guilty of treason, and saved from the gallows by the lenity of the late chief justice of Pennsylvania." Furthermore, he accused Duane of asserting that "the respectable jury who tried your cause had given a most infamous verdict" and of making insinuations, "too plain to be misunderstood," that Pennsylvania's citizens could not expect justice from the federal circuit court.[10] It was clear to Tilghman exactly what Duane was trying to do, as he explained in the following paragraph:

> The evident tendency of your whole publication was to vilify and degrade the character of the plaintiff, and thereby to lessen his damages; to deter the counsel of the plaintiff, the clerk of the court, and the future jury, from doing their duty; and to intimidate the court themselves, if they were susceptible of intimidation, which most surely they are not.... If judges and jurors, parties and their counsel, be subjected, during the pendency [sic] of suits, to the aspersions and unrestrained

[8] Ibid., 2.
[9] Ibid., 3.
[10] Ibid., 4.

> publications of the press, what, but the destruction of the trial by jury, must ensue?[11]

If the trial by jury system was to be preserved, Tilghman concluded, and "if the rights of suitors are to be protected touching their dearest interests, of property, life, or character; courts of justice must prevent all discussions, all interference, or reflections in newspapers, while causes are depending."[12] He referred to the conclusion in *Respublica v. Oswald*, which established that publications could be punished as contempts of court, as "too strongly founded to be shaken," adding that "the statutes of the United States expressly give to their courts the power of punishing contempts by fine or imprisonment at their discretion...."[13] Tilghman wrote that Duane's case was of "far greater aggravation than Oswald's," but it was not the court's inclination to "crush [him], by an oppressive fine, or lasting imprisonment."[14] Tilghman decided that Duane would "be imprisoned for thirty days including this day, that [he] pay the costs of the prosecution, and that [he] stand committed till [sic] this judgment be complied with."[15]

The decision enforced the idea that contempt could be used to punish any publication that could be interpreted as an attempt to influence a court's decision in any matter. It was an historic case because it was the first federal court decision on contempt by publication since the passage of the Judiciary Act of 1789, which recognized the federal judiciary's contempt authority. The Circuit Court of Pennsylvania also recognized the possibility that a rival political newspaper may have provoked Duane's troublesome publication, but the court refused to consider that as an excuse. There was no mention of

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[11] Ibid., 4-5.
[12] Ibid., 6.
[13] Ibid., 7. See Chapter One for an explanation of *Respublica v. Oswald.*
[14] Ibid., 8-9.
[15] Ibid., 9.

the First Amendment in the chief judge's opinion, which suggests there was not yet a significant ideological concern about America's free press ideals and the Blackstonian view of punishing publications for abusing their press privileges.

In a state case the following year, the Pennsylvania Supreme Court ruled in *Respublica v. Passmore* that a publication that referred to a pending case, even if indirectly, could be punished for contempt.[16] On September 8, 1802, Thomas Passmore was seen hanging a publication on an exchange board in a Philadelphia tavern.[17] Andrew Bayard later testified that Passmore had published the paper (it was signed by him, after all), and Bayard said he believed that the contents related to a pending suit that Passmore had filed against Bayard and Andrew Petit. The suit involved an insurance policy underwritten by Bayard, Petit and others, and it was pending before the Pennsylvania Supreme Court.[18] The contents of the publication included the following:

> The subscriber publicly declares, that Petit and Bayard of this city, merchants and quibbling underwriters, has basely kept from me the said subscriber for nine months about 500 dollars, and that Andrew Bayard, the partner of Andrew Petit, did on the 3d or 4th instant go before John Inskeep, esq., alderman, and swore to that which is not true, by which the said Bayard and Petit is enabled to keep the subscriber out of his money for about three months longer, and the said Bayard has meanly attempted to prevent others from paying the subscriber about 2500 dollars.... I therefore do publicly declare, that Andrew Bayard is a liar, a rascal and a coward.[19]

The Supreme Court charged Passmore with contempt because his publication concerned a pending case, and the court ordered him to answer the charge. Moses Levy argued on behalf of Passmore that a contempt could not have been presumed in this case. There were "several matters in the obnoxious publication which do not relate to the suit in this

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[16] *Respublica v. Passmore*, 10 Am. Dig. Cent. Ed. 2394 (Pa. 1802).
[17] *Bayard v. Passmore*, 1802 Pa. LEXIS 24, 1. This case is also known as *Andrew Bayard and Andrew Petit against Thomas Passmore.*
[18] Ibid., 3.
[19] Ibid., 1-2.

court," he suggested, and it did not "appear by the publication that any cause was depending upon which it was founded." He also argued that contempt should only be triggered if the paper contained an explicit reference to the pending case. Prosecutors, however, argued that "if the unlawful intention must appear on the face of the writing itself, any artful man may escape with impunity, though the publication may have the most pernicious tendency to interrupt the course of justice."[20] They concluded that there was no doubt concerning Passmore's intent to influence the court, and perhaps worse, "no atonement has been offered for this base outrage."[21]

The Pennsylvania Supreme Court rendered an opinion that was credited to the entire court, not just one author. "The implication is irresistible, that the publication referred to the suit then under the cognizance of the court," it stated. "It was an attempt to prejudice the public mind in a cause then depending, and was in the eye of the law a contempt of the court." Passmore then asked for time to deliver a response before the court and offered to "give security for his appearance," and the court accepted his suggestion.[22] In the meantime, the justices told Passmore "to consider well, what atonement [you] will make to the court as well as Mr. Bayard for the gross injury done to him by this publication."[23]

Passmore heeded the court's advice. At his next appearance, he told the judges that he truly believed there was no pending lawsuit at the time he posted his criticisms of Bayard and Petit. He also "denied that he had the most distant intention to prejudice the public mind in his favour [sic], or to treat with disrespect the judicial authority of his

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[20] Ibid., 4.
[21] Ibid., 5.
[22] Ibid.
[23] Ibid., 5-6.

country, for which he had always entertained the highest respect." He said that, in the moment of his heat and passion, he "published the expressions he experienced, without allowing himself time to reflect on the harshness of the manner in which they were conceived, or the extent of their application." Passmore also told the court that he thought well of Andrew Petit and was sorry his statements may have implicated him in any wrongdoing. Even though he said he still believed "that he was extremely ill used by Andrew Bayard," he certainly would not have published his paper "if the impetuosity of the moment had not hurried him into it."[24]

The prosecutor was not at all pleased with Passmore's responses. In fact, he suggested to the court "that each step taken by the defendant was but an aggravation of his first offence [sic]." Passmore's answers were "drawn up in such a manner, as to add fresh insult to Mr. Bayard, whom he so grossly injured before," he said. "He has not extenuated his offence [sic], but has aggravated it." It was also the prosecutor's opinion that Passmore knew full well that his publication was improper. "If his intentions were even innocent, the justice of the country and of the court requires, that he shall stand committed," he said. "Ignorance of the law will not justify an improper publication."[25]

The Pennsylvania Supreme Court ruled that Passmore's publication was, indeed, a contempt against the authority of the court. Chief Justice Edward Shippen wrote the final opinion, which stated that "if the minds of the public can be prejudiced by such improper publications, before a cause is heard, justice cannot be administered." He wrote that Passmore "has set at nought [sic] the advice we gave him when we ordered the attachment. He has made no atonement whatever to the person whom he has so deeply

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[24] *Respublica v. Passmore*, 1802 Pa. LEXIS 25, 1.
[25] Ibid., 2.

injured, and he can only blame himself for the consequences."[26] He ordered Passmore to pay a $50 fine and "be imprisoned in the debtor's apartment for the space of 30 days; and afterwards, until the fine and costs are paid."[27] This case relied on one English precedent that had been decided six decades earlier instead of the more recent contempt by publication cases to come from Pennsylvania. Shippen referred to the 1742 English case of *Roach v. Garvin*, in which Lord Hardwicke famously concluded that "there cannot be anything of greater consequence than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters."[28] It was the Pennsylvania Supreme Court's determination that contempt could be – and should be – used to protect the administration of justice.

Despite Pennsylvania's initial contributions to the development of a contempt by publication doctrine, it was in New York where the courts seemed eager to address the issue. The New York Supreme Court determined in the 1804 case of *People v. Freer* that even if the publisher did not intend for a publication to be contemptuous, it was left to the presiding court to make that determination. The *Balance and Columbian Repository*, published in Albany, reported in its August 30, 1803, edition that Samuel Freer, the publisher of the *Ulster Gazette*, had been charged with contempt for "publishing certain observations respecting the trial of [Harry] Croswell," the editor of the Federalist

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[26] Ibid., 3.
[27] Ibid., 3-4.
[28] Ibid., 3. *Roach v. Garvan*, 2 Atk. 469 (1742) also has been referenced under the names *Re Read and Huggonson and the St. James's Evening Post* and *Roach v. Garvan and Read & Huggonson's Case*. A brief explanation of the *Roach* decision's role in the history of contempt by publication can be found in Chapter One.

newspaper *The Wasp*.[29] Croswell had been charged with libeling President Thomas Jefferson, and Freer had published some comments concerning the case.

In November 1803, Freer's counsel addressed the New York Supreme Court alone (Freer did not attend the legal proceeding) and told the judges that Freer did publish the article concerning Croswell's trial.[30] However, Freer denied "any intentional contempt or disrespect towards either the court or its members." The prosecutor, however, suggested that because Freer admitted he published the article in question, the court's only duty was to decide whether it amounted to a contempt. "The question," he argued, "is simply this, ought an attachment to go for this publication? In deciding this question the court is not to look beyond the words contained in the paper."[31] The defense attorney questioned that principle, calling it an extension of the doctrine of libels. "I have heard," he stated, "that there the truth may not be given in evidence, but never yet did I hear that another paper or circumstance may not be given in evidence to show the intent." He argued that in this case, "the motive of publication may surely be urged to prove that no contempt, in fact, existed."[32] The court viewed the defense attorney's arguments unfavorably and Freer's absence even more unfavorably. "The affidavit does not justify the publication. It is at best but an excuse," the opinion stated. "On such occasions as the present, the defendant ought to appear in person and answer. Let, therefore, the rule for an attachment be made absolute."[33]

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[29] "Equal and exact justice to all men," *Balance and Columbian Repository*, 30 August 1803, 274, reproduced in American Periodicals Series Online 1740-1900, http://proquest.umi.com/pqdweb?DBId=5197&LASTSRCHMODE=1&RQT=575.
[30] *People v. Freer*, 1803 N.Y. LEXIS 81, 1.
[31] Ibid., 1-2.
[32] Ibid., 2.
[33] Ibid., 2-3.

The New York Supreme Court, without citing the opinion's author, rendered its final verdict in February 1804.[34] "This proceeding was correct and necessary," the court determined. "Publications scandalizing the court, or intending unduly to influence or overawe their deliberations, are contempts...." It was essential to the judiciary's "dignity of character, their utility and independence" that it should not only possess, but also exercise, the contempt authority.[35] The court, however, accepted Freer's explanation that he intended no disrespect or contempt toward the court.[36] The judges even considered other variables: the editorial discussion originated in one of the *Ulster Gazette*'s rival newspapers; the fact that such publications must have caused great irritation; and what the court described as "the unguarded license with which all questions of general concern have been usually treated in our public prints...."[37] The court determined that Freer's case did not require a serious penalty. When there was sufficient evidence of an intentional contempt, it would be the court's duty to inflict a strong and exemplary punishment, but

> we trust, the notice we take of the present case will answer all the ends of justice, by serving as a sufficient warning to the defendant and others, not to presume to use language which must be understood as reflecting upon, or threatening the court in respect to questions then under investigation.[38]

The court fined Freer $10 and ordered him committed until it was paid.[39] The court, while recognizing a political rivalry among newspapers as a possible instigator in this case, did not refer to any previous contempt by publication cases in reaching its decision.

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[34] *People v. Freer*, 1804 N.Y. LEXIS 200.
[35] Ibid., 1.
[36] Ibid., 2.
[37] Ibid., 3.
[38] Ibid.
[39] Ibid., 4.

Three years passed before another case of contempt by publication appeared in New York. The 1807 case of *People v. Few* determined that a publication was not a contempt if the publishers maintained they did not intentionally disrespect the court or attempt to influence it in any way. The administration of New York Governor Morgan Lewis had filed a lawsuit accusing Thomas Farmar of libeling the governor.[40] While the suit was pending, the *American Citizen*, a newspaper published in New York City, printed the following on March 6, 1807:

> Resolved, That we consider the prosecution, commenced by Governor Lewis against Thomas Farmar, as chairman of a public meeting of free citizens, to be an unwarrantable attempt to suppress and destroy one of our dearest and most valuable privileges, that of assembling together openly and publicly; of discussing freely the conduct of public men and public measures; and of expressing our resolutions and opinions to the world: and that, therefore, such prosecution evinces an intolerant spirit, unbecoming the chief magistrate of a free State, disgraceful in a free government, and insulting to the feelings of every citizen who was present at that meeting.[41]

The resolution was signed by William Few and James Townsend. On March 12, even more resolutions were published in the *American Citizen*, including one that continued to reprimand Governor Lewis for "exhibiting an instance of and disposition towards tyranny, novel and unprecedented, dangerous to civil liberty, repugnant to the spirit and genius of our free constitution, and utterly subversive of the principles of an elective government."[42] This particular reproach was signed by William Few and Pierre C. Van Wyck. Perhaps fanning the flames, the Albany *Balance and Columbian Repository* described the publications in the *American Citizen* as exceeding anything ever seen "for

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[40] *People v. Few*, 1807 N.Y. LEXIS 58, 1.
[41] Ibid., 1-2.
[42] Ibid., 2.

perfidy, baseness, falsehood, malice, and scurrility."[43] Few, Townsend, and Van Wyck were subsequently charged with committing a contempt against the New York Supreme Court because their publication was considered an attempt to influence a case that had not yet been resolved.

In his affidavit, Van Wyck assured the judges of the Supreme Court that he had not intended to hold the court in contempt or to influence the administration of justice. The resolutions, he said, were intended to influence the upcoming gubernatorial election and had no "design to influence, in any manner, the progress or decision of the cause pending in this court."[44] Few and Townsend filed similar affidavits "in which they disavowed all intention or idea of any contempt of the court."[45]

The New York Supreme Court accepted the men's arguments. "The defendants have, by affidavits, negatived [sic] any intentional disrespect to, or contempt of this court, or any intention to influence or affect the course of justice, in the decision of the cause in question," the court ruled. "Under these circumstances ... we do not consider that this case calls for any further proceeding on the part of the court."[46] The court's opinion, which did not list the author, also stated that the publication amounted "only to a constructive contempt, and the parties having completely purged themselves by oath, of any intention to commit one, we do not think it requisite to grant an attachment."[47] While the court made it clear that "the issuing of an attachment is always a matter of discretion in the court," this was a case where "public justice does not require our interposition."[48]

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[43] "Editor's Closet," *Balance and Columbian Repository*, 31 March 1807, 97, reproduced in American Periodicals Series Online 1740-1900.
[44] *People v. Few*, 3-4.
[45] Ibid., 4-5.
[46] Ibid., 5.
[47] Ibid., 5-6.
[48] Ibid., 6.

The contempt citations were dismissed. Though the opinion in this case was brief, the decision was significant. The Supreme Court of New York established the concept that an editor or publisher did not face automatic punishment if a publication was accused of being contemptuous. Previous decisions had held that ignorance of the law was no excuse; in this case, though, the court established that the intent of the editor and publisher should determine guilt or innocence.

The 1808 contempt case against Baptis Irvine determined that a court had the authority to punish as a contempt any publication that was abusive toward the court. Irvine, the editor of *The Whig* in Baltimore, Maryland, had a reputation as a troublemaker. When he was arrested on charges of using his newspaper to promote a riot, he whipped up so much sentiment against the local judge who had issued the arrest order that the state legislature was forced to comment on the situation.[49] In another incident, he fired two of his workers who later came back to challenge his decision and take some of the equipment away with them. The interlopers were forcibly removed from the premises, and the men sued Irvine and his remaining workers for assault and battery. George Tomlin, one of Irvine's employees, was the first to be convicted, and *The Whig* published the following commentary of the jury's decision in the next day's edition:

> Suppose ... that the *foreman* in a printing-office, having discharged a couple of workmen, who, however, return, whilst this foreman *is at dinner* ... and in attempting to take away the tools of their successors, were thrust *down stairs* with as little force, as was possible to effect the purpose – what could any *honest juror* say, if *such men* came forward to prosecute unoffending journeymen for assault and battery?[50]

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[49] George Bourne, *The Case of Baptis Irvine* (Baltimore: Magill, 1808), 5.
[50] Ibid., 7.

The article also contained this question: "Is not the condemnation of an innocent man, *on the oath of perjurers*, a highly unjust proceeding?"[51] On the same day that Irvine was convicted of assault and battery against the men, he also was charged with contempt of court for his comments concerning Tomlin's trial.[52]

The hearing on that matter was postponed until February 18, 1808. Prosecutor Jon Meredith concluded that he had never seen anything like this case before. "No man has been found daring enough to oppose the laws and insult the tribunals of justice" like Irvine had done, he said. "It has been asserted that the liberty of the press, the palladium of our rights, that pledge of our freedom, is this day threatened with destruction."[53] While the case against Tomlin was still pending, Meredith argued, Irvine published remarks in which

> the verdict is declared to be unjust, the prosecutor is described as infamous, the witnesses are stated to be perjurers, the jury is said to have been composed of men who have forgotten the existence of a God and denunciations of vengeance are published against all those who support the prosecution.[54]

No matter what a person's point of view concerning the publication, it was "unparalelled [sic] in insolence, effrontery or falshood [sic]," he said. Claiming to be a friend of a free press, Meredith nevertheless insisted that "a proper restraint can be no infringement of the liberty of the press."[55] The court had authority to restrain the press through its contempt power, he said, and he concluded that Irvine's publication was definitely a contempt of court. "It was committed during the pendency [sic] of a trial – witnesses as

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[51] Ibid.
[52] Ibid., 8.
[53] Ibid., 9.
[54] Ibid., 10.
[55] Ibid.

well as jurors have become the victims of public calumny," he said, and "their injuries ought to be revenged, and their feelings receive respectful attention."[56]

A member of Irvine's defense team, J.L. Donaldson, countered with a discussion concerning English precedent and practices on such matters, arguing that British laws no longer had a place in Maryland – or the United States. He submitted the following statement:

> No, sir, it cannot be that for printing a true account of judicial proceedings, or for speaking irreverently of the character of a judge, or the conduct of a court, acts which in the course of things may be highly just and necessary, a citizen shall be liable to be brought up for trial before the offended party, and there be called upon to answer upon oath to his own condemnation, and be exposed to arbitrary fine and imprisonment without being entitled to that great constitutional rampart, the trial by jury, the sacred avenger of innocence, the certain punisher of guilt.[57]

Donaldson pointed out the recent contempt cases against Eleazer Oswald and Thomas Passmore in Pennsylvania and how that state's legislature was asked to review the Pennsylvania Supreme Court's decisions on those matters. The Pennsylvania General Assembly chose not to impeach the justices, but even by considering the matter, Donaldson suggested that "the conduct of the Pennsylvania legislature amounts to a solemn protest against the doctrine...."[58] He urged that "the Pennsylvania decisions ought not to be received as the judicial guides of this court...."[59]

The judge who delivered the opinion in Irvine's case concluded that without the power to punish contempts, there could be no administration of justice because

> upon this principle the courts of justice are likely to be affected by consequential contempts. The counsel have said that if the publication be criminal or incorrect,

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[56] Ibid., 11.
[57] Ibid., 15-16.
[58] Ibid., 20.
[59] Ibid., 21.

> the respondent is entitled to a trial by jury: but this would altogether destroy the power of punishing contempts.[60]

The court also took a Blackstonian view concerning the amount of freedom the press may exercise. "There is a wide difference between the liberty of the press and its licentiousness," the judge said. "The liberty of the press consists in laying no previous restraint upon publications *that are legal* – but if the publication is wrong, the writer renders himself subject to punishment." He noted that the New York Supreme Court punished contempts by attachment, and Congress also had recognized the judiciary's contempt power. "*This court*," he declared, "*are* [sic] *of opinion that they have a right to punish contempts in the manner contended for.*" The court declared Irvine's article as a contempt and gave him an opportunity to respond. He refused, declaring that the entire proceeding against him was unconstitutional and illegal.[61] The court immediately sentenced him to 30 days imprisonment and ordered him to pay the costs of the trial.

Irvine's conviction got noticed in at least one contempt by publication case several years later, but it received immediate attention among his professional colleagues who, depending on their point of view, decried or applauded the court's action. "Baptis Irvine, Editor of the Baltimore '*Whig*,' has been imprisoned and fined for *telling the truth* – 'in contempt of court'!" reported the *National Aegis*. The *Balance* published that statement along with a different take on Irvine's conviction. "The editor of the Aegis must know that the whole article is a tissue of falsehood," it read. "The editor of the Whig was imprisoned for one of the most outrageous attacks on a court, jury, and witnesses, (while a cause was pending) ever known in any place or at any time."[62] Based

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[60] Ibid., 56-57.
[61] Ibid., 57.
[62] Cited in *Balance*, March 22, 1808, 45, reproduced in American Periodicals Series Online 1740-1900.

on that exchange, it appears that Irvine's contempt conviction revealed an interesting phenomenon. Members of the press were not universally opposed to the contempt authority being used against rival editors.

An 1815 case from New York, *In re Bronson*, also recognized the idea that any publication that reflected on a court or the parties involved in a pending suit constituted a contempt of court.[63] It also has a unique position among contempt by publication cases in the early Nineteenth Century.[64] The Supreme Court of New York used British precedent concerning the titles of affidavits for contempt attachments. The prosecutor wanted the court to issue an attachment against Caldwell Mitchill, a newspaper editor, for a published report concerning a pending suit involving Isaac Bronson. The affidavits were titled "In the matter of Isaac Bronson and Caldwell Mitchill," which the defense attorney argued was technically incorrect. He cited a British ruling that determined that affidavits should be titled using the original or civil suit until the attachment for contempt was granted. Afterward, according to the ruling, the proceedings had to be in the name of the people involved.[65] The primary reason behind this and similar rulings was that at the time the affidavits were made, there was no official case pending in court.[66] Because the affidavits in this case did not follow that precedent, the defense attorney argued that they could not be read. The Supreme Court justices determined that, indeed, the affidavits were wrongly titled and could not be introduced, effectively ending the contempt complaint against Mitchill.[67]

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[63] *In re Bronson*, 10 Am. Dig. Cent. Ed. 2391 (N.Y. 1815).
[64] *In re Bronson*, 1815 N.Y. LEXIS 137. This case is also sometimes referred to as *Bronson v. Mitchill* and *In re Bronson and Mitchill.*
[65] Ibid., 1.
[66] Ibid., footnote n-1, 2.
[67] Ibid., 1-2.

The second decade of the Nineteenth Century was proving to be a fruitful period for contempt-by-publication litigation in New York. The 1818 contempt cases involving Mordecai Noah and Alden Spooner determined that a publisher's or editor's intent mitigated the punishment for contempt of court. Noah, the editor of the *National Advocate* in New York, was indicted for publishing the contents of a private letter.[68] In a November 1817 report titled "SMALL FRY," he wrote that it was "a remarkable circumstance that, prior to the late election for governor in this state, a number of the presses were decidedly hostile" toward the eventual winning candidate. After the election, "these presses, with an apparent simultaneous movement, came out in his favor."[69] Noah concluded that a "*suitable consideration* had been promised them," and he publicly denounced "the spirit of corruption, which is now the order of the day in this state."[70] He accused many newspaper editors of rejecting their principles in exchange for political favor.

To support his assertions, Noah published the contents of a private letter that the editors of the *Dutchess Observer* in Poughkeepsie had written to a lawyer named Alden Spooner. Noah said that the letter had been "found in our office, *open*; how it came there we are unable to say...."[71] Not only did he publish the letter's contents, but he also included his own comments within it. In the following example, Noah's commentary is contained within parentheses inside the letter's original content:

> *We take a lively interest in your warfare with Noah, and hope the time is not far distant when this wretch* (thank ye, gentlemen; very much obliged for the

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[68] "Mordecai M. Noah's Case," *The New-York City-Hall Recorder*, Feb. 1818, 13, reproduced in American Periodicals Series Online 1740-1900.
[69] Ibid., 14.
[70] Ibid. The italic font is used in the original document.
[71] Ibid.

> compliment) *will meet with that general detestation which the pander of an unprincipled junta merits.*[72]

The main point of Noah's interest, though, came at the end of the letter, which follows:

> *We wish to have something done this winter by the republicans*, TO DISTRIBUTE THE PRINTING OF THE STATE LAWS MORE GENERALLY AMONG THE PRINTERS OF THIS STATE; *the* PATRONAGE *to the state printer is* ENORMOUS.[73]

This was the proof for which Noah had been looking. "This *confirms* our position," he wrote. "The state printing is in the gift of the Legislature, and is valued at many thousand dollars...." According to the new order of things, he suggested sarcastically, such an offer was considered to be "supporting the *purity and independence* of the press...."[74]

The publication secured Noah a date with New York City's Court of General Sessions of the Peace, but not for contempt. He was indicted on five charges: intercepting a private letter, opening it, reading it, publishing it in a newspaper, and including his own comments with the publication.[75] After much testimony and debate between the prosecution and defense, the jury "returned a verdict of guilty generally."[76] Noah's defense attorneys, though, argued that only the first three counts of the five-count indictment were actually indictable offenses, and because the prosecution was unable to prove those charges, the jury incorrectly delivered the guilty verdict based on the remaining two charges. The defense appealed the verdict.

While the appeal was pending, the case took an interesting turn. On February 6, 1818, New York City Mayor Jacob Radcliff announced that the court had been prepared to deliver its decision during the previous term. During that time, though, the court

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[72] Ibid., 15. The font styles and punctuation reflect those used in the case record.
[73] Ibid.
[74] Ibid.
[75] Ibid., 13.
[76] Ibid., 21.

learned of publications in Noah's *National Advocate* and Spooner's *Columbian* which "contained undue reflections, particularly on the jury who tried this cause, and on a witness who was examined on the trial."[77] Both editors were summoned to court to justify why they should not be charged with contempt.[78]

While awaiting the decision concerning his appeal, Noah had published several trial-related "reports" over a four-day period in January. According to the district attorney, one of the reports, titled "Liberty of the Press," attributed Noah's conviction "to the influence of party" and contained complaints of "considerable severity" against the grand jury and the trial jury. The other three publications contained similar grievances, including one in which Noah accused the court of "bending justice to meet a *specific purpose*."[79] After reading the publications, the court gave Noah and the owner of the *National Advocate* until the beginning of the next court term to show why they should not be held in contempt. Meanwhile, Spooner had also addressed the trial within the pages of the *Columbian*, and after the offending articles were read aloud, he, too, was ordered back for the next term.

When the time came for the contempt proceeding, Noah's attorney "raised a question to the jurisdiction of the court, in proceeding to punish for a contempt *not committed in the face of the court*." In England, he argued, "no court of inferior jurisdiction, could proceed by attachment, to punish a party for an alleged contempt, not

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[77] Ibid., 22-23.

[78] Ibid., 23. The mayor, continuing at length with his speech, announced that the court had decided to grant Noah a new trial. It is also worth noting that Spooner had been charged with publishing a libel against Noah over this same issue. The jury, though, could not reach a verdict, and the case against Spooner remained pending even though the jury was dismissed. However, Spooner had published reports about the case, which prompted the charge of contempt. See "Alden Spooner's Case," *The New-York City-Hall Recorder*, Feb. 1818, 27.

[79] "In Several Matters of Mordecai M. Noah and Alden Spooner," *The New-York City-Hall Recorder*, Feb. 1818, 32, reproduced in American Periodicals Series Online 1740-1900.

committed in the face of the court." Mayor Radcliff, who also sat on the Court of General Sessions of the Peace, believed that the statement "was inconsistent with everything that had been done" before. "The court possesses all the powers ... over cases within its jurisdiction," he said, "and, if it cannot punish for contempts like these, it had better be abolished." Attorneys prepared affidavits for both Noah and Spooner assuring the court that they did not "mean or intend, either directly or indirectly, any contempt of this court." The mayor then "proceeded at some length to expatiate on the impropriety of publishing any matter, in a public newspaper, reflecting on the conduct of jurors or of witnesses, or of the court, in any judicial proceeding, while it was pending, and undetermined."[80] In Noah's case, the mayor noted, a verdict had been rendered but the court had not yet ruled on a motion for a new trial. In Spooner's case, he said, the legal issue was still pending even though the jury had been discharged.[81] He continued with the following:

> In the view of the court, it can never be tolerated, that any party in a judicial proceeding, or any other person, should be permitted to publish any matter, relative to such proceeding, reflecting on the motives or conduct of jurors, witnesses, or of the court, while the case was pending. It is obvious, that such publications are calculated, not only to impeach the administration of justice, but to bias the public mind, to excite prejudices, and to influence the future decision of the case; and must therefore be considered as high contempts.[82]

Despite the ruling that the men did commit contempts, the court believed that they did not do so purposefully; so the judges accepted Noah's and Spooner's apologies and dismissed the contempt charges. However, the court made it clear that "should another

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[80] Ibid., 33.
[81] Ibid., 34.
[82] Ibid.

case of this kind occur, we should be disposed to punish with severity, if not to the extent of our power."[83]

This was a case in which the earlier decision in *People v. Few* had an obvious impact (that case was even mentioned in this record). This court determined that even though a contempt had been committed and punishment would be proper, it was Spooner's and Noah's intent that mattered most; they claimed they did not intend to embarrass the court, and that tipped the scale in their favor. The court chose to balance its contempt power with judicial discretion, showing that a charge of contempt did not automatically lead to a conviction. However, the court was also very clear that this ruling was intended to be somewhat of a warning, indicating that it would likely choose to punish subsequent contempts much more harshly.

Two years later in 1820, Alden Spooner found himself facing contempt charges once again. In this case, the court determined that contempt should not have been used when there was no specific language in the article that could trigger a contempt citation. On August 10, 1820, Spooner commented on the news, "which has excited the *disgust* of many," that a man convicted of a highly offensive misdemeanor two years previously "has been appointed, by the *sheriff*, (as I understand) to be the *foreman* of the grand jury of this highly respectable and wealthy city!!" This foreman had assailed the courts, juries, and attorneys "with the most outrageous language," Spooner wrote, and since this man's earlier conviction "his press has occasionally slandered the Mayor, the judges, and other officers of the court."[84] Spooner was speaking of Mordecai Noah, whom Spooner had since dubbed the "Knight of the Broken Seal" (referring to Noah's earlier charge of

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[83] Ibid.

[84] "In the Matter of Alden Spooner," *The New-York City-Hall Recorder*, Sept. 1820, 109, reproduced in American Periodicals Series Online 1740-1900.

illegally opening a mailed letter), and Spooner took the sheriff to task for appointing Noah as a grand jury foreman.[85] He printed the following criticism:

> We know not what may be the feelings of the Mayor, Recorder, and the respectable Jury of freeholders, on this occasion; but we do say, that, in our humble opinion, the sheriff has not shown a decent regard to the feelings of a moral community, or a proper respect to the dignity of the court.[86]

The day after the publication, excerpts of the article were read in New York City's Court of General Sessions of the Peace, and Spooner was ordered to appear the following week to argue why he should not be held in contempt.

Spooner's attorney proposed three arguments, one of which was that there was no complainant for the contempt charge. This was essential, he said, because "the court ought not to permit their own dignity to be asserted by strangers." Mayor Cadwallader Colden, who sat on the court, said there was no need for one. "If the court itself should see a contemptuous publication," he said, "it might order proceedings to be instituted." Spooner's lawyer also argued that the actual publication did not amount to a contempt of the court. He was "at a loss to perceive what part of the paragraph was contemptuous to the court, the sheriff, or the foreman of the grand jury, *in their several capacities* as such." The publication, he admitted, defamed Noah, but Noah was "not entitled to the protection of this court unless he has been assailed in his conduct or capacity as a grand juror." No matter how "intemperate and injudicious the publication may be considered," Spooner's counsel claimed, "it did not amount to a contempt of this court." Furthermore, he argued that when Spooner published his comments, he "had no intention or idea of committing a contempt of this court, or in any way interfering with, or influencing the administration of justice, or in any way scandalizing the court, or interfering improperly

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[85] Ibid. See "Mordecai M. Noah's Case" or the text above for an explanation of Noah's trial.
[86] Ibid.

with its right or dignity."[87] The prosecutor flatly rejected these arguments, insisting that the publication was manifestly contemptuous. "It was an attack upon the dignity of the court" because of the suggestion that the court could find no better man for foreman of the grand jury than one who had been convicted of a misdemeanor.[88] The prosecutor also pointed out that, in fact, Spooner had been less than truthful because he neglected to include that Noah's conviction was later set aside because of problems with the case.

Mayor Colden issued the final verdict, stating that there was no question that the court had the power to punish direct contempts, which are committed in the immediate environs of the court, and also "consequential or implied contempts, among which are speaking or writing contemptuously of the court." He rejected the argument that while defamatory publications against a judge could be punished as a contempt, those against a grand juror could not. "It is the administration of justice that is to be vindicated by these means," he said, "and a Grand or Petit Juror is no less one of the ministers of justice than a Judge upon the bench." To speak reproachfully of a member of a grand jury was "no less a contempt than it would be to apply the same language to a judge." Colden, however, recognized that all citizens should be free to comment, within reason, on legal cases that had already been completed without fear of risking a contempt citation. "It does not follow, then, that every slanderous or defamatory publication of a Judge or Juror is contemptuous, merely because he is a Judge or Juror," he said.[89] When a court was considering whether to punish a publication related to a grand jury, he said, the court had

[87] Ibid., 110.
[88] Ibid., 111.
[89] Ibid., 111-112.

to determine whether the publication both was defamatory and related to the grand jury's official functions.[90]

This case presented the court with a challenge. Colden suggested it was not easy to say whether Spooner's article was contemptuous because it did not express any disrespect toward the court directly. Colden referred to the *Few* case, in which the court dismissed the authors of a contemptuous publication because they said they had not intended to disrespect the court. Colden viewed that case as an example of judicial restraint, as he noted in the following paragraph:

> This power of punishing contempts is one that is absolutely necessary to preserve the respect, authority, and even existence of courts. It is a power that, on fit occasions, ought to be fearlessly exercised; but it must be remembered that it is an arbitrary power; that it is intimately connected with the liberty of the press; that it deprives a party accused of a trial by jury, and puts him wholly at the mercy of the members of the court, who are generally the persons offended....[91]

It was Colden's opinion that in cases of implied or constructive contempts, the contempt power "ought not to be exercised, but when the language is so explicit, and the offence [sic] so gross and palpable, that innocence of intention cannot be presumed, and, if it could, ought not to excuse." The court adopted the exact ruling from the *Few* case to express its opinion, and the contempt charge against Spooner was dismissed.[92]

Here again, the ruling in *People v. Few* proved to be a powerful influence, if not an emerging precedent. Before that ruling, a person's intent had not been a successful argument against a citation for contempt – it was the interpretation or effect of the article that counted most. The decision in the *Spooner* case, though, further reinforced original intent as a legitimate protection. This case also was among the first to begin considering

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[90] Ibid., 112.
[91] Ibid.
[92] Ibid. See *People v. Few* or the text above for an explanation of that case.

the sometimes competing values of a free and open press and a strong judiciary. Mayor Colden expressed a sentiment that would echo throughout the century – when both values conflicted with each other, which was superior? It proved to be a difficult question.

The United States Supreme Court considered the issue of contempt in an 1821 decision from the District of Columbia, and it is worth considering here. However, it was not a contempt by publication case. In *Anderson v. Dunn*, United States Supreme Court Associate Justice William Johnson wrote a decision that included comments that reinforced the judiciary's privilege to use the contempt authority as it deemed necessary. "It is true, that the Courts of justice of the United States are vested, by express statute provision, with power to fine and imprison for contempts," he wrote.[93] The passage also included the following:

> Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates, and, as a corollary to this proposition, to preserve themselves and their officers from the approach and insults of pollution.[94]

Though it was not a precedent-setting decision concerning contempt by publication, it did have the weight of the United States Supreme Court behind it. At least half a dozen contempt by publication cases from the Nineteenth Century cited Justice Johnson's opinion in their decisions.

By the middle of the 1820s, contempt by publication litigation had moved outside of New York and Pennsylvania. The Tennessee Supreme Court, in the 1824 case of *In re Darby*, upheld the judiciary's authority to disbar an attorney for publishing an article that was determined to be a contempt against the court. P.H. Darby was a practicing attorney

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[93] *Anderson v. Dunn*, 1821 U.S. LEXIS 358, 29.
[94] Ibid., 28-29.

in Tennessee when he wrote a published article concerning a suit that was still pending in the Anderson County Circuit Court.[95] The publication was determined to be an attempt to affect the course of justice; Darby was convicted of contempt and disbarred.[96]

Upon his requesting the Tennessee Supreme Court to grant him license to practice before that court, the justices used the occasion to discuss the powers and uses of contempt. It was publications such as his that threatened the very foundations of justice, the court responded, and the justice who wrote the opinion wondered what would be the consequences if the courts had no authority to punish contemptuous publications.[97] "If the court had not such power, the laws could not be executed, and the government itself would be prostrated," the justice argued. "But how is this power to be exercised? I answer, by fine and imprisonment, when it is proper; and by striking the name of the attorney from the rolls when it is more proper."[98] Far from being unconstitutional, the justice suggested, the contempt power was part of the recognized law of the land. Furthermore, this power was to be wielded by individual judges as they saw fit, and it was not subject to any review. "The power itself, from its very nature, must necessarily be independent of all other tribunals," he said. "For if it depends upon another, whether punishment can be inflicted or not, that very dependence defeats and overturns it."[99] Therefore, he concluded, the contempt authority could not "be interfered with in any degree by any other court or judge."[100]

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[95] *In re Darby*, 3 Wheeler Cr. 1 (Tenn. 1824), included in Jacob D. Wheeler, *Reports of Criminal Law Cases*, 2nd ed. (New York: Banks and Brothers, 1860), 1.
[96] Ibid.
[97] Ibid., 3.
[98] Ibid., 4.
[99] Ibid., 5.
[100] Ibid., 7.

Upholding the court's power to punish Darby for his publication, his application to be reinstated was refused. The decision in *In re Darby* included a bit of a twist from previous contempt by publication cases; it involved the disbarment of an attorney for the publication of something he wrote. The basic principle was the same as others. The court decided that the contempt power was an inherent part of the country's legal system, and judges had the authority to wield it as they saw fit.

Five years passed between the *In re Darby* decision and the next recorded contempt by publication case. John Sheldon, the editor of the *Detroit Gazette*, was fined and jailed on March 5, 1829, for "writing articles critical of territorial courts."[101] The year before, William Fletcher, attorney general of the Michigan territory, had recommended that Sheldon be charged with contempt because he had written an article that criticized the Michigan Supreme Court for granting a new trial to a man who had already been convicted of larceny.[102] The article included the following:

> To men of plain common sense, we think the above decision of the learned majority of the supreme court will be thought a curious thing ... and they will wonder, too, that *law* should differ so widely from *common sense* and *justice*. We think, too, that many a poor plodding attorney, in the *states*, when he shall read the above decision of the supreme court of Michigan, will kick his Blackstone out of his office, and acknowledge himself a nincom [sic].[103]

Fletcher considered the publication to be "manifestly scandalous and contemptuous towards the said supreme court, its proceedings and the judges thereof," and the Michigan Supreme Court granted his request to cite Sheldon with contempt.[104] Sheldon's primary arguments against the charge were that the court had no jurisdiction or authority

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[101] "Michigan History Calendar," Historical Society of Michigan, cited at http://www.hsmichigan.org/pdf/timelines/mar_05.pdf.
[102] Sheldon, John P., *Statement of the trial of John P. Sheldon, editor of the Detroit Gazette, before the Supreme Court of the Territory of Michigan, on an attachment for contempt* (Thomas Smith Grimké pamphlet collection: College of Charleston Libraries, 1828), 2-3.
[103] Ibid., 4.
[104] Ibid., 4-5.

to pursue the case against him and that the publication was not a contempt of court.[105] In rendering the Michigan Supreme Court's decision, Justice Henry Chipman considered – and rejected – Sheldon's arguments that the court was infringing upon his free press rights. "Respect for this liberty ought not to be carried so far as to secure to a publisher an entire impunity from the operation of the law," he wrote. "It cannot confer on him the right to do wrong. It cannot place him above the reach of the law. It does not make him a privileged being, to disregard all rights but his own."[106]

As the following passage indicates, Chipman's opinion also suggested that the common law actually superseded federal protections for both speech and press, and any restrictions against imposing on those protections were narrowly tailored to the legislative branch:

> The constitution of the United States places the freedom of speech and of the press upon the same footing. Congress is prohibited from passing any law abridging either. But it has never been dreamed that this inhibition can take away the common law action for slanderous words, any more than it can alter the law of libels for a printed slander. And although that instrument prohibits the passing of any law abridging the liberty of the press, it does not follow, that if the act of which this defendent [sic] is charged is a contempt of the authority of the court, that it is any the less a contempt because it is committted [sic] through the medium of the press.[107]

Furthermore, the Supreme Court justice rejected the notion that the contempt power "was repugnant to the genius of a republican government," saying that it was necessary "to vindicate the right of American citizens, to an administration of the laws, free from the control or misrepresentations of the press."[108] Chipman ultimately determined that there

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[105] Ibid., 5.
[106] Ibid., 12.
[107] Ibid.
[108] Ibid., 22.

was no doubt that Sheldon's article was intended to "prejudice the public mind against the judges" and was, therefore, a contempt of court.[109]

By the following month, the incident had caught the attention of publishers elsewhere. *American Jurist and Law Magazine* printed the news in its "Intelligence" section. According to the magazine, Sheldon was sentenced by the Supreme Court of Michigan Territory to pay a fine of $100, and he was to stay in jail until he paid it. *American Jurist* indicated that its staff had not seen the publication or the judge's opinions on the matter, but it reported that Sheldon told the court that "he had only availed himself of what he considered to be his rights as a freeman" in publishing his article, and he was determined "to go to prison, and to remain there until his hairs were white."[110] *American Jurist* reported that many of Sheldon's friends accompanied him to the jail, and an estimated crowd of 300 gathered later at a public meeting to denounce the court's decision.

Another newspaper, *The Free Enquirer*, also carried a report originally published in the *Boston Daily Advertiser* concerning Sheldon's imprisonment. During the public meeting, the group appointed a committee to raise money to pay Sheldon's fine. So that everyone who wished to contribute to "the release of the unlucky editor" could do so, "it was declared that no individual should be allowed to pay a sum exceeding *twelve and a half cents*." The group also organized a public dinner at the jail the following Saturday, at

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[109] Ibid., 23.
[110] "Intelligence," *American Jurist and Law Magazine*, April 1829, 378, reproduced in American Periodicals Series Online 1740-1900.

which "a great many toasts were given, and many songs sung."[111] The toasts included the following:

> The Press – The mouthpiece of freemen – how strong must be the hand that would muzzle it – how weak the head that would conceive such a project.
>
> Naturalized Citizens – We came here to enjoy the liberty of speech and of the press. Who shall rob us of either?
>
> A Jury Trial – Our fathers fought for it – and we will never relinquish it while we have life.[112]

The group soon raised enough money to pay Sheldon's fine, and he was released from jail.

The contempt case against Sheldon was one of the earliest cases in which the opinion included a significant number of references to practically all of the American decisions on the subject (along with some British decisions). Justice Chipman cited at least ten American contempt cases, and eight of them involved contempt by publication specifically.[113] He also indicated that contempt by publication was a much more common problem for editors and publishers than the early case record suggests, concluding that "some of the cases are reported, but the greater number are not."[114] Sheldon's ordeal also appears to be a rare case in which there was a great public outcry against his conviction and imprisonment.

American Jurist and Law Magazine also included another report of contempt by publication in the same article that addressed John Sheldon's case. Thomas Pen, the editor of the *New Orleans Mercantile Advertiser*, also had been sentenced in 1829 to

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[111] "From the Boston Daily Advertiser," *The Free Enquirer*, April 29, 1829, 216, reproduced in American Periodicals Series Online 1740-1900.
[112] Ibid.
[113] Ibid., 14-19. The eight contempt by publication cases are included in Chapters One and Two of this work.
[114] Ibid., 15.

spend six hours in jail on a contempt of court charge.[115] He had published comments concerning a local murder trial. The criminal case was still pending at the time of his publication.

Legislatures Define Contempt

By the end of the first decade of the Nineteenth Century, there was already a considerable amount of worry among state assembly members in Pennsylvania that the court system's contempt power might be too great. The Pennsylvania Assembly decided to place restrictions on judicial contempt in 1809 through statutory authority. Section One included an explanation of some of the restrictions to which Pennsylvania's judges would have to adhere, and the section included the following:

> The power of the judges of the several courts of this commonwealth, to issue attachments and inflict summary punishments for contempts of court, shall be restricted to the following cases, *that is to say*, To the official misconduct of the officers of such courts respectively, to the negligence or disobedience of officers, parties, jurors, or witnesses against the lawful process of the court, to the misbehavior of any person in the presence of the court, obstructing the administration of justice.[116]

It was Section Two, though, that specifically included instructions pertaining to contempt and its use against publications. It included the following language:

> All publications out of court respecting the conduct of the judges, officers of the court, jurors, witnesses, parties or any of them, of, in and concerning any cause pending before any court of this commonwealth, shall not be construed into a contempt of the said court, so as to render the author, printer, publisher or either of them, liable to attachment and summary punishment for the same....[117]

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[115] "Intelligence," *American Jurist and Law Magazine*, April 1829, 378.
[116] Act of 3d April 1809, full text cited in John Purdon, *A Digest of the Laws of Pennsylvania, from the year one thousand seven hundred, to the twenty-fourth day of March one thousand eight hundred and eighteen* (Philadelphia: Philip H. Nicklin, 1818; reprint ed., Holmes Beach, Fla.: Gaunt, Inc., 2002), 91.
[117] Ibid.

To stress its point even further, the Pennsylvania Assembly attempted to leave no doubt that the law was intended to prevent judges from taking cases into their own hands. The passage continued:

> ...but if such publication shall improperly tend to bias the minds of the public, the court, the officers, jurors, witnesses or any of them, on a question pending before the court, any person feeling himself aggrieved by such publication, shall be at liberty either to proceed by indictment, or to bring an action at law, against the author, printer, publisher or either of them, and recover thereupon such damages as a jury may think fit to award.[118]

The Assembly intended the act to stay in force "during the term of two years from the passing thereof, and from thence unto the end of the next session of the legislature." The law was made permanent in March 1812.[119]

There is at least one example of the respect this statute held among Pennsylvania's judges. In 1822, attorneys James Biddle and William Meredith went before the Court of Common Pleas of the County of Philadelphia to represent three men who had been accused of murder.[120] After many hours of deliberation, the jury notified the judge that it would only be able to render a verdict concerning two of the defendants. Because it appeared a judgment was not possible against all three men together, the judge decided to discharge the jury. Less than a week later, the same three men were brought to court on charges of assault and battery in a separate case. The next morning, an account of the previous murder trial was published in Zachariah Poulson's *American Daily Advertiser*.[121] Meredith asked the court to hold the printer in contempt because that issue was still pending; the court, however, replied "that clearly under the act of Assembly they

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[118] Ibid.
[119] Ibid.
[120] James C. Biddle and William M. Meredith, *A Statement by James C. Biddle and William M. Meredith, of the Philadelphia Bar* (Philadelphia: June 19, 1822), 5.
[121] Ibid., 6.

had no power to grant it."[122] Meredith then asked the court to "instruct the Attorney General to indict the printer." The court again denied the motion, the judge saying that "he saw no impropriety in the publication of what was done publicly."[123] He knew of no law to the contrary, the judge said, and the publication did not appear to be anything other than a fair statement.

There is a twist to this episode. Meredith became so disgusted with the judge during the jury selection process that he angrily chastised him in open court, and the outburst got Meredith and Biddle more than three weeks in jail for contempt of court.[124] After their release, the attorneys then publicly accused the judge of being the author of the published report that prompted their original contempt complaint, as the following suggested:

> To publish during the pendency [sic] of a judicial proceeding, an account of that proceeding which may tend to prejudice the public mind against the parties, is highly improper and illegal; and if the account be garbled and incorrect, the offence [sic] against law and propriety is thereby increased.[125]

Their campaign to get Poulson charged with a contempt of court, however, was unsuccessful.

New York became the next state to enact a contempt by publication law, even though it happened two decades after Pennsylvania's effort. The state legislature adopted it during its 1827-1828 session. The new statute established specific guidelines under which New York courts could use their contempt authority. A court could punish "disorderly, contemptuous or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to

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[122] Ibid., 8.
[123] Ibid., 10.
[124] Ibid., 15.
[125] Ibid., 20.

impair the respect due to its authority." The statute was also very specific concerning the press, which courts could punish for "the publication of a false, or grossly inaccurate report of its proceedings." However, no court could "punish as a contempt, the publication of true, full and fair reports of any trial, argument, proceedings or decision had in such court."[126] New York and Pennsylvania started a trend of legislative intervention that other states soon followed, and it was just a few years after New York's action that Congress passed its own contempt restriction. The congressional intervention into this issue was directly related to another case of contempt by publication that occurred during the late 1820s in Missouri. Because of its legacy concerning American contempt law, the case involving Judge James Peck and attorney Luke Lawless will be explored in the next chapter.

Conclusions

The contempt by publication cases decided during the early years of the Nineteenth Century exhibited some common themes. American judges entered the century with a practically universal recognition that courts could exercise their contempt authority in any manner they chose. This privilege included citing publications deemed to threaten the administration of justice or those that brought a court or its proceedings into public ridicule. The truth of the report, at least during part of this period, was irrelevant. Courts consistently determined that any publication concerning a legal proceeding, particularly one that was not yet decided, amounted to a contempt. However, that did not necessarily mean that a contempt charge was equivalent to a contempt conviction. As *People v. Few* and a few other cases showed, some judges were willing to concede that

[126] N.Y. Rev. Stat. of 1829, part iii, ch. iii, tit. 2, art. 1, sec. 10, reproduced in Walter Nelles and Carol Weiss King, "Contempt by Publication in the United States: To the Federal Contempt Statute," 28 *Columbia Law Review* 401 (1928): 421.

though a contempt had been committed, it had been unintentional and did not merit punishment.

The case record also suggests that those publications containing more than just a routine explanation of legal activity were usually the ones targeted for contempt citations. The editors and publishers in these cases tended to go beyond reporting the facts of a particular case by including their own commentaries within their published reports. It was this inclination to share their personal views with the public that usually got them into trouble with a local judge or prosecutor. It is also worth nothing that with the exception of a few cases, editors tended to admit their responsibility for the offending publications while denying any intent to disrupt the judicial process. It remains a mystery whether this was a true representation of their beliefs or simply a convenient argument to avoid jail and a stiff fine, but the record is clear that this method of defense was not foolproof. Some courts adopted the stance that a contempt was a contempt no matter what the excuse. Other judges accepted editors' apologies and dismissed the charges against them. Those few editors who did not apologize for their publications usually refused to recognize the court's authority to punish them, or they argued that America's tradition of press freedom allowed them to publish their observations and criticisms publicly. These arguments helped fuel the beginning of legislative efforts to restrict the judiciary's contempt authority, and a major congressional act from the early 1830s promised to be the final word on the matter.

CHAPTER THREE

CONGRESS RESTRICTS CONTEMPT, 1830-1854

The first significant Congressional debate concerning America's guaranteed press freedoms and a judge's established powers of contempt resulted from an incident in Missouri. It is one of the Nineteenth Century's most recognized and studied contempt by publication cases. It involved Judge James Peck and attorney Luke Lawless, and it is important because it had the potential to threaten the core of American tradition. The case forced Congress to consider which was the greater right – the right to publish freely on judicial matters or the right of the judiciary to protect itself. America was built on a firm foundation that included press freedom and the right to criticize those in authority. The country's independent judicial system also was a prized possession. While lawmakers expressed support for maintaining a free press in America, they also seemed hesitant to set any kind of precedent that would suggest the erosion of an independent judiciary. Congress sought to strike a balance between both.

James Peck, judge of the U.S. District Court for Missouri, was among the first judges to issue a ruling concerning disputed Spanish land claims in his region.[1] As a result, he was asked to publish it publicly, which he did on March 30, 1826, in the *Missouri Republican*. A little more than a week later on April 8, the *Missouri Advocate*

[1] *Journal of the Senate of the United States of America, 1789-1873* (May 25, 1830), 251-254, reproduced in A Century of Lawmaking for a New Nation: U.S Congressional Documents and Debates, 1774-1873, http://memory.loc.gov/ammem/amlaw/lawhome.html. All journal and debate register citations come from this online source.

and St. Louis Enquirer printed a critical response to Peck's ruling.[2] The author, "considering the opinion so published to be a fair subject of examination to every citizen who feels himself interested in, or aggrieved by its operation," included eighteen different points of disagreement with Peck's ruling. It was signed anonymously as "A Citizen."[3]

When Peck opened the new court term on April 20, he demanded that Stephen Foreman, the editor and publisher of the *Missouri Advocate and St. Louis Enquirer*, appear in court the next day to argue why he should not be held in contempt for publishing a false statement that tended "to bring odium on the court, and to impair the confidence of the public in the purity of its decisions."[4] Attorney Luke Lawless, who had represented the clients Peck had ruled against in the land claims case, also represented Foreman at his contempt hearing. Determining that no argument apparently would sway the judge, Lawless gave Foreman permission to reveal to the judge that it was Lawless himself who had written the article.[5] He wrote the criticisms after the case was over and saw no threat to the judicial process, but the ruling had been appealed, and Peck considered the case still active. He dismissed the editor and ordered Lawless to show "why an attachment should not be issued against him for the false and malicious statements" which Judge Peck considered to be detrimental to his court and the administration of justice in general.[6]

In the case of *United States v. Luke E. Lawless*, Peck did not accept any of Lawless' arguments, and Peck declared him guilty of contempt. He handed down the following decision on April 21, 1826:

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[2] *Journal of the House of Representatives of the United States of America, 1829-1830* (May 1, 1830), 592.
[3] Ibid., 593-594.
[4] Arthur J. Stansbury, *Report of the Trial of James H. Peck, Judge of the United States District Court for the District of Missouri* (Boston, 1833; reprint ed., New York: Da Capo Press, 1972), 2.
[5] Ibid., 2-3.
[6] Ibid., 3.

> The defendant in this case having refused to answer interrogatories, and having persisted in the contempt, it is ordered, adjudged, and considered, that the said defendant be committed to prison for twenty-four hours, and that he be suspended from practising [sic] as an attorney or counselor at law in this court, for eighteen calendar months from this day.[7]

Lawless spent only about five hours in jail before being released on a legal technicality. There was no judicial seal or signature on his commitment papers.[8] He was still incensed about his suspension from practice, though, which he believed was an abuse of the judge's power. It also threatened Lawless' livelihood and the legal interests of his many clients. In December 1826, John Scott, a U.S. Representative from Missouri, presented the House with a request that Lawless had written the previous September.[9] It ended with the following paragraph:

> Wherefore, and inasmuch as the said James H. Peck has not only outraged and oppressed your petitioner as an individual citizen, but, in your petitioner's person, has violated the most sacred and undoubted rights of the inhabitants of these United States, namely, the liberty of speech and of the press, and the right of trial by jury, your petitioner prays that the conduct and proceedings in this behalf, of said Judge Peck, may be inquired into by your honorable body, and such decision made thereon as to your wisdom and justice shall seem proper.[10]

Various other issues delayed action on the request, but Lawless was persistent. More than three years passed before Congress began considering whether Judge Peck should be impeached for his actions against Lawless.

Congress Debates Press Freedoms and Judicial Power

The U.S. House of Representatives considered the impeachment question in early April 1830. Congressman Clement Clay urged caution when considering the matter in which "a great officer had been accused of a great offence [sic]." When a private

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[7] Ibid., 4.
[8] Ibid., 5.
[9] Ibid., 1.
[10] Ibid., 5.

individual accused a high officer of the government, Clay asked, must he be impeached at once? One "should hesitate much, before he could subscribe to such an opinion," he said.[11] Clay suggested that the House proceed very carefully. Following that suggestion, Congressman Spencer Pettis offered a resolution that Judge Peck be allowed to explain before House members anything he wished regarding the charges filed against him.[12]

The resolution prompted considerable debate. Congressman William Ellsworth of Connecticut said he had trouble with the issue because "it was a grave thing to put a judicial officer of this Government to his trial for his character, his office, his subsistence, and, in a word, for all that is dear to humanity...." He also recognized Judge Peck as having the full authority of the federal government behind him, a position that Ellsworth believed required considerable restraint. Peck, said Ellsworth, stripped Lawless of his profession, clothed him with shame, and incarcerated him "in a felon's dungeon, the place of disgrace and infamy." Ellsworth had tried to view the case with impartiality, he said, but having heard Lawless' account, he decided if the facts substantiated the testimony, Peck did indeed deserve to be impeached. Furthermore, Ellsworth had read the published accounts that launched the legal inquisition and found "nothing that looked in the least like a contempt of court, or an impeachment of the integrity or character of the presiding officer...." The U.S. House was in crisis, he said, because "it must decide whether it would sanction the arrest and imprisonment of an individual by a judge for commenting on one of his opinions."[13] Have the days of the Star Chamber returned, Ellsworth asked? He posed the following scenario:

Shall it be declared to the American people, that, after a judge has given his

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[11] *Gales & Seaton's Register of Debates in Congress*, House of Representatives (April 5, 1830), 737.
[12] Ibid., (April 7, 1830), 746.
[13] Ibid.

> opinion, and dismissed the cause, he may arrest a citizen, drag him before his tribunal, and say to him, you have written strictures on my opinion, which I consider derogatory to me, and I, therefore, send you to prison, and take away your livelihood for eighteen months.[14]

Error in judgment was not an impeachable offense, Ellsworth said, but "wicked conduct and a wicked motive are." Judge Peck had used "judicial thunder to demonstrate that ... he was not to be contradicted or reviewed," and unless it was shown that Peck had such authority, Ellsworth was prepared to impeach him.[15]

Congressman J.W. Huntington, an attorney from Connecticut, considered the issue before the House as one of deep interest to the nation. However, he disagreed with the effort to impeach Judge Peck and expressed hope that his position would not be interpreted as "favoring judicial tyranny, the worst of all tyranny...." He raised the following question: was Peck justified in his reactions concerning the behavior of Lawless? "It may be assumed as a correct, legal proposition," Huntington said, "that any publication, the object and design of which is to corrupt the fountains of justice ... is a contempt." Such contempts, he argued, are "punishable by fine and imprisonment, and, in case of an attorney, by suspension from practice."[16] Huntington also challenged his fellow lawmakers, asking them if they really believed Judge Peck assumed authority that he did not rightfully possess. "The committee has been told, over and over, in a style the most warm and animated, that his conduct was arbitrary, oppressive, unconstitutional," he said, "calculated to destroy the liberty of the press...." Such rhetoric should be toned down, Huntington suggested, but there was no one in the House who would not decry any attempt to suppress "the legitimate freedom of the press." Huntington expressed hope that

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[14] Ibid., 746-747.
[15] Ibid., 747.
[16] Ibid., 750.

America's courts would never be held so sacred that their decisions could not be the subject of fair and temperate criticism. "The moment you curtail the freedom of the press," he said, "you destroy liberty."[17]

Even though he claimed to guard such freedoms, Huntington declared that he also was "greatly opposed to the licentiousness of the press." He would not, he said, allow it "to bring down upon a court the vengeance of the public, and thus affect the great and vital interests of justice, and the peace and well being of society."[18] He questioned Lawless' motives for writing the article, dismissing others' claims that Lawless simply wanted to protect his clients from a bad decision. "It is impossible his motives could have been such as gentlemen suppose," Huntington said. "Charity believeth all things, and covereth a multitude of sins; but charity herself can have no room here." It was the "obvious tendency of the publication" to affect the administration of the court or those who were to become jurors and witnesses, he said, and Lawless' article was subject to the law of contempt.[19] Huntington, it appeared, would cast his vote against impeachment.

Congressman Buchanan's Analysis

As chairman of the House Committee on the Judiciary and author of the report concerning the case against Judge Peck, Congressman James Buchanan – who later became the nation's fifteenth president in 1857 – addressed the Peck-Lawless affair on the floor of the U.S. House. The "dearest rights of the people of our country" were hanging in the balance against "those of a citizen occupying a high and responsible judicial office." The offense being considered was "the illegal, arbitrary, and oppressive conduct" of Peck toward Lawless, "a citizen of the United States." Buchanan began to

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[17] Ibid., 751.
[18] Ibid.
[19] Ibid., 752.

break down the components of the case. "Intention," he said, "is necessary to constitute guilt," but because one cannot search the heart of a man, one is left to form judgments based on his actions. Buchanan described himself as "one of the last men in this House, or in this country," to seek to interfere with the constitutional independence of the judiciary – the "great bulwark of our rights and liberties...." It was fit and proper, however, to make an example of a judge who forgot what he owed "to the liberties of the people" and violated those rights by "arbitrary and oppressive conduct."[20] It was Buchanan's conviction that Peck was guilty of such conduct, and he offered an extended review of the court case that brought the issue to the attention of Congress.

He questioned whether Lawless did anything to offend Peck, saying Lawless "argued the case in the most respectful language." He also argued, according to Buchanan, that the newspaper article that offended Judge Peck "was neither contemptuous nor libelous; and that, if even it were libelous, the editor was protected from summary punishment by the guarantees of the constitution." Buchanan recounted witness testimony of how Peck gradually lost his temper with Lawless and would not allow him to argue that the article was not a contempt. Peck "had determined it to be a contempt," Buchanan said, "and his will was the law."[21] Not able to follow that line of argument, Lawless contended that even if the article was contemptuous, it should be tried in a different manner. That argument, said Buchanan, also was in vain.

It was the concluding scene, according to Buchanan, that "displays the evil intention – the improper motives of the Judge, in the clearest light." Judge Peck, who was nearly blind and unable to read the article himself, requested that it be read by the district

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[20] *Gales & Seaton's Register of Debates in Congress*, House of Representatives (April 21, 1830), 1.
[21] Ibid., 3.

attorney, and Peck followed each paragraph with his own commentaries. Instead of acting in the "calm, dignified, and impartial manner which becomes a judge upon all occasions," Buchanan suggested that Peck was "heated, acrimonious, and severe." After keeping quiet for two to three hours, Lawless arose and left the courthouse to attend to another case. "Could you," Buchanan asked, "... have sat silently and patiently, and heard the Judge for two or three hours uttering every odious epithet against you...?" Buchanan reminded House members that Lawless was sentenced to twenty-four hours in prison and suspended from his law practice for eighteen months. By the arbitrary mandate of Judge Peck, Lawless was "not only deprived of his personal liberty but of the means of supporting himself and his family."[22] Buchanan said that he found it difficult to believe there was no malice or evil intent on the part of Judge Peck, and he said he knew of no such case bearing any parallel to this one.

Buchanan concluded by stating what he believed to be the law regarding contempts of court. There were two kinds of contempts in England – direct and constructive. The power to punish direct contempts, he said, had to exist in every court because "without such power, they could not proceed with their business." Direct contempts included misbehaviors that were committed in the courtroom and tended to obstruct the administration of justice. Constructive contempts, however, included actions that the judge believed were prejudicial even though they were committed away from the courtroom, such as publishing a newspaper. This class of contempt, Buchanan said, was "of a very different character, and, under a free Government, will ever be viewed with jealousy and suspicion."[23] The trial of such contempts deprives a citizen of a jury and

[22] Ibid.
[23] Ibid.

allows the injured to be both "the judge and the avenger of his own wrongs."[24] Under this arrangement, he said, the judge becomes the accuser and is able to both try and punish the offender at his own discretion. Such authority includes levying as "heavy a fine and as long an imprisonment as he may think proper," Buchanan said. "Is not this a power in its nature revolting to every freeman?" He considered the simultaneous authority to accuse, try, and convict to be a tremendous – and dangerous – power to give any man. If indeed this power did exist in the judiciary, Buchanan suggested it existed without appeal. "The principle is well settled, that in cases of commitment for contempt the injured party has no redress," he said. "He must endure the penalty, without the possibility of having his case reviewed by any other judicial tribunal."[25] Buchanan even accused Peck's actions of violating the First Amendment. "The constitution declares that Congress shall make no law abridging the freedom of the press; but Judge Peck punishes the exercise of this freedom," he said. If lawmakers sanctioned such activity, Buchanan argued, "the constitution, the right of trial by jury, and the liberty of the press, are nothing better than trite topics."[26]

Decision to Impeach Judge Peck

The U.S. House went into a committee of the whole on April 23, 1830, to discuss the impeachment of Judge Peck.[27] Congressman Everett began discussing the issue by stating that he could not vote for the impeachment resolution because he did not believe Peck should be impeached.[28] He believed there was proof of the judge's good intentions,

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[24] Ibid., 3-4.
[25] Ibid., 4.
[26] Ibid., 5.
[27] *Gales & Seaton's Register of Debates in Congress*, House of Representatives (April 23, 1830), 814.
[28] Ibid. There were two congressmen with the last name of Everett serving in the U.S. House of Representatives – Edward Everett and Horace Everett. Because the recorded debate refers only to "Mr.

and Everett had "looked in vain in the evidence for proof of evil intent." Therefore, Everett concluded, Peck should not be treated severely for a first offense because he was "already punished sufficiently by these proceedings."[29] Everett proposed to soften the language used to describe Peck's actions and offered the following for consideration:

> That though, on the evidence now before it, this House does not approve of the conduct of James H. Peck, judge of the district court of the United States for the district of Missouri, in his proceeding by attachment against Luke E. Lawless, for alleged contempt of the said court; yet there is not sufficient evidence of evil intent, to authorize the House to impeach the said judge of high misdemeanors in office.[30]

Congressman Storrs objected to the proposed change, calling it "an appeal to the sympathy of the House."[31] As far as he was concerned, Peck had violated Lawless' personal rights by throwing him into jail and had usurped a "jurisdiction which the Judge did not possess." It was the violation of Lawless' rights "which justified impeachment." The amendment, after a few slight changes, was defeated. William Ellsworth then took the floor to support the impeachment resolution. As a member of the Judiciary Committee, he "had given the subject full examination, and had come to the opinion that this impeachment should take place."[32] After more discussion in favor of and against the resolution, the House committee of the whole adjourned without reaching a final decision.

House members, on April 24, 1830, proposed a resolution that Peck, "Judge of the District Court of the United States for the District of Missouri, be impeached of high

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Everett," it is not clear which congressman was speaking. The author was unable to determine the correct identity of the speaker.

[29] Ibid.

[30] Ibid.

[31] Ibid. Yet again, there were two congressmen with the last name of Storrs serving in the U.S. House of Representatives – Henry Storrs and William Storrs. Henry Storrs of New York was later elected as a House Manager for the impeachment, but the record here is not clear about which congressman was speaking.

[32] Ibid., 815.

misdemeanors in office."[33] It was approved 123 to 49. One week later, the House adopted an article of impeachment against Peck. It stated in part:

> James H. Peck ... unmindful of the solemn duties of his station ... with intention wrongfully and unjustly to oppress, imprison, and otherwise injure the said Luke Edward Lawless, under color of law ... arbitrarily, oppressively, and unjustly ... arrested, imprisoned, and brought into the said court ... Luke Edward Lawless [who] was ... thereupon suspended from practising [sic] as such attorney ... and immediately committed to the common prison in the said city of St. Louis, to the great disparagement of public justice, the abuse of judicial authority, and to the subversion of the liberties of the People of the United States.[34]

The House then cast ballots and elected James Buchanan of Pennsylvania, Henry R. Storrs of New York, George McDuffie of South Carolina, Ambrose Spencer of New York, and Charles A. Wickliffe of Kentucky as impeachment managers. A few days later on May 4, 1830, the U.S. Senate received "the article of impeachment agreed to by this House...."[35]

Peck's Initial Response

Judge Peck submitted his responses to the charges through his counsel, William Wirt, on May 11, 1830. Concerning the accusation that he overstepped his bounds when he declared Lawless' article a contempt of court, Peck claimed that the publication did indeed constitute a contempt because it "misrepresented, distorted, and discolored" his opinion.[36] The article, he said, also exposed the court to public scandal and prejudiced other matters still pending in court. Therefore, "the court was supported and justified by the highest authority, and did not act unjustly, arbitrarily, and oppressively, towards the party who stood convicted of the publication...." Peck claimed to be "influenced solely

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[33] *Journal of the House of Representatives of the United States, 1829-1830*, 565-566.
[34] Ibid., (May 1, 1830), 592-595.
[35] *Gales & Seaton's Register of Debates in Congress*, House of Representatives (May 4, 1830), 872.
[36] *Journal of the Senate of the United States of America, 1789-1873* (May 11, 1830), 245.

by a conscientious sense of public duty...."[37] Having made these statements, he said he could not possibly provide adequate answers concerning the matter unless he was given another two weeks to prepare. Lawmakers agreed to his request.

The Senate heard Peck's prepared responses on May 25, 1830.[38] Peck explained that he believed Lawless' article questioning his judicial decision was a contempt of court because it misrepresented the opinion of the court. Lawless, as an attorney familiar with the issue, must have known and understood the court's opinion, he said, so he believed that the published "misrepresentations were wilfully [sic], wantonly, and maliciously made." There were also other land claims still awaiting judicial review, Peck said, and "the immediate tendency and object of the publication were to prejudice the public mind with regard to these claims" and "disturb and interrupt the due and regular administration of justice." Peck said these were the primary reasons why he considered Lawless' publication to be a contempt of court. Despite his impeachment, Peck said he believed he was "justified by the Constitution and laws of the land in so considering and adjudging it, and in punishing it as a contempt, by the summary process of attachment, in the manner in which it was punished."[39] He sought to assure lawmakers that his actions were "dictated by the purest sense of official duty; were warranted and justified by the Constitution and known laws of the land; and were free from all feelings, designs, and intention, on his part, wrongfully, arbitrarily, and unjustly, to oppress, imprison, or otherwise to injure the said Luke E. Lawless...."[40]

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[37] Ibid., 246.
[38] Ibid., (May 25, 1830), 251.
[39] Ibid., 253.
[40] Ibid., 254.

Peck then proceeded to examine at length what he considered to be eighteen misrepresentations in Lawless' article. "That a man of sufficient discrimination ... could have accumulated such a mass of misrepresentation through innocent mistake, was, and still is, in the opinion of this respondent," he said, "utterly incredible." He questioned why one would issue such a publication if not to "enlighten the public by a rational discussion of an important subject." Peck believed there was no such discussion, only a "naked, sheer misrepresentation from beginning to end."[41] It was designed to "bring this court into open contempt and scandal" and to fill potential jurors with "a load of preconceived prejudice against the Judge, as to indispose them to receive with respect any instruction, even on points of law, which might be given from the bench...."[42]

Furthermore, Peck said that he was not convinced by Lawless' arguments that the First Amendment protected the publication. According to Peck, Lawless claimed that the article was a correct representation of Peck's opinion and that Lawless was "exercising the rights of an American citizen." To punish him would be "an invasion of the liberty of the press, and of the right of trial by jury," Lawless had argued.[43] Peck had disagreed, ordering Lawless to spend a day in jail and suspending his law license for a year-and-a-half. Peck denied that he handed down a wrong and unjust punishment. Instead, he said he was motivated "by the purest sense of what he deemed a high official duty," saying that he still believed his actions were "well warranted and supported in every step by the Constitution and laws of the land...."[44] Peck had established the groundwork to defend himself and, in a larger sense, America's entire judiciary.

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[41] Ibid., 277.
[42] Ibid., 278.
[43] Ibid.
[44] Ibid., 279.

What promised to be a highly charged debate of historical importance came to an abrupt halt when Congress simply ran out of time to discuss it and adjourned. Peck, Lawless, and the rest of the nation would have to wait about seven months before the trial would continue. The *Saturday Evening Post* noted the delay with one sentence: "The trial of Judge Peck, of Missouri, under the impeachment by the House of Representatives, is postponed to the next session of Congress."[45] Peck's impeachment trial would not resume until December 1830.

Impeachment Trial Resumes

Congressman George McDuffie, who served as a House manager for the impeachment in the Senate, opened the case for the prosecution on December 20. Arguing that Peck had violated the nation's constitutional principles, he hoped to convince senators that Peck was "guilty of an illegal and tyrannical usurpation of power."[46] It was generally recognized, McDuffie said, that courts had exerted authority over their jurisdiction "by punishing for contempts committed within and against it." However, he contended, the power to punish for contempt was "a high criminal power" that was "the most dangerous that could be enforced." Such power could not be used to disfranchise citizens or deprive them of liberty and livelihood, he said. America's courts, therefore, "had no power to punish for contempt, further than their own self-preservation required." McDuffie recognized that it was necessary at times to protect the administration of justice by punishing direct outrages upon the court. Such rights to punish were inherent in these cases. "But," McDuffie asked, "how far did it extend?" He

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[45] "Epitome of the Times," *Saturday Evening Post*, May 22, 1830, 2, reproduced in American Periodicals Series Online 1740-1900, http://proquest.umi.com/pqdweb?DBId=5197&LASTSRCHMODE=1&RQT=575.

[46] *Gales & Seaton's Register of Debates in Congress*, U.S. Senate (Dec. 20, 1830), 9.

blamed the infiltration of concepts and ideas from the British judiciary, "which were utterly incompatible with liberty."[47] He entered the following argument that was to be used in other contempt cases throughout the Nineteenth Century:

> What was the case of the respondent? He was not in court; he was not in the actual administration of justice, when the publication of Mr. Lawless was made.... The judgment of the court had been rendered six months before the publication. The decree had been entered. There was an end to the judicial functions of the judge as to that case.[48]

In essence, McDuffie said, Peck had claimed for himself a power to punish "a citizen for contempt, in daring to question the infallibility of his opinion." This was a power denied to the Senate, the House of Representatives, and even the president. "He claimed a power to make the law," McDuffie argued, "and punish under it, at the same moment. This was the most infamous and tyrannical of the whole tissue of usurpations."[49] Furthermore, the Judicial Act of 1789 limited contempt punishments to fine and imprisonment. Judge Peck, however, also had chosen to disfranchise Lawless by barring him from legal practice for a year-and-a-half. "Such a power," McDuffie declared, "was never claimed before by any tribunal in the civilized world."[50] He suggested the following legal principle: reproachful words toward a judge could be immediately finable by the court; but a man "could not be punished for words said against a judge not in the actual execution of his official duties."[51]

Having finished presenting the case to the Senate, McDuffie offered some remarks on "the danger, the real, great, and alarming danger" of the precedent that would be established if Judge Peck were not punished for his actions. Peck had "violated the

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[47] Ibid., 10.
[48] Ibid.
[49] Ibid., 11.
[50] Ibid., 12.
[51] Ibid., 13.

liberty of the press in the most dangerous form," he said.[52] He said that Peck even defended "his tyrannical conduct" by claiming "demagogues, slanderers, and libelers" used the idea of press freedom to justify their anti-government behavior. McDuffie extolled the virtues of press freedom and its importance to personal liberty, saying that "if any functionary ought to be held responsible to the press, which was the organ, the only true organ, of the people, it was the judges...."[53] Concluding his remarks, McDuffie urged lawmakers to protect the liberty of the press by making the following appeal:

> It must appear much better, in the view of every statesman, to suffer the most unjust libels to be published in the newspapers, and to let their poisoned arrows recoil upon themselves, than to suppress the liberty of the press. But what was the liberty of Mr. Lawless, according to the practical doctrine of Judge Peck? It was the liberty of being sent to prison, incarcerated with common felons, and deprived of the means of his subsistence, for respectfully differing in opinion with the judge.[54]

Defending Judge Peck

Attorney Jonathan Meredith addressed the Senate court of impeachment on Peck's behalf on January 5, 1831. He began the defense of Peck by noting that the judge was accused of disparaging public justice and subverting "the liberties of the people of the United States." Meredith urged lawmakers to consider the issue carefully. "The surest safeguard of the liberties of the people," he argued, "was to be found in the firm and independent administration of justice...."[55] Peck considered Lawless' article "to be a gross and palpable misrepresentation of his opinion, calculated to bring his court into disrespect...." So Peck did what he was given legal authority to do – "he proceeded to attach and punish its author for the contempt." Lawless was given ample opportunity,

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[52] Ibid., 16.
[53] Ibid., 17.
[54] Ibid., 18.
[55] *Gales & Seaton's Register of Debates in Congress*, U.S. Senate (Jan. 5, 1831), 25.

said Meredith, to explain himself to the judge, but he did not admit to his error. Meredith also argued that Peck was influenced "by a sense of official obligation and duty," not by the "wilful [sic], malicious, and arbitrary motive and intention imputed to him in the article of impeachment."[56] Peck saw in Lawless' article a grave misrepresentation that was "calculated to bring ridicule and contempt upon the court" and "break down the court by the force of public opinion." Peck's actions were justified, Meredith argued, by the inherent contempt power of the courts, "a power which, although sometimes questioned, had remained untouched in every political struggle that had taken place."[57] Judicial contempt, he said, was sanctioned by American precedents and had been practiced at every judicial level in the country. Meredith, having finished his remarks in Peck's defense, then left the judge's fate in the hands of the U.S. Senate.

The Peck-Lawless Legacy

Atkinson's Saturday Evening Post noted the conclusion of the impeachment trial with a single paragraph.[58] "After having occupied almost the entire attention of the Senate since the session commenced," the article stated, "and after the expenditure of an immense deal of money, the trial is at length concluded by an acquittal of the Judge." There were twenty-two "not guilty" votes and twenty-one "guilty," which did not meet the two-thirds majority required of the Senate to convict him. Peck was promptly acquitted, and the court of impeachment adjourned.

The Senate had given Judge Peck, and in a sense the entire federal judicial system, a tentative victory. However, the implications of Peck's actions continued to

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[56] Ibid., 26.
[57] Ibid., 27.
[58] "Congress," *Atkinson's Saturday Evening Post*, Feb. 5, 1831, 3, reproduced in American Periodicals Series Online 1740-1900.

resonate within the chambers of Congress, and lawmakers in the U.S. House almost immediately began considering ways to restrict use of the judicial contempt power. Congressman Joseph Draper proposed a resolution asking the House Committee on the Judiciary to "inquire into the expediency of defining by statute all offences [sic] which may be punished as contempts of the courts of the United States." He was specifically concerned about the issue of fair comment and criticism. "If the object of a publication be to convince the public at large that any particular proposition agitated here is correct," he asked, "is it not competent for any citizen to call in question the correctness of such an opinion? Surely it is."[59] If this reasoning applied to Congress, Draper reasoned, it should apply to all branches of government, as well.

Draper recognized that it would be a difficult task to determine what exactly would constitute a contempt of court. However, he believed that Congress could decide "many cases which are not contempts." They would include opinions expressed after a court decision had been made final. The law, Draper argued, "ought to be so clear, that every individual may ... know whether ... he acts within the law or not" and whether his personal liberty may be at stake.[60] The House granted Draper's request to consider the issue.

A week later, Congressman Buchanan submitted a bill that specifically addressed the judiciary's contempt power. His proposal placed a geographic limitation on judges who would use contempt to maintain order. It stated the following:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court, shall not be construed to extend to any cases except the misbehavior of

[59] *Gales & Seaton's Register of Debates in Congress*, House of Representatives (Feb. 1, 1831), 560.
[60] Ibid., 561.

> any person or persons in the presence of said courts, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or other person or persons, to any lawful writ, process, order, rule, decree, or command of the said courts.[61]

Congress approved the geographic restriction on federal contempt authority less than a month later on March 2, 1831.[62] Federal judges were obligated to follow the letter of the law, and it was hoped that state courts would be willing to follow the spirit of the law, as well.

Judicial Contempt from 1831 to 1854

Before the Senate held Peck's impeachment trial, Congressman Michael Hoffman remarked that the proceedings would become a noted part of America's history.[63] The congressmen who considered the Peck-Lawless dispute recognized a potential crisis was looming between two American values – freedom of the press and a strong, independent judiciary. The country was founded on a tradition that included press freedom and the right to criticize those in authority. America also prized its judicial system, which was designed to work independently while keeping a check on other branches of government. These values seemed to be squarely at odds in the dispute between Peck and Lawless. As the congressional record suggests, the issue was of grave concern for lawmakers. As a result, Congress attempted to achieve a compromise by restricting the use of contempt powers to events occurring in the immediate environs of the court. Under this arrangement, publishers would still be able to comment on court proceedings without the fear of reprisal, and judges would retain their unquestioned authority to maintain decorum within their courtrooms.

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[61] H.R. 620, *Bills and Resolutions, House of Representatives, 21st Congress, 2nd Session*, Feb. 10, 1831.
[62] Act of Mar. 2, 1831, chap. 99, 4 Stat. 487.
[63] *Gales & Seaton's Register of Debates in Congress*, House of Representatives (Dec. 20, 1830), 377.

The federal case of *Ex parte Poulson* from Pennsylvania was determined four years later in 1835 and was among the first to recognize – and follow – the congressional act restricting contempt. Zachariah Poulson, editor of the *American Daily Advertiser* in Philadelphia, got into trouble when an attorney accused him of publishing an "offensive" article against his client while a court case was proceeding.[64] The article had been reprinted from a newspaper in Maine and referred to the man as a counterfeiter.[65] The federal Circuit Court of the Eastern District of Pennsylvania was handling the trial, and the attorney asked the court to hold Poulson in contempt. Circuit Court Judge Henry Baldwin concluded that "the publication refers directly to the plaintiff, and the cause of action which he has submitted to the court and jury, and in a manner calculated to produce the worst effect upon the administration of justice...."[66] Before anything related to the publication could be discussed, though, the judge determined that "the first inquiry is into the jurisdiction of this court to issue an attachment for contempt for a publication relating to a suit on trial, or in any way pending before it."[67]

Baldwin then commented at length on the Congressional Act of March 2, 1831, which restricted contempt citations to actions occurring in and around the courtroom. "As this is an inferior court within the provision of the constitution," he explained, "it is created by the laws, with such powers only as congress has deemed it proper to confer."[68] He concluded that the courts should recognize the following:

> It is in the discretion of the legislative power to confer upon courts a summary jurisdiction to protect their suitors or itself by summary process, or to deny it. It has been thought proper to do the latter, in language too plain to doubt of the

[64] *Ex parte Poulson*, 1835 U.S. App. LEXIS 230, 1.
[65] Ibid., 1, 3.
[66] Ibid., 1.
[67] Ibid., 5.
[68] Ibid., 7.

> meaning of the law.... It would ill become any court of the United States to make a struggle to retain any summary power, the exercise of which is manifestly contrary to the declared will of the legislative power.[69]

Baldwin believed that Congress' intent was clear. "The law prohibits the issuing of an attachment," he continued, "except in certain cases, of which the present is not one." In his opinion, it would have been "utterly useless" to pursue a charge of contempt when considering the congressional act.[70] He lamented the change in the following passage:

> The court is disarmed in relation to the press; it can neither protect itself, or its suitors; libels may be published upon either without stint; the merits of a cause depending for trial or judgment may be discussed at pleasure; anything may be said to jurors through the press, the most wilful [sic] misrepresentations made of judicial proceedings, and any improper mode of influencing the decisions of causes by out of door influence practiced with impunity.[71]

Before the congressional act, Judge Baldwin said, "there was an acknowledged power resting in the sound, legal discretion of the court" that was to be used carefully in order "to prevent and punish the publication of articles like the one before us...."[72] He continued:

> But as congress has deemed such a power too dangerous to be entrusted to the discretion of judges on a motion, or of a court and jury on an indictment, and have not thought it expedient to give a remedy to a party who has been injured by a publication by authorizing him to bring a suit against the publisher for damages, we have no cognizance of the matter. The means of redress which had before existed have been taken away without the substitution of any other.[73]

Baldwin noted that "while suitors in the state courts can be protected against publications like this, they are without protection in the federal courts."[74] He then appealed to the press to

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[69] Ibid., 9-10.
[70] Ibid., 10.
[71] Ibid., 10-11.
[72] Ibid., 15.
[73] Ibid, 15-16.
[74] Ibid., 17.

> remember that suitors stand unarmed and defenseless before them; that the hands of the court are manackled [sic]; that the law of 1831 has placed no arbiter between an editor and a party to a trial, whose life, character, liberty, or property may be put in jeopardy by the influence of the press. The law has taken from him a shield, and from the court the sword. Both must be submissive under the inflictions of the press, be they just or unjust.[75]

As far as Judge Baldwin was concerned, Congress had given the advantage to the press, and contempt by publication was a thing of the past.

Ex parte Poulson was an important case because it recognized Congress' authority to place restrictions on the federal judicial system. It was the first successful legal test of the federal contempt statute, and the decision effectively set a precedent. After this decision, contempt by publication cases virtually disappeared from the federal court system for the remainder of the Nineteenth Century. Judge Baldwin also proved prophetic by noting that the statute excluded state courts, where contempt convictions would still be possible. It would be two decades before his observation became reality.

The 1842 federal case of *United States v. Holmes* was not a case of contempt by publication, but Pennsylvania Circuit Court Judge Henry Baldwin again recognized the federal Act of 1831. He used it as an excuse to employ a novel way of making sure that reporters did not publish anything that could affect the outcome of the trial. The congressional act, he said, stripped the court of the power to punish publications of testimony as contempts. "We have, however, the power to regulate the admissions of persons and the character of proceedings within our own bar," he stated. Concluding that several people in the courtroom, "apparently connected with the daily press," were there to report on the proceedings, Baldwin issued the following order:

> The court takes occasion to state that no person will be allowed to come within the bar of the court for the purpose of reporting, except on condition of suspending all

[75] Ibid., 18.

> publication till [sic] after the trial and not otherwise, the court will direct that a convenient place be afforded to the reporters of the press.[76]

The trial report states that "reporters expressed their acquiescence in this order of the court, and the most respectful silence, on the part of the press, prevailed during the whole trial."[77]

As Judge Baldwin had observed in the case of *Ex parte Poulson*, the federal contempt restrictions were not applicable to the states, and those courts continued to address contempt by publication cases based on their own laws. The New York case of *Morrison v. Moat* established in 1839 that the publication of an inaccurate report about a court's decision did not constitute a contempt. The case stemmed from a legal dispute involving pills that were being marketed falsely under the name of another brand, Morrison's Pills, which were a popular "remedy" for various ailments of the day. The New York Court of Chancery issued an injunction against the sale. The order was later modified, and the defendants noted the changes in an advertisement that was riddled with inaccuracies. Morrison's representatives requested that the court hold the defendants in contempt. Court Vice Chancellor William McCoun issued a short decision. New York's statutes, he ruled, limited contempt punishments to a few acts committed in and around the courtroom and to gross misrepresentations of legal decisions. "What is alleged against the defendants hardly amounts to 'the publication of a false or grossly inaccurate report'" of the court's ruling, he said. Furthermore, because the defendants had disavowed "any intentional contempt [or] disrespect towards the court," McCoun dismissed the charges.[78]

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[76] *United States v. Holmes*, 26 F.Cas. 360 (U.S. 1842), 363.
[77] Ibid.
[78] *Morrison v. Moat*, 4 Edward's Chancery Reports 25 (N.Y. 1839), 25.

Morrison v. Moat was the first known contempt by publication case that was decided in a state court after the federal restrictions were in place. The decision, though, did not acknowledge the federal law. It relied instead on New York's contempt statutes, which had been in force for the previous decade. It was an early indication that state courts were less likely to follow the spirit of the federal law in favor of following the letter of the law in their respective states.

The 1842 case of *Stuart v. People* carved out what portions of Illinois common law were and were not in effect concerning contempt. The Circuit Court of Cook County, Illinois, had a bone to pick with William Stuart. The editor of the *Chicago Daily American* was summoned to court in May 1840 to explain why he "ought not to be fined or imprisoned, or both, for publishing ... a contemptuous article ... concerning the jury and Circuit Court of Cook county" while it was conducting a murder trial.[79] The article stated that one of the jurors sitting in the trial was also writing editorials for another publication, and it also suggested that the presiding judge was too weak to control the courtroom.[80] Stuart's attorneys argued that the publication was not a contempt; they said that the court could not punish as a contempt any newspaper article published away from the court; and they argued that no out-of-court publication relating to the court or its proceedings was punishable as a contempt.[81] In the April 1841 term, Stuart defended himself and his publication before the court by invoking protections granted by the Illinois legislature. "The constitution of this state expressly declares that printing presses shall be free to every person who undertakes to examine the proceedings of the general assembly, or any branch of government," he argued, "and no law shall ever be made to

[79] *Stuart v. People*, 1842 Ill. LEXIS 18, 1.
[80] Ibid., 2.
[81] Ibid., 3.

restrain the right thereof...."[82] He also said that the articles he published were not intended "to violate the constitution of this state, nor cast contempt upon this court."[83] The Circuit Court of Cook County was unimpressed and ordered Stuart to pay a $100 fine and court costs.

Stuart appealed, and the Supreme Court of Illinois heard the case in December 1841. It rendered its decision the following year.[84] Justice Sidney Breese wrote the opinion and provided a succinct explanation of direct contempts, which occurred in the presence of the court, and constructive contempts, which occurred away from the courtroom. He provided the following analysis:

> Into this vortex of constructive contempts have been drawn, by the British courts, many acts which have no tendency to obstruct the administration of justice, but rather to wound the feelings, or offend the personal dignity of the judge, and fines imposed, and imprisonment denounced, so frequently and with so little question, as to have ripened, in the estimation of many, into a common law principle....[85]

The state of Illinois had deemed only certain common law principles as applicable, he wrote, and in Stuart's case, the publications "had no tendency to obstruct the administration of justice...."[86] Breese determined that

> an honest, independent and intelligent court will win its way to public confidence, in spite of newspaper paragraphs, however pointed may be their wit or satire, and its dignity will suffer less by passing them by unnoticed, than by arraigning the perpetrators, trying them in a summary way, and punishing them by the judgment of the offended party.[87]

Contempt "is at best an arbitrary power, and should only be exercised on the preservative, and not on the vindictive, principle," he ruled. "It is not a jewel of the court, to be

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[82] Ibid., 9.
[83] Ibid., 10.
[84] Ibid., 15.
[85] Ibid., 21.
[86] Ibid., 22-23.
[87] Ibid., 24.

admired and prized, but a rod rather, and most potent when rarely used."[88] The Illinois Supreme Court reversed Stuart's contempt conviction.[89]

The federal contempt statute played virtually no role in the case of *Stuart v. People*. As a state case, Illinois law was used to determine the outcome. However, the ruling was among the few that expressly recognized the court's contempt power as an arbitrary one that was capable of being abused. The Illinois Supreme Court issued a warning that the contempt authority was much more effective when used sparingly, and the decision also attempted to demystify the notion that contempt was an infallible component of the common law. However, some remarks unrelated to the final decision would prove to be important later. The opinion suggested that Illinois law allowed any act that was "calculated to impede, embarrass, or obstruct the court in the administration of justice" to be considered as "done in the presence of the court."[90] It was a distinction that was later used in the Illinois case of *People v. Wilson*.[91]

It was established under the 1844 ruling in *Ex parte Hickey* that the power to punish constructive contempts, such as newspaper publications, by fine and imprisonment was contrary to Mississippi's constitution. The Circuit Court of Warren County, Mississippi, was handling a murder trial in June 1844.[92] Attorney Daniel Adams was charged with killing Dr. James Hagan, and the *Vicksburg Sentinel* published an

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[88] Ibid., 25.
[89] Justice Stephen Douglas (referenced incorrectly as "Douglass" in the case record) disagreed with the court's opinion. The case record, however, does not include his dissent or rationale behind it.
[90] Ibid., 23.
[91] *People v. Wilson*, 1872 Ill. LEXIS 256. See Chapter Four for an explanation of this case.
[92] *Ex parte Hickey*, 1840 Miss. LEXIS 104, 1. There appears to be an error in the citation of this case. LEXIS lists this case as decided in July 1840. However, the text of the case refers to all activities occurring in 1844. This case is also cited as occurring in 1844 in *Bridges v. Superior Court of Los Angeles County*, 1939 Cal. LEXIS 352, 69.

editorial concerning the case on June 10.[93] The editorial chastised the judge for allowing Adams to remain free even though he was under indictment for murder. The following passage was particularly critical:

> Having disregarded his oath of office, and failed to execute the laws, Judge Coalter deserves to be hurled from a seat he desecrates, and brought as a criminal abettor of murder to the bar, to answer for his crimes.... If Judge Coalter cannot be made to execute the laws in this case ... immediate steps should be taken, in accordance with the laws, to impeach Judge Coalter.[94]

The murder case was of special interest to the *Sentinel*. Hagan had co-founded the newspaper in 1837 and was editor at the time of his death a few years later. Adams, who was from Jackson, had killed Hagan in a street fight after the newspaper published an article that was critical of Adams' father.[95] A week after the editorial was published, Circuit Court Judge George Coalter declared Walter Hickey, the *Sentinel*'s current editor, guilty of contempt. The judge ordered him to appear before his court, and the case record states that Hickey appeared several months later on November 11.[96] Hickey answered that, yes, he was the editor of the *Vicksburg Sentinel* and, yes, he did write the article in question.[97] The judge then issued the following order:

> It is considered by the court, that said Walter Hickey, for said contempt, be committed to the jail of Warren county, for the term of five months from this date; that he pay to the state of Mississippi a fine of five hundred dollars, and the costs herein expended, and that he be detained in said jail until the fine and costs aforesaid be paid; and it is ordered that the sheriff of this county do forthwith execute this judgment.[98]

Several citizens who supported Hickey appealed the judge's decision directly to Albert Brown, the governor of Mississippi, and he quickly pardoned Hickey. Brown cited

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[93] Ibid., 1.
[94] Ibid., 1-2.
[95] Patridge, I.M., "The Press of Mississippi," *Debow's Review* 29:4 (Oct. 1860): 505. A digitized version is available on the Making of America web site at http://www.hti.umich.edu/m/moajrnl.
[96] *Ex parte Hickey*, 2.
[97] Ibid., 3.
[98] Ibid., 3-4.

Mississippi law for his decision, noting that the rules that governed the state's circuit courts only allowed a contempt charge for actions committed within the courtroom. Because Hickey's offense was "not alleged to have been committed in the presence or hearing of said court, nor during the sitting of said court," the proceeding was "an exercise of judicial power over the liberty and property of the citizen" that was not "warranted by the constitution and laws of the land...."[99] The local sheriff received the pardon and released Hickey from jail.

Unfortunately for Hickey, Judge Coalter had not been informed of the pardon. He believed that Hickey had somehow escaped incarceration and was flagrantly disregarding the judge's order. Hickey was again arrested and imprisoned to serve his contempt conviction, so he appealed to the Supreme Court of Mississippi.[100] The court accepted the case, and the attorney who represented Hickey referred to Congress' effort to define – and limit – the judiciary's contempt power after the impeachment trial of Judge Peck. "Our present constitution was adopted shortly afterward," he said, "and the marked language in the declaration of rights may possibly have been in a degree influenced by the lights afforded by that trial."[101] He urged the Supreme Court to consider it "an empty bugbear to fear detriment to the judicial authority by the rejection of this fearful power of constructive contempt."[102] Society, he concluded, "cannot endure a judicial censorship of the press."[103]

Justice Joseph Thacher of the Mississippi Supreme Court, in the following paragraph, cautioned that an uncensored press was essential to democracy:

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[99] Ibid., 5
[100] Ibid., 7.
[101] Ibid., 29.
[102] Ibid., 31.
[103] Ibid., 32.

> The shield which our constitution throws around the press has been held up to interpose before the power of the courts to punish for contempts. The most dearly prized offspring of our national liberty, is the freedom of the press.... Yet the freedom of the press is abused to base and unworthy purposes.... The free air we breathe is essential to our existence, but when infected with pestilential matter, it becomes the most terrible weapon of death. But who would argue, because disease may float in the atmosphere, that that atmosphere should be destroyed?[104]

Hickey's actions, "when judged by the practice and assumptions of the English, and some of the American courts, constitute an undoubted contempt of an aggravated character," Thacher wrote. "But when passed through the crucible of our state constitution, instead of a contempt of court, they become a mere libel on the functionary, and subject only to the punishment prescribed by law for the latter offence."[105] He concluded that Hickey was being held in custody unlawfully, and he was ordered discharged.[106]

The case of *Ex parte Hickey* considered both state and federal statutes concerning contempt by publication, even though Congress' 1831 act was non-binding on Mississippi's judiciary. The state already had a contempt statute in place that restricted citations to acts committed in the presence of the court, but the federal law also was considered to be a powerful influence. The case demonstrated the possibility that Congress had created a statutory example for states to follow. *Ex parte Hickey* was also the only known case in which a sitting governor pardoned an editor who had been convicted of contempt by publication.

Conclusions

It appeared that the episode between Luke Lawless and Judge James Peck had created the momentum that was necessary to maintain a restricted contempt power for the judiciary. The dispute brought contempt by publication to the forefront of America's

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[104] Ibid., 56-57.
[105] Ibid., 57-58.
[106] Ibid., 61.

political, legal, and social consciousness. The federal contempt statute effectively ended contempt by publication actions within the federal court system. It also highlighted the similar efforts of state legislatures, which had begun passing their own statutes that restricted state courts' ability to use the contempt authority. Nine states had already approved such laws by the time the issue reached Congress – Pennsylvania, Louisiana, New York, South Carolina, Kentucky, Connecticut, Illinois, Mississippi, and Florida. By the beginning of the Civil War, fourteen other states had approved contempt statutes. Seven of them modeled their laws on the 1831 federal statute – Virginia, Tennessee, Ohio, Alabama, Georgia, North Carolina, and Maryland. The remaining seven – Missouri, Arkansas, Indiana, Iowa, Minnesota, Michigan, and Wisconsin – copied New York's contempt statute.[107] The series of apparent victories for the nation's press lasted but a short while, though. By the mid-1850s, judicial compliance with restrictive contempt statutes began to erode.

[107] Walter Nelles and Carol Weiss King, "Contempt by Publication in the United States: Since the Federal Contempt Statute," 28 *Columbia Law Review* 525 (1928): 533. See footnote 30 for a thorough list of state legislative actions regarding contempt and how they related to the federal contempt statute. See the Appendix on page 554 for even more explanation of state contempt statutes.

CHAPTER FOUR

JUDGES REAFFIRM CONTEMPT AUTHORITY, 1855-1879

The congressional restrictions placed on contempt by publication acted as a catalyst for several state legislatures to address the contempt issue. Legal historian Donald Gillmor wrote that during the first half of the Nineteenth Century "the legislatures rather than the courts attempted to alter the law of contempt by restricting the summary contempt power to a limited number of misbehaviors committed within the immediate environs of the court." Some statutes even "expressly excluded" publications from the list of punishable misbehaviors.[1] It was during these years, historian Margaret Blanchard noted, that court citations against journalists had almost disappeared. It was a trend that did not last. "With the rise of more intrusive journalism," she wrote, "contempt cases reappeared."[2] The Penny Press revolution, which had begun in the 1830s, ushered in a new era of journalism in which crime and court reporting was both widely popular and lucrative. The competitive pressures to "one up" rival newspapers by getting the latest legal scoop did not go unnoticed by judges. Some courts expressed concern that America's press was becoming too aggressive and was acting with impunity; so they began reasserting their contempt by publication authority. One case in particular stood out as providing the philosophical foundation for a decades-long reaffirmation of the judicial contempt power. It was *State v. Morrill* from Arkansas.

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[1] Donald M. Gillmor, *Free Press and Fair Trial* (Washington, D.C.: Public Affairs Press, 1966), 143.
[2] Margaret A. Blanchard, *Revolutionary Sparks: Freedom of Expression in Modern America* (New York: Oxford University Press, 1992), 67.

Contempt Authority Reaffirmed

The 1855 case of *State v. Morrill* boldly reaffirmed a court's power to use its contempt authority regardless of statutory limitations. The Arkansas Supreme Court had agreed to hear a *habeas corpus* application from a man incarcerated for murder. The circuit judgeship of the district in which the murder occurred was vacant at the time; so the defendant asked the Supreme Court to reduce the amount of bail the local magistrate had recommended. The court heard the case in February 1855, decided that "the offense was a bailable [sic] homicide," and set bail at $5,000. The prisoner was unable to pay it, and he was sent back to jail with the promise that he could come before the court again if he were able to get the money, which he never did.[3]

J.C. Morrill, the editor of the Des Arc *Citizen*, published an article on March 24 about the court's decision. "The language of the article would seem to intimate, by implication, that the court was induced by *bribery*, to make the decision referred to," the Arkansas Supreme Court later determined. "It is not an attack upon the private character or conduct of the members of the court, as men, but seems to be an imputation against the purity of their motives while acting officially, as a court, in a specified case."[4] Called before the court to defend against a contempt charge, Morrill's attorneys said he had not intended "to make such an imputation against the court" and said he was simply "unfortunate in the selection of language, and the construction of his sentences."[5] Furthermore, they argued that the Arkansas Supreme Court had to adhere to the state's statutory restrictions on contempt, "not to any supposed inherent power of its own," in

[3] *State v. Morrill*, 1855 Ark. LEXIS 73, 3.
[4] Ibid., 4.
[5] Ibid., 5.

deciding whether it could punish Morrill.[6] The Supreme Court considered that argument with skepticism, as the following passage suggests:

> In other words, that the will of a co-ordinate department of the government is to be the measure of [the court's] power, in the matter of contempts, and not the organic law, which carves out the land-marks of the essential powers to be exercised by each of the several departments of the government.[7]

Chief Justice Elbert English, in a decision that turned against the will of Congress and state legislatures across the country, delivered the opinion of his court. The right to summarily punish for contempts, he wrote, was inherent to all courts of law, without regard to statutes.[8] He explained:

> The Legislature may regulate the exercise of, but cannot abridge the express or necessarily implied powers, granted to this court by the constitution. If it could, it might encroach upon both the judicial and executive departments, and draw to itself all the powers of government: and thereby destroy that admirable system of checks and balances to be found in the organic frame-work of both the Federal and State institutions, and a favorite theory in the governments of the American people.[9]

While Arkansas' law concerning contempt was "entitled to great respect," the chief justice believed that considering the law "absolutely binding upon the courts, would be to concede that the courts have no constitutional and inherent power to punish any class of contempts, but that the whole subject is under the control of the legislative department...."[10] English continued crafting his court's opinion with liberal amounts of excerpts from older contempt cases and scholarship, some of which were British. These cases, he argued,

> abundantly show that, by the common law, courts possessed the power to punish, as for contempt, libelous publications, of the character of the one under

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[6] Ibid., 6.
[7] Ibid.
[8] Ibid., 6-8.
[9] Ibid., 10.
[10] Ibid., 11.

> consideration, upon their proceedings *pending or past*, upon the ground that they tended to degrade the tribunals; destroy that public confidence and respect for their judgments and decrees, so essentially necessary to the good order and well being of society, and most effectually obstructed the free courts of justice.[11]

It was English's opinion that the framers of the U.S. Constitution did not place any contempt limitations on America's judiciary. The courts could exercise common law authority on the matter.[12]

Though he admitted that some judges had abused the privilege, he concluded that on the whole, the courts, particularly in Arkansas, had been friends to a free press, and he made the following comments:

> Any citizen has the right to publish the proceedings and decisions of this court, and if he deem it necessary for the public good, to comment upon them freely, discuss their correctness, the fitness or unfitness of the judges for their stations, and the fidelity with which they perform the important public trusts reposed in them....[13]

The chief justice was quick to inform Morrill, though, that no one could, with impunity, subject the Supreme Court to ridicule, as he continued:

> ... but he has no right to attempt, by defamatory publications, to degrade the tribunal, destroy public confidence in it, and dispose the community to disregard and set at naught its orders, judgments, and decrees. Such publications are an abuse of the liberty of the press, and tend to sap the very foundation of good order and well-being in society, by obstructing the course of justice.... The liberty of the press is one thing, and licentious *scandal* is another.[14]

Finally, English returned to Morrill's earlier defense – that the construction of his article may have implied more than was originally intended, but it did not destroy public confidence in the court. These circumstances, argued Morrill's defense, did not lend themselves to a charge of contempt. English wrote that the Supreme Court "cannot look

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[11] Ibid., 26-27.
[12] Ibid., 29-30.
[13] Ibid., 32-33.
[14] Ibid., 33.

beyond the face of the article, and the natural effects of such publications upon the public mind."[15] With that, the court told Morrill that he would have an opportunity to respond to the charge, and his next appearance was postponed until the January 1856 term.

The Arkansas Supreme Court considered Morrill's defenses when the new judicial term began. Chief Justice English explained that Morrill had sworn that "he did not intend the intimation of bribery made in [the] publication complained of, to apply to this court or its judges, but to other persons."[16] In fact, Morrill had published an editorial two weeks after the original article appeared – and before he was charged with contempt – that stated he did not intend for that portion of the article to apply to the Arkansas Supreme Court. According to the chief justice, Morrill "positively denies all intention to commit a contempt by the publication of the article in question."[17] Though Arkansas' attorney general argued that Morrill's statement lacked sincerity, the court simply remarked that it felt incumbent "to take some notice of the matter, and to enquire into the constitutional power of the court to punish in such cases, as for contempt." Satisfied that the court had accomplished its purpose, the judges decided that they were "not disposed to take further notice of the [publication]. The response being upon oath, we shall treat it as true, and the rule will be discharged."[18] Morrill escaped a contempt conviction.

Morrill's Influence

The Arkansas Supreme Court's decision had a significant impact on the nature of judicial contempt. It reestablished the foundation that contempt was an inherent authority possessed by all courts, and it could be wielded with minimal regard to statutory

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[15] Ibid., 47.
[16] *State v. Morrill*, 1856 Ark. LEXIS 1, 1. This is the same case, but it was listed under a new heading because it took place during a new judicial term.
[17] Ibid., 1-2.
[18] Ibid., 2.

restrictions. It was the first decision to boldly challenge both federal and state laws on the matter, and it eventually became the source of a movement in which America's courts began reasserting their privilege to punish out-of-court publications.

During the following quarter of a century, subsequent rulings reflected the spirit of that decision, even if they did not mention the *Morrill* decision specifically. Five of the following cases demonstrated the philosophy that it was a court's province alone to decide what was or was not a contemptuous publication. A decision to spare an editor or publisher from punishment did not mean that a contempt had not occurred; it simply meant that the court accepted that person's apologies or excuses for the indiscretion. In the sixth case, *In re Chiles*, the United States Supreme Court reinforced the judiciary's authority to punish contempts whenever necessary.

The 1869 New Hampshire case of *In re Sturoc* established that a newspaper article that was severely critical of a pending legal proceeding was a contempt of court. A local liquor law was at the center of this contempt citation. Welcome A. Angell of Sunapee, New Hampshire, was charged with keeping "intoxicating liquors" at his house and selling them "contrary to law." Public notices of the case were published in the *Argus and Spectator* during the first two weeks of August 1867. One month later, on September 6, the *Argus and Spectator* published an article signed anonymously as "A Member of Sull. Co. Bar." The author was William C. Sturoc, an attorney in Sullivan County, and his complaint was that the local authorities who had been involved in the liquor raid had overstepped their constitutional authority. He had this query:

> Is it not disreputable, in this age of vaunted freedom, that, by false and forced construction of a statute, bad enough at best, the private security of the citizen should be ruthlessly invaded, and his home, which the English under Magna Charta, hold to be their "sacred castle," and which the American people should be

> equally careful to defend and protect--should be entered and despoiled at mid-day, and yet no signs of resistance to such oppression be heard or seen?[19]

Because the New Hampshire Supreme Court was scheduled to hear the liquor case, it called Sturoc to answer charges of contempt. He admitted that he wrote the article and that it did refer to the liquor case. However, he said that he did not know that the proceedings were still pending, and he also denied that "he intended to obstruct the administration of justice, or to do any thing more than he supposed he had the legal right to do."[20] The Supreme Court was not convinced by Sturoc's first argument. "It may have been his idea that no proceeding were [sic] then pending in a technical, legal sense," Chief Justice Ira Perley wrote, but Sturoc "must have understood by the notice, which he read, if not otherwise, that the cause was to proceed in this court...." In fact, the Supreme Court concluded that "the article itself plainly implies that the question was pending and was to be determined ... and there can be no doubt that the article was written and published in reference to that individual case."[21]

The New Hampshire Supreme Court also considered the physical place of publication, saying it was likely that potential jurors would have read the article. "All persons attending the court and interested in the business would be in the way of reading the article and could hardly fail to know that it referred to that pending prosecution," Perley concluded. "This no one would understand better than an intelligent member of the legal profession, like the respondent...."[22] The chief justice believed that Sturoc was aware that those who would have been involved in the trial would have seen the article. It

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[19] *In re Sturoc*, 1869 N.H. LEXIS 55, headnotes.
[20] Ibid.
[21] Ibid., 1.
[22] Ibid., 2.

was clear that "the article has an obvious tendency to bring the prosecution, and the promoters of it, into odium and contempt."[23] He continued:

> The whole tone of the article assumes that the prosecution was illegal, oppressive and unjust; and in particular passages it denounces the prosecution in opprobrious and abusive terms. It must have been intended to persuade those who read it, that the prosecution ought not to be maintained. If jurors, who might read the article, should adopt such views of the cause, they would be improper persons to try it; and the direct effect would be to obstruct and corrupt the administration of the law.[24]

Perley wrote that the natural consequences of Sturoc's act corrupted the administration of the law, and he "cannot discharge himself by alleging that he meant no harm, and did not suppose that he was doing any thing illegal."[25]

The court recognized the public's right "to criticise [sic] and censure the conduct of courts and parties when causes have been finally decided."[26] Newspaper publishers certainly had the right "to bring to public notice the conduct of courts and parties after the decision has been made," and as long as the publications were true and fair, Perley knew of no law or disposition "to restrain or punish the freest expression of the disapprobation that any person may entertain, of what is done in or by the courts."[27] In this case, though, the question was "whether publications can be permitted, which have a tendency to prejudice the decision of pending causes."[28] The court had clearly decided such publications could not be permitted. The chief justice, however, having believed that Sturoc did not intentionally mean to harm the judicial process, was "happy" to hand down a mild judgment, "since enough will be done to show that such publications in such

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[23] Ibid., 3.
[24] Ibid.
[25] Ibid., 4.
[26] Ibid.
[27] Ibid., 5.
[28] Ibid., 4.

circumstances are illegal and cannot be tolerated."[29] Sturoc was ordered to pay a $30 fine.[30]

In re Sturoc provided yet another example in which a judge or justice determined that a contempt had been committed but accepted the defendant's apology or excuse. Though Sturoc was found guilty, Perley believed that he had not intended to bring the court into public disrespect and limited his punishment to a fine only. The relatively light sentence, however, was not an indication of the court's attitude toward contempt by publication. Perley clearly intended for his decision to be a warning to other newspaper publishers that contemptuous publications would be treated much more harshly in the future. His opinion also left no doubt that the New Hampshire Supreme Court recognized judicial authority to determine exactly what constituted a contempt of court.

The North Carolina case of *In re Moore, Bragg, Haywood and Others* determined in 1869 that the severity of punishment for contempt depended on the actual intent of the person who published the contemptuous article. In Raleigh, N.C., 108 "present or former members of the Bar of North Carolina" published an unflattering commentary of the state Supreme Court on April 19, 1869. In an article in Raleigh's *The Daily Sentinel*, the attorneys blasted the court's justices for their "public demonstrations of political partisanship" and expressed "profound regret and unfeigned alarm for the purity of the future administration of the laws of the land."[31] The criticism was pointed, as the next example demonstrates:

> From the unerring lessons of the past we are assured that a Judge who openly and publicly displays his political party zeal renders himself unfit to hold the "balance

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[29] Ibid., 4.
[30] Ibid., 5.
[31] *In re Moore, Bragg, Haywood and Others*, 1869 N.C. LEXIS 93, 1.

> of justice," and that whenever an occasion may offer to serve his fellow-partisans he will yield to the temptation and the "wavering balance" will shake.[32]

The group of attorneys, "unwilling that our silence should be construed into an indifference to the humiliating spectacle now passing around us," published their criticisms "under a sense of solemn duty" to the public.[33] Less than two months later, on the second day of the North Carolina Supreme Court's new term, the court issued the following order:

> The Court being informed of a certain libelous publication directly tending to impair the respect due to the authority of the Court, which appeared in The Sentinel, a newspaper published in Raleigh, on 19 April, 1869, and is headed "A Solemn Protest of the Bar of North Carolina," etc., and purporting to be signed by certain attorneys of this Court, the Clerk is hereby ordered to inquire and report to the Court which of the persons whose names appear to be signed to said publication are attorneys practicing in this Court.[34]

The clerk found 25 names, including B.F. Moore, Thomas Bragg, and E.G. Haywood. They and the others were banned from practicing before the Supreme Court until they answered for the publication.[35] Moore, Bragg, and Haywood were the first to be called, and the court explained with the following paragraph why only those three were summoned:

> For the purpose of showing that the Justices have no disposition to carry matters to an extreme, or to do more than what is in their opinion necessary to preserve the respect due to the Court by its officers, and to prevent its usefulness from being impaired ... and also for the purpose of avoiding useless costs, the Clerk has been instructed to issue copies only to Mr. Moore, Mr. Bragg and Mr. Haywood in the first instance, with the hope that further action in respect to others might become unnecessary.[36]

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[32] Ibid., 2.
[33] Ibid., 2-3.
[34] Ibid., 4.
[35] Ibid., 5.
[36] Ibid., 6.

The next day, the attorney for Moore answered the court's charges. He argued that North Carolina's Supreme Court had no authority to temporarily deprive Moore of his attorney privileges "without notice and without affidavit or other legal proof...." Furthermore, the attorney argued that the publication was not a contempt and did not "impair the respect due to the authority of said Court."[37] Finally, he told the court that the article's publication had been delayed until recent political fervor had subsided "to avoid its having the appearance of a partisan document."[38] The article was intended to express disapproval of the justices' actions, he said, but he flatly rejected "any intention of committing a contempt of the Supreme Court or of impairing the respect due to its authority...." He said the members of the North Carolina Bar simply sought to "preserve the purity which had ever distinguished the administration of justice by the courts of this State."[39]

The North Carolina Supreme Court rendered its verdict three days later, quickly dismissing the argument that it had no authority to temporarily suspend Moore's attorney privileges. Moving on to the charges concerning the newspaper publication, Chief Justice Richmond Mumford Pearson disagreed with the claims that the publication was not meant to impair the court. "The paper is drafted with all the adroitness of a skillful lawyer," he said, "and, under cover 'of love and veneration for the *past* purity which has distinguished the administration of law in our State,' aims a deadly blow at the Court to

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[37] Ibid., 7. Moore's arguments were the only ones referenced in the court's final decision. His case was most likely considered as representative of the others who were also involved.
[38] Ibid., 8. It is unclear what the "recent political fervor" may have been, but it is possible that the group was referring to the Fifteenth Amendment to the U.S. Constitution, which gave African American men the right to vote. North Carolina had ratified the Amendment in March 1869 (source: North Carolina Museum of History, http://ncmuseumofhistory.org/nchh/nineteenth.html#1861-1880). The amendment was ratified nationally the following year.
[39] Ibid.

which that sacred trust is *now* confided."[40] He compared the judiciary to a living being. "If you hurt the head, or arm, or leg, or limb, or member, or any part of the body, you hurt the man," Pearson wrote. "And the idea of an intention to injure the character of the Justices who compose the Supreme Court, singly or *en masse,* without an intention to injure the Court, is simply ridiculous."[41] The chief justice asked a rhetorical question: "Is this allegation of fact true or is it false? There is no pretense that it is *true*.... In our judgment the paper is libelous and 'doth tend to impair the respect due to the authority of the Court.'"[42]

As for the final argument – that the publication was delayed to avoid the appearance of political influence – the Supreme Court determined that such an admission could have been made simply to avoid being convicted of contempt. However, based on Moore's "ability, legal learning, integrity, devotion to the Constitution, unwavering love of the Union, and *hitherto* most consistent and influential support of the judicial tribunals of his country," Pearson decided to take Moore at his word – for the most part.[43] "The motion to discharge the rule is allowed, on payment of costs, a case having, in the judgment of the Court, been made against the respondent," Pearson declared. "It is proper that he should pay the costs. He is not acquitted, but is excused."[44] Though not technically acquitted, the ruling meant that Moore and his colleagues escaped the usual punishments of fine and imprisonment. It further established that a court had complete discretion over contempt by publication. *In re Moore, et al.*, *In re Sturoc*, and the following case of *Ex parte Biggs* also demonstrated a sentiment expressed in the earlier

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[40] Ibid., 14.
[41] Ibid., 14-15.
[42] Ibid., 15.
[43] Ibid., 18.
[44] Ibid., 18-19.

case of *Stuart v. People*. That decision had warned judges that the contempt authority was an arbitrary power that should be used with great care.[45]

Ex parte Biggs was another case from North Carolina. It determined in 1870 that even though a contempt was committed against a court, if the editor or publisher showed that he did not intend to commit the contempt, he would not be punished. William Biggs was both an attorney and the editor of the *Tarboro' Southerner* in North Carolina.[46] In late 1869, he published some comments concerning the judge of the Superior Court for the second judicial district of North Carolina. Biggs was ordered to appear in that court on December 9 to argue why he should not "be disabled from hereafter appearing as attorney and counsellor [sic] in court...."[47] Biggs made three arguments. His first was that he had never disrespected the judge in court and had never "entertained any intention of committing a contempt of the court, or any purpose to destroy or impair its authority or the respect due thereto."[48] He also admitted that he wrote and published the article titled "Edgecombe Superior Court," but he insisted that he "wrote and published the same as editor of said paper, and not as an attorney and counsellor [sic] at law...."[49] Furthermore, the article did not contain a libel, he argued, and it did not contain "any comment as applied to a public elective officer not allowed by the freedom of the press, as defined by the Constitution of the United States."[50] His final argument was that by becoming an attorney,

> he has not surrendered any right as an editor, and as such he is entitled, according to every republican idea of the "freedom of the press" to fully comment on all

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[45] *Stuart v. People*, 1842 Ill. LEXIS 18. See Chapter Three for an explanation of this case.
[46] *Ex parte Biggs*, 1870 N.C. LEXIS 65, 6.
[47] Ibid., 5-6.
[48] Ibid., 6.
[49] Ibid., 6-7.
[50] Ibid., 7.

> public officers, a right that ought never to be restrained except for abuse, and that, before he is held responsible for any alleged abuse, he is entitled to a trial by a jury of his countrymen.[51]

The Superior Court judge rejected those arguments. Noting Biggs' second and third claims, the judge determined that even "by assuming the character of an editor, an attorney was not freed in any degree, from the respect otherwise due to the court," and he barred Biggs from practicing.[52] Biggs appealed to the North Carolina Supreme Court, where his attorneys argued that the lower court had admitted that the publication itself was not a contempt of court. "For, had it been so, then the co-editor ... would have been equally guilty," they argued. "Yet he is not noticed in the rule."[53] The fact that the court did not file a contempt charge against the publication's editor, but did pursue such a charge against Biggs because he was an attorney, was simply "against reason," they said. State and federal laws, they argued, clearly were meant to supersede any common law principles on the matter, "and such a publication is not one of the acts specified or embraced in its language or meaning, by the broadest construction in regard to persons or attorneys."[54] The attorneys also took aim at the following passage, which they believed was the only one in the publication that could possibly be interpreted as contemptuous:

> His Honor seems to have somewhat deserted the service of the profane poetical masters, and confined most of his quotations to the Holy Scriptures – a happy omen, if it is possible to believe anything happy in such a character.[55]

Other than the last few words, "no exception can be taken to any part of this paragraph," they said, and "no definite offensive meaning can be given to the expression." The paragraph was nothing but light ridicule, and there was nothing disrespectful of the

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[51] Ibid.
[52] Ibid., 7-8.
[53] Ibid., 12.
[54] Ibid., 13.
[55] Ibid., 13-14.

judge's official action, they said, calling the paragraph "too trifling for notice, on or off the bench."[56]

Biggs' attorneys also noted that even if the publication was determined to be a contempt (and they did not believe that it was), "the respondent swore that he did not so intend it; and honestly separated his acts done as an attorney from those done as an editor." Supposing that Biggs had been mistaken, they asked, "was not a reprimand from the bench sufficient, or a fine or imprisonment for a short time? The punishment inflicted for so venial an offence [sic], if offence [sic] it be, *is unusual and unprecedented.*"[57] The North Carolina Supreme Court, however, considered it settled case law that a court had the power to bar attorneys from practicing.[58] The court determined that the principle behind this power also included "cases where an attorney makes a publication calculated to injure the court, and *intended by him* to have that effect...."[59] Chief Justice Richmond Mumford Pearson, the same justice who had written the *In re Moore, et al.* decision a year earlier, asked the following question to help make his point:

> Was the publication calculated to injure the court, and destroy its usefulness? The article refers to Judge Jones in his official character, and is calculated to hold the court up to ridicule, and thereby injure and bring it into disrepute. But it purports to be by the editor of a newspaper -- has no reference to Mr. Biggs as an attorney of the court, and does not seek to attach to the publication any additional importance, by reason of the fact, that besides being an editor of the newspaper ... he is also an attorney of the court. This fact, however, being known to his readers, was calculated to add to the force of the article.[60]

Because Biggs had disavowed ever intending to commit a contempt of court or to impair the lower court's authority through the publication, Pearson determined that the Supreme

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[56] Ibid., 14.
[57] Ibid., 15.
[58] Ibid., 20-21.
[59] Ibid., 21.
[60] Ibid., 22-23.

Court "must accept it, and is not allowed to call in question, the truth or the sincerity of the disavowal." Such questions were left "to the Searcher of all hearts," he said, and Biggs was acquitted of the charge.[61]

The 1872 case of *People v. Wilson* resulted in a rare split decision, but the Illinois Supreme Court majority upheld the historical assumption that a publication that tended to bring a court into disrespect or obstructed the administration of justice could be punished as a contempt. Charles Wilson and Andrew Shuman were the publisher and managing editor, respectively, of the *Chicago Evening Journal*.[62] They found themselves facing charges of contempt for publishing an editorial about on ongoing murder trial. They argued that the murderer, who had already been found guilty and sentenced to death, should be hanged immediately.[63] However, the issue had been appealed to the Illinois Supreme Court, and their article expressed indignation about the delay in the following terms:

> The courts are now completely in the control of corrupt and mercenary shysters – the jackals of the legal profession – who feast and fatten on human blood spilled by the hands of other men. All this must be remedied. There can be found a remedy, and it must be found.[64]

The article also made the following bold prediction:

> We have no hesitancy in prophesying clear through to the end just what will be done with [the convicted murderer]. He will be granted a new trial. He will be tried somewhere, within a year or two. He will be sentenced to imprisonment for life. Eventually, he will be pardoned out. And this in spite of all our public meetings, resolutions, committees, virtuous indignation and what not.[65]

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[61] Ibid., 26.
[62] *People v. Wilson*, 1872 Ill. LEXIS 256, 1.
[63] Ibid., 20.
[64] Ibid., 3-4.
[65] Ibid., 3.

The men were ordered before the Supreme Court to defend themselves against charges of contempt. Wilson, the newspaper's publisher, filed his answer with the court on November 1, 1872. He claimed that he did not know the article had been written and was not aware of any plans to publish it, saying that "he neither advised or counseled, nor was he advised or counseled with by any person whatever, relative to the publication of said article, or any article whatever upon the subject."[66] However, he said that he did not believe the article was designed to embarrass, impede, or obstruct the administration of justice.[67] He also insisted that he had the right, through his paper, "to examine the proceedings of any and every department of the government of this State," and he noted that "such has been the established law of this State for over thirty years past, and that said court has no judicial power to change the same."[68] He asked the court to dismiss the charge against him.[69]

Shuman, the newspaper's editor, also filed his answer to the contempt citation on the same day. He told the court that he did not write the article in question; it had been written by the *Journal*'s assistant editor.[70] As was the practice at the newspaper, Shuman said he merely examined the article and "allowed it to be published without dissent on his part, and without supposing that there was any thing in it disrespectful to, or in contempt of, said court, or of any of its judges or officers."[71] He said he believed that the article was intended to impress upon the public, and legislators, the need for changing state laws

[66] Ibid., 5.
[67] Ibid., 6.
[68] Ibid., 6-7.
[69] Ibid., 8.
[70] Ibid., 9.
[71] Ibid., 10.

concerning crimes and punishments. The rest of Shuman's arguments were identical to Wilson's.

The Illinois Supreme Court split four to three, with Chief Justice Charles Lawrence delivering the majority decision.[72] "The only ground for pronouncing any act or publication a contempt of court, is, that it tends in its final results to 'impede, embarrass or obstruct the administration of justice,'" he wrote.[73] If the defendants believed that they could publish anything concerning the courts and not be liable for contempt unless there was proof of actual damage, he said he "regretted that the respondents were not better advised as to the law, before swearing what the law is."[74] He determined that

> the difference is radical, and marks precisely the difference between the guilt or innocence of the respondents in this case. They swear to a rule which would require us to say that we have actually been impeded, embarrassed or obstructed in the administration of justice, before we can hold the respondents guilty of contempt. The true test is, not whether the court has been weak or base enough to be actually influenced by a publication, but whether it was the object and tendency of the publication to produce such an effect.[75]

Lawrence believed that the publication's intent was obvious. "No candid man can deny that the article in question was well calculated to make upon the public mind the impression that the court, in a pending case, was influenced by money in its judicial action, and that it could be so influenced in other cases," the chief justice continued. "Neither can it be denied that the article seeks to intimidate the court as to the judgment

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[72] Ibid., 19.
[73] Ibid., 23.
[74] Ibid., 23-24.
[75] Ibid., 25.

to be pronounced in a case then pending and involving the life or death of a human being."[76]

Lawrence then considered the broader issue of the press and its coverage of the court system. "The respondents are correct in saying in their answers that they have a right to examine the proceedings of any and every department of the government," he said. "Such freedom of the press is indispensable to the preservation of the freedom of the people."[77] Certainly no one connected with the press, he suggested, should try to use it to control justice or influence pending cases. He offered the following considerations:

> A court will, of course, endeavor to remain wholly uninfluenced by publications like that under consideration, but will the community believe that it is able to do so? Can it even be certain in regard to itself? Can men always be sure of their mental poise? A timid man might be influenced to yield, while a combative man would be driven in the opposite direction. Whether the actual influence is on one side or the other, so far as it is felt at all, it becomes dangerous to the administration of justice.[78]

In that light, "a majority of the court were of [the] opinion that this publication could not be disregarded without infidelity to our duty," and he wrote that the court "felt constrained to call the persons responsible for this publication to account."[79] The majority decision concluded that

> never before, so far as the members of this court are aware, has the integrity of this tribunal been assailed by a public journal. The respectability of the paper in which the article in question has appeared, and the circumstances surrounding its publication, have given it a gravity which a casual article of like import would not possess. We have personally felt great reluctance to taking notice of the publication, but our consciousness of the mischief that may be done in embarrassing the administration of justice, and impairing the moral authority of the judiciary throughout the State, if this article is to stand as an unpunished

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[76] Ibid., 26.
[77] Ibid., 28-29.
[78] Ibid., 29.
[79] Ibid., 30-31.

> precedent, has compelled us to issue the rule, and now compels us to order an attachment.[80]

Justice John Scott, however, was among the three members of the Illinois Supreme Court to issue a dissenting opinion. "Whatever may be the true construction of the article," he said, "the respondents have both denied, under oath, any purpose in its publication to obstruct or influence the administration of the law, or any intention to reflect upon the integrity of any member of the court...."[81] As far as he was concerned, that was all that was required of them. Having difficulty understanding the perceived danger of the article, he expressed the following sentiment:

> The newspaper in which the paragraph was printed was published in a city distant from the one where the court is now holding its sessions, and it was not thrust upon the attention of the court by the respondents or anyone else.... It seems to me that the majority of the court have attached an undue importance to a mere newspaper paragraph.[82]

He believed that members of the judicial branch should be more tolerant of unfavorable publications. "It is far better that the judges of the courts should endure unjust criticism, and even slanderous accusations," Scott wrote, "than to interpose of their own motion to redress the offence against themselves, where the offence complained of is not committed in their immediate presence."[83] Fellow Justice Benjamin Sheldon also disagreed with the majority and issued the following statement:

> I am opposed to the exercise of the power of punishing for constructive contempts, where the alleged contempt consists merely in personal aspersions upon a court, contained in a newspaper article; especially in the case of all appellate court[s], where I am unwilling to admit that newspaper paragraphs affect or are calculated to embarrass the administration of justice.[84]

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[80] Ibid., 34-35.
[81] Ibid., 60.
[82] Ibid., 60-61.
[83] Ibid., 64.
[84] Ibid., 65.

On November 8, 1872, Wilson and Shuman stood before the Illinois Supreme Court to receive their sentences. The court, having "no desire to inflict a severe penalty," took into consideration that neither Wilson nor Shuman had written the article, and the court also noted that Wilson had not even seen it before it was published.[85] Wilson was fined $100, and Shuman was fined $200 and court costs.[86] The Supreme Court ordered the sheriff to keep both men in custody until the fines and costs were paid.

People v. Wilson was a rare case in which the court was sharply divided. The majority of the Illinois Supreme Court took the position that a contempt should be punished, regardless of the circumstances surrounding the publication, to prevent the public from perceiving the court in a negative way. The four majority justices also indicated that they believed the publication would serve as an example for future insolent behavior by the press if it were not punished. The court's minority either flatly rejected the use of contempt to punish out-of-court publications or believed an editor or publisher's intent should be the only criterion used in determining guilt or innocence. The majority decision proved to be politically damaging for Chief Justice Lawrence. It was debated throughout the state, and attorney and author Stephen Strong Gregory noted that Lawrence was defeated for reelection "in no small part on account of this decision."[87] Three years later, under new leadership, the Illinois Supreme Court had the opportunity to revisit – and restrict – courts' contempt authority in *Storey v. People*.[88] That case and others that curbed the contempt power are discussed later in this chapter.

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[85] Ibid., 67-68.
[86] Ibid., 68.
[87] Stephen Strong Gregory, "Sidney Breese," in William Draper Lewis, ed., *Great American Lawyers*, 8 vols., (Philadelphia: The John C. Winston Company, 1908), 4: 473.
[88] *Storey v. People*, 1875 Ill. LEXIS 443. See below for an explanation of this case.

The 1874 decision in *Wilson v. Territory*, a case from Wyoming, reversed a contempt citation because of a procedural error at a lower court. However, it did not question that court's contempt authority. In April 1873, the judge of the District Court for Laramie County, in the Wyoming Territory, had ordered Posey Wilson to answer charges that he had been writing "certain articles reflecting upon the first district court" and its judge.[89] Even though the articles had been published in the *Omaha Herald* of Nebraska, the judge convicted Wilson of contempt and fined him $500. Upon taking the case for review, the Supreme Court of Wyoming Territory noted that no evidence had been initially presented that showed Wilson had committed a contempt. According to the Supreme Court, it also appeared that he had been convicted of contempt simply by his own answers and nothing else. Without considering the issue of contempt and without "justifying in the slightest degree the very reprehensible conduct" of Wilson, the court ruled that the district court had made an error "at the very commencement of the proceedings...." The Supreme Court reversed the lower court's decision because that court had issued an attachment without the evidence needed to support such a procedure in a case of constructive contempt.[90]

The issue of judicial contempt eventually made its way to the United States Supreme Court. *In re Chiles* was not a contempt by publication case, but the 1875 decision did appear to support the conclusion in *State v. Morrill*, the 1855 Arkansas decision, that a court had authority to use its contempt power without concern for statutory limitations placed upon it. The U.S. Supreme Court, while largely silent on the issue of contempt during the Nineteenth Century, did recognize and uphold a court's

[89] *Wilson v. Territory*, 1 Wyo. 155 (1874), 156.
[90] Ibid., 155.

contempt authority in this ruling. The case came from Texas, and the Supreme Court upheld federal statutes that stated that "the courts of the United States shall have power to punish by fine and imprisonment for contempts of their authority." The exercise of this power had two purposes, according to the decision: "first, the proper punishment of the guilty party for his disrespect to the court or its order, and the second, to compel his performance of some act or duty required of him by the court, which he refuses to perform."[91] With this decision, the nation's highest court affirmed the contempt power as a necessary and proper tool of coercion. Curiously, though, only one Nineteenth Century contempt by publication case specifically cited the case of *In re Chiles*, indicating that the Supreme Court's decision was essentially ignored in the contempt by publication case record.

All of the previous cases were part of a new movement in which judges began to distance themselves from legislative restrictions that had been imposed on the contempt authority. The Arkansas Supreme Court's decision in the *Morrill* case was a turning point in Nineteenth Century contempt by publication law. It was the progenitor of a renewed philosophy in which judges reaffirmed their right to use the contempt power in any way they deemed proper. The geographic limitations that Congress and state legislatures had placed on the contempt authority – limitations that were designed to protect publications – had begun to erode.

Recognizing Statutory Limitations

Though the above cases reflected *Morrill*'s philosophy that the scope of the contempt power was the judiciary's to determine alone, a few cases during this period did not adhere to *Morrill*'s reasoning. These decisions recognized a state legislature's

[91] *In re Chiles*, 1874 U.S. LEXIS 1259, 1.

authority to curb the use of the contempt power, especially through geographic limitations. Most of these state restrictions were practically identical to those that were included in the federal contempt statute, which Congress passed in 1831 to limit the scope of actions that the federal judiciary could punish as contempts. The following rulings also recognized legislative authority to determine what could and could not be punished as a contempt of court.

The 1858 case of *State v. Dunham* recognized that Iowa's constitution did not allow publications to be considered as contempts of judicial authority, particularly those concerning cases that had already been decided. C. Dunham caught the attention of Thomas Claggett, judge of the First Judicial District in Iowa, when he published an article concerning a recent criminal case the judge had decided. As editor of *The Daily Hawkeye* in Burlington, he had printed a report in which he expressed astonishment that the judge had fixed bail at $50,000 when the defendant could not afford to pay a $100 fine to satisfy the judgment.[92] Dunham believed that the judge had violated the Eighth Amendment of the U.S. Constitution, which prohibited excessive bail requirements. He posed this question:

> In light of this oppressive demand, it is easy to see what an engine of injustice and outrage our courts of justice are capable of being made, in the hands of a vindictive and implacable man, such as we hope Judge Claggett will not prove himself.... Has the case a parallel?[93]

Dunham was ordered to appear before the court to defend himself against a charge of contempt. He told the court that at the time of his publication, the criminal case in question "had been fully adjudicated in the District Court, and taken by appeal to the Supreme Court." Even though he admitted that "his object and purpose was to condemn

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[92] *State v. Dunham*, 6 Iowa 245, 246.
[93] Ibid., 246-247.

the action of the court," he insisted that "he intended no disrespect" and that he had a right "to publish the facts and comments" related to the trial. Furthermore, he said that he did not support the court's actions against him and rejected "the right or power of the court to thus call upon him to answer, or that said publication amounts to a contempt."[94]

A hearing was scheduled to consider the contempt charge, and during the intervening days, Dunham chose to address the issue in the pages of his newspaper. In a November 10, 1857, article titled "The First Attempt in Iowa to Muzzle the Press," Dunham promised to publish the next day a "full and complete report of the arrest and trial of C. Dunham, in violation of his constitutional rights, and his privileges of trial by jury, for daring to speak of the doings of Judge Claggett and the Circuit Court."[95] Calling the case against him a "high-handed assault upon the liberty of the press by a vindictive and unjust judge," he promised that extra copies of the *Hawkeye* would be available at its office or at news depots.[96] Two other articles concerning Dunham's case and Judge Claggett also were published that day. As promised, on November 11, the *Hawkeye* included an account of Dunham's case.[97] In response to those articles, Judge Claggett again charged Dunham with contempt, and Dunham countered with yet another article on November 13 under the heading "More Contempt."[98] It included the following:

> It is certainly a refinement upon the legal technicality for Judge Claggett to charge us with attempting to influence his decision, in our own case, by reproducing in print the arguments which were made before him, and his rejoinder. And he *swears* that in that publication, our object was to influence his high mightiness.[99]

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[94] Ibid., 247.
[95] Ibid., 247-248.
[96] Ibid., 248.
[97] Ibid., 249.
[98] Ibid., 250.
[99] Ibid.

For this article, the judge charged him with contempt for a third time. Judge Claggett dismissed the first charge against Dunham but convicted him of the remaining two, and he fined him $50.[100] Dunham then asked the Iowa Supreme Court to intervene.

Chief Justice George Wright delivered the court's opinion. In deciding the case, he wrote that Iowa's justices sought to strike a balance among the power of the courts, individual liberties, and press freedoms.[101] While he recognized the contempt authority as important to preserving society, it was a "preservative power" that "should not be used for vindictive purposes."[102] The court interpreted Iowa's contempt statutes as placing a geographic restriction on the contempt authority, meaning it could be used primarily to punish behaviors "in the actual or constructive presence of the court."[103] According to Wright,

> it would be a perversion of the entire language used, and a palpable violation of the spirit and policy of the provision, to say that a judge could bring before him every editor, publisher or citizen, who might, in his office, – in his house – in the streets – away from the court, by printing, writing, or speaking, comment upon his decisions, or question his integrity or capacity. The law never designed this.[104]

In a country where the freedom of speech and the press was so fully recognized and so highly prized, he wrote, "it would be a fruitless undertaking … to attempt to prevent judicial opinions from being as open to comment and discussion as an opinion or treatise upon any other subject."[105] The Iowa Supreme Court interpreted the state code as limiting the use of contempt to those instances specifically outlined in state statutes; publications were not included. Though Dunham's articles may have been unjust, malignant and

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[100] Ibid., 251.
[101] Ibid., 253.
[102] Ibid., 254.
[103] Ibid., 255.
[104] Ibid.
[105] Ibid., 257.

libelous, Wright concluded, they did not amount "to contemptuous or insolent behavior toward the court" and were not calculated to "impede, embarrass or obstruct the court in the administration of the law...."[106] The Supreme Court reversed Dunham's convictions.

State v. Dunham was the first major contempt by publication case decided after the Arkansas Supreme Court's *Morrill* decision, but it did not follow that court's philosophical example. The Iowa Supreme Court chose instead to uphold Iowa statutes that restricted the use of judicial contempt, particularly when out-of-court publications were involved. Though the *Morrill* decision came to be regarded as a watershed decision in American contempt law, the *Dunham* case never achieved significant national status, even though it was cited in several subsequent Nineteenth Century decisions. Perhaps it was because the decision was narrowly tailored to Iowa statutes and did not reassert the view of an expansive contempt power. However, it did set a precedent for that state, and the decision was used nearly two decades later as a guiding principle in *State v. Anderson*, another case of contempt by publication.

The case of *State v. Anderson*, which was decided in 1875, recognized Iowa's statutory restrictions on the judicial contempt power, particularly when the legal case in question had already been decided. Anderson was an attorney in Lee County, Iowa, who was found guilty of publishing a contempt against that county's district court.[107] He had published an article in the *Daily Gate City* of Keokuk that criticized the district court while it was still in session. The presiding judge saw a copy of the newspaper and appointed a committee of attorneys to investigate Anderson for violating his duties as an attorney. Even though the committee recommended that no action should be taken, the

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[106] Ibid., 258.
[107] *State v. Anderson*, 1875 Iowa Sup. LEXIS 9, 1. The case record does not provide Anderson's first name.

judge ordered Anderson to pay a $25 fine and court costs.[108] He appealed to the Iowa Supreme Court, claiming that the judgment was illegal.

The Iowa Supreme Court determined that the lower court's case, which had been the topic of the article, "had been tried and determined prior to the publication of the article," and the Supreme Court ruled that such publications were not contemptuous, even if they were unjust and libelous.[109] In Anderson's case, according to Chief Justice William Miller, "it appears that no disrespect of the judge was intended, although the correctness of the various rulings in the case is criticized somewhat severely, and it is implied by the article that the mind of the judge was biased in favor of the plaintiff therein." The legal issue was straightforward, as far as the Iowa Supreme Court was concerned. The case of *State v. Dunham* had established the precedent seventeen years earlier in Iowa when it ruled that publications concerning completed legal cases could not be considered as contempts. In the case against Anderson, "the proceedings in the cause had been brought to a close, and what was said in the published article could in no manner influence the rulings of the court."[110] Based on the case as it was presented, Miller concluded that "there was no legal cause for the judgment assessing a fine against the defendant for a contempt," and the Supreme Court ordered that the judgment be reversed.[111]

The 1868 ruling in *State v. Galloway* supported the notion that a contempt conviction was not subject to review by any Tennessee court, but it also determined that state courts were subject to some statutory restrictions on their contempt authority. The

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[108] Ibid., 2.
[109] Ibid.
[110] Ibid., 3.
[111] Ibid., 4.

editors and publishers of the *Memphis Avalanche* were displeased with the Criminal Court of Memphis.[112] The judge had allowed a prisoner to be freed on bond, even though the man had been indicted on felony charges. Within a couple of days of the prisoner's release, M.C. Galloway and W.H. Rhea published an editorial "denouncing the Judge of the Court as guilty of official corruption...."[113] The Criminal Court of Memphis convicted them of contempt and sentenced them to a fine and imprisonment.[114] The publication *Flag of Our Union* took note of the convictions with a one-sentence report: "Galloway, of the Memphis Avalanche, is in jail for contempt of court...."[115] While in jail, he and Rhea appealed to the Tennessee Supreme Court to reverse the lower court's decision.

When considering the state's contempt statutes, Justice Henry Smith wrote, inferior courts had to follow Tennessee's code, which specified the circumstances in which the contempt power could be applied. Common law contempt was not included; Smith wrote that Tennessee law was "not intended to embrace, and does not embrace, the vast and undefined scope of contempts at common law...."[116] Furthermore, he considered that stance to be "the universal opinion and practice of the Courts and the profession in Tennessee, since the passage of the [Congressional] Act of 1831 ... which is substantially transferred to the [state] Code."[117]

Even though the Tennessee Supreme Court questioned the criminal court's authority to consider the publication as a contempt, it determined that a conviction for

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[112] *State v. Galloway*, 1868 Tenn. LEXIS 15, 1-2.
[113] Ibid., 2.
[114] Ibid., 1.
[115] "Much in Little," *Flag of Our Union*, April 11, 1868, 239, reproduced in American Periodicals Series Online 1740-1900, http://proquest.umi.com/pqdweb?DBId=5197&LASTSRCHMODE=1&RQT=575.
[116] *State v. Galloway*, 3.
[117] Ibid., 3-4.

contempt was "not subject to the *revision*, by appeal, writ of error, or otherwise, of any other Court, co-ordinate or superior."[118] The court also recognized a judge's authority to control any publications related to an ongoing proceeding. "Unquestionably the power exists," Justice Smith determined, perhaps not "by direct attachment of the publishing party after publication, but by the exclusion from the Court of parties who are there for the purpose of reporting the testimony or proceedings of the Court...."[119] The opinion continued:

> It must be obvious to all persons conversant with the administration of the courts, the absolute necessity of exercising, upon occasions, the power to prevent the publication of testimony and other proceedings, while the trial is going on. The safe, effectual and pure administration of the law would be difficult, and often impossible, did not the courts possess the right and the instant power to enforce the right.[120]

According to the opinion, "no order abridging publicity ought to be made, unless proper to secure the correct and effective administration of the law, upon a case where the publicity would be likely to defeat it."[121] Ultimately, though, the Supreme Court concluded that the power and the method of preventing unwanted publications of court activities were left to the discretion of the presiding judge. It was not within the Tennessee Supreme Court's power, it concluded, to reverse the contempt convictions of Galloway and Rhea.

State v. Galloway was a very unusual decision in contempt by publication case law. The Tennessee Supreme Court acknowledged that the state's contempt statutes superseded common law doctrines and that courts were subject to those restrictions. The decision also suggested that while judges could not directly control the content of

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[118] Ibid., 6.
[119] Ibid., 16.
[120] Ibid., 17.
[121] Ibid.

publications, they could refuse reporters admittance into trials.[122] The Tennessee Supreme Court even adopted the unprecedented stance that neither it nor any other state court could revise a lower court's contempt conviction. Such reasoning was contrary to every other known contempt by publication decision, and it made *Galloway* a unique contempt ruling. For broader precedent purposes, it was practically useless.

The 1875 case of *Storey v. People* essentially reversed the Illinois Supreme Court's 1872 decision in *People v. Wilson* by determining that a judge's contempt authority was in some regards subordinate to Illinois statutes. Wilbur Storey found himself a prime candidate for a contempt of court citation in the spring of 1875 when he published several articles in the *Chicago Times* that derided recent grand jury indictments against him. The articles, according to the legal record, "censure the action of the grand jury, and question its integrity, as a body, and one of them indirectly attacks the moral character of certain of the members of the grand jury."[123] Justin Walsh's biography of Storey, *To Print the News and Raise Hell!*, called the episode "one of the most sensational chapters in the entire history of *the press* v *the bench*...."[124]

According to Walsh, Storey was determined "to terrorize the Grand Jury" into rescinding several libel indictments against him. The March 16, 1875, edition of the *Times* sarcastically concluded of the grand jury members that

> not one of these gentlemen but has a record of the most lofty character. Not one of them is a "sport" or a bummer. Not one of them has a bastardy [sic] case on his hands. Not one of them keeps a one-third interest in a notorious prostitute; not

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[122] See *United States v. Holmes*, 26 F.Cas. 360 (U.S. 1842) in Chapter Three for another example in which reporters were restricted from covering a trial.
[123] *Storey v. People*, 1875 Ill. LEXIS 443, 1.
[124] Justin E. Walsh, *To Print the News and Raise Hell! A Biography of Wilbur F. Storey* (Chapel Hill: The University of North Carolina Press, 1968), 240.

> one is a male strumpet; not one of them is a notorious companion of abandoned women and a regular frequenter of brothels.[125]

After several such publications, Judge Erastus Williams of the Criminal Court of Cook County, Illinois, had had enough. "Exasperated beyond further toleration," he found Storey guilty of contempt and sentenced him to jail. He said a simple fine would not do for Storey, who "by a series of articles he published in his paper day after day, AND INCREASING IN VENOM, has deliberately, and persistently attempted to destroy the efficiency of a court of justice...."[126] Williams sentenced Storey to spend ten days in the Cook County jail, and the judge denied bail to insure that Storey would serve the sentence. According to Walsh, Storey spent only ten hours in jail before the Illinois Supreme Court ordered him to be released.[127]

Supreme Court Justice John Scholfield noted that the articles were published while the grand jury was in session, but Storey's comments concerning the specific decisions against him were published after those issues had already been decided.[128] In fact, Storey had defended himself by telling Judge Williams that the grand jury had returned "three indictments against him for libel, and one for publishing an obscene newspaper" before any of his articles were published, and those indictments "were the only matters referred to in said articles...."[129] Storey also said that at the time the articles were written and published, "there were no complaints against him pending before said grand jury, of any kind whatever, and he did not suspect that any other or further

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[125] *Chicago Times*, March 16, 1875, cited in Walsh, *To Print the News and Raise Hell!*, 240.
[126] Walsh, *To Print the News and Raise Hell!*, 242.
[127] Ibid., 243.
[128] *Storey v. People*, 1-2.
[129] Ibid., 2.

indictments would be returned against him...."[130] He denied that any of the articles referred to charges or complaints pending against him.

Justice Scholfield wrote that there was no allegation that the articles were "calculated to prevent the obtaining of a competent petit jury" or that the lower court judge would be "affected thereby in the discharge of his duty."[131] He determined that there was no attempt to interfere with the judicial process, and there was no attempt to influence officers of the court or witnesses.[132] He made the following observation:

> All that it would seem could be claimed is, that the publications would cause disrespect to be entertained by the public for the grand jury, and for its action in the particular cases criticised [sic], and thereby tend, to that extent, to bring odium upon the administration of the law.[133]

The only remaining issue, as Scholfield saw it, was, if the articles were assumed to be libelous, "whether the publishing of a libel on a grand jury, or on any of the members thereof, because of an act already done, may be summarily punished as a contempt."[134] Noting the difference of opinion among some members of the Illinois Supreme Court regarding the majority opinion reached three years before in *People v. Wilson*, the court this time considered it inadmissible "that a publication, however libelous, not directly calculated to hinder, obstruct or delay courts in the exercise of their proper functions, shall be treated and punished, summarily, as a contempt of court."[135] In Illinois,

> our constitution guarantees "that every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense." This language,

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[130] Ibid., 2-3.
[131] Ibid., 3.
[132] Ibid., 3-4.
[133] Ibid., 4.
[134] Ibid., 3.
[135] Ibid., 9.

> plain and explicit as it is, can not be held to have no application to courts, or those by whom they are conducted.[136]

Considering that the Illinois constitution protected words both "spoken or published in regard to judicial conduct and character," the justice determined that a "defendant has the right to make a defense which can only be properly tried by a jury, and which the judge of a court, especially if he is himself the subject of the publication, is unfitted to try."[137] In light of those considerations, the Supreme Court reversed the lower court's decision and dismissed the contempt charge against Storey.

The Illinois Supreme Court must have been waiting for a case like Storey's to come along. Only three years had passed since the court issued its controversial decision in *People v. Wilson*. At that time, it had determined that publishers and editors could be convicted of contempt for publishing articles that cast judges or courts in an unfavorable light. However, public reaction to that ruling was overwhelmingly negative, and a newly reconstituted Supreme Court essentially reversed that decision in *Storey v. People*. All Illinois residents, the court concluded, had the right to publish freely on any subject, and that included the activities of the state's judicial system.

The cases listed above did not follow *Morrill*'s example of rejecting legislative oversight. Instead, they recognized the legislative branch's right to impose a set of restrictions on the judicial contempt power. Some of these cases carved out protections for editors and publishers who reported or commented on completed trials. According to these decisions, it was virtually impossible to affect the administration of justice when all legal activity concerning a case had ceased. These courts based their decisions on what the law said, not on interpretations of their own judicial authority.

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[136] Ibid., 12.
[137] Ibid., 13.

Conclusions

During the years between 1855 and 1879, America's courts began to reestablish the infallibility of their contempt authority. The Supreme Court of Arkansas revived the philosophy that the contempt power was an inherent component of every court system, and it was not subject to infringement of any kind, statutory or otherwise. Furthermore, that decision placed journalists on notice that at least one state court system was unwilling to subject itself to unrestrained invectives from the press. Some courts began expressing similar sentiments; other courts were not yet willing to be so bold and continued to adhere to statutory limitations placed on the contempt power.

It is interesting to note the decade-long gap in known contempt by publication cases between 1858 and 1868. Though there is no direct evidence in the case law from the 1860s, it is a safe presumption that the Civil War and the beginning of the Reconstruction period were the primary causes for this break in the legal record. Why this break occurred, however, is a mystery. It is possible that contempt by publication cases occurred in inferior court systems but were never challenged or appealed to higher courts. Convicted editors and publishers often requested a *habeas corpus* hearing before a higher court to challenge their incarcerations. President Abraham Lincoln suspended *habeas corpus* in 1862 for "all persons arrested, or who are now, or hereafter during the rebellion shall be, imprisoned in any fort, camp, arsenal, military prison, or other place of confinement by any military authority...."[138] Though the suspension was designed to squelch the spread of violent insurrection, it is likely that the proclamation had a much broader legal influence. This was also a period in which America's press focused intently

[138] "Proclamation Suspending the Writ of Habeas Corpus," Sept. 24, 1862, quoted online at http://teachingamericanhistory.org.

on stories of war, politics, and civil liberties. Local trial reporting may not have held as much interest, as the nation's attention often was focused on the latest battle reports or other news related to the war.

Whatever the cause, scholars consistently viewed the Civil War as a watershed event in American contempt law. Media law specialist Frank Thayer suggested there was a drift toward the Arkansas Supreme Court's position after the Civil War, with "state after state adopting the position that the power to cite for contempt by publication was inherent in the courts, and that legislative enactments had little or no power to limit it."[139] Press historian Edward Gerald believed that the war prompted a reaction among judges, who began bringing back the old repressive concept of contempt that allowed them to set their own limits on the power.[140] Media historian Timothy Gleason argued that contempt case law developed two distinct lines during the post-Civil War period. "When judges recognized the checking value of freedom of the press, the contempt power remained limited," he concluded. "In the other line of cases, judges stressed the need to protect the administration of justice and upheld broad use of contempt by publication."[141] As the 1880s dawned, it would become clear that a move away from the geographic and statutory restrictions on contempt was well underway.

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[139] Frank Thayer, *Legal Control of the Press: Concerning Libel, Privacy, Contempt, Copyright, Regulation of Advertising and Postal Laws*, Fourth Ed. (Brooklyn: The Foundation Press, Inc., 1962), 556.
[140] J. Edward Gerald, *The Press and the Constitution, 1931-1947* (Minneapolis: University of Minnesota Press, 1948), 29.
[141] Timothy W. Gleason, *The Watchdog Concept: The Press and the Courts in Nineteenth-Century America* (Ames, Iowa: Iowa State University Press, 1990), 90-91.

CHAPTER FIVE

CONTEMPT REESTABLISHED, 1880-1889

The period after the Civil War saw a resurgence of contempt by publication cases, particularly those that rejected statutory restrictions on the power of contempt. That trend gathered strength throughout the 1880s. No other single decade during the previous eighty years had experienced more such cases. These decisions tended to rely on more case law because of the increasing number of contempt by publication rulings available for review. However, that did not mean that judges had to follow them. A contempt decision from one state was not binding on a court in another state. Judges tended to cite decisions that supported their personal views of the subject. Courts also considered the growing number of statutory restrictions that state legislatures had attempted to place on a court's contempt authority. However, a publication's tendency to obstruct the administration of justice or publicly embarrass the officers of the court remained at the core of contempt by publication litigation during this time.

Restrictions Get Support

The decade began with two cases that generally adhered to the restrictions Congress and other states had placed on the contempt power. These cases recognized legislative authority over the power of judicial contempt and favored the press' right to scrutinize the judiciary. The Pennsylvania Supreme Court decided the first case, *Ex parte Steinman and Hensel*, in 1880. The appeal to the Supreme Court did not directly involve contempt by publication, but the case contained a review of a lower court's contempt

proceeding against the editors involved in the matter. Andrew Jackson Steinman and William Hensel were the editors of *The Lancaster Daily Intelligencer* in Pennsylvania.[1] They were also attorneys and members of the Lancaster County bar. On January 20, 1880, they published a rebuke of the Court of Quarter Sessions of Lancaster County for acquitting a man who had strong political ties to the area. Steinman and Hensel accused the court and its officers of manipulating justice, charging that the acquittal

> was secured by a prostitution of the machinery of justice to serve the exigencies of the Republican party. But as all the parties implicated, as well as the judges, belong to that party, the court is unanimous – for once – that it need take no cognisance [sic] of the imposition practised [sic] upon it, and the disgrace attaching to it.[2]

The presiding judge, whose name was not included in the Supreme Court record, called both men to answer for the article, saying that the "court could have no respect for itself or for the people who promoted us to administer the law if we failed to take notice of the article or paragraph reflecting on its integrity."[3] He charged them with contempt and ordered them to return to court in several days to defend themselves. Less than two weeks later, both men submitted identical arguments claiming that the court had no authority to punish an out-of-court publication. The article had been published "in good faith, without malice and for the public good of and concerning a case of great public importance," they said.[4] The case in question had been "fully ended and determined" before the article was published, and Steinman and Hensel further noted that neither of them had an interest in the case in their capacities as attorneys. The presiding judge expressed his disgust with their answers in the following terms:

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[1] *Ex parte Steinman and Hensel*, 1880 Pa. LEXIS 306, 1-2.
[2] Ibid., 2-3.
[3] Ibid., 4.
[4] Ibid., 5.

> There is no disclaimer in their several answers whatever, of an intention to charge the court, in its official capacity, with anything other than what the words of the publication themselves plainly import, to wit: corruption -- want of integrity in the office of judge. Every reader would attach that meaning to it.[5]

The judge concluded that he could "see in their answers no word or expression showing even an attempt to purge themselves of the breach of official fidelity which constitutes the gravamen of the rules entered upon them."[6] However, he determined that under Pennsylvania law, the publication could not be classified as an offense occurring in the presence of the court, and he dropped the contempt charges against Steinman and Hensel.[7]

Another case that generally favored the press over the judicial contempt authority was *State ex rel Liversey et al. v. Judge of Civil District Court.* The 1882 case determined that Louisiana's constitution did not allow a judge to restrain or prevent any article from being published, and a contempt charge for disobeying such a ruling was in error. The Civil District Court for the Parish of Orleans, Louisiana, was hearing a case brought against the "proprietors and publishers of a certain newspaper ... known as 'The Mascot'...."[8] W. Van Benthuysen had accused the newspaper of publishing "certain false, malicious and libellous [sic] cartoons and editorial paragraphs, libelling [sic] and defaming him, and designed and calculated to injure and destroy his character and reputation as a man and a citizen." He told the court that he feared such malicious libels against him would be repeated in subsequent issues of the *The Mascot*, and he asked the court to issue an injunction to prevent the newspaper from publishing anything

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[5] Ibid., 10.
[6] Ibid.
[7] The court, however, did find that Steinman and Hensel had violated their oaths as attorneys, and they were disbarred. They appealed that point to the Pennsylvania Supreme Court, which overturned the lower court's ruling.
[8] *State ex rel Liversey et al. v. Judge of Civil District Court*, 1882 La. LEXIS 184, 1.

"calculated to disparage him in the estimation of the community...."[9] The court agreed, but the injunction was of little use. *The Mascot* once again targeted Van Benthuysen, and he once again appealed to the court, this time asking it to hold the newspaper and its operators in contempt.[10]

The newspaper proprietors made several arguments against the contempt charge. Their primary defense was that

> their right to publish a newspaper, and to express and insert therein, without prior restraint, what they, as editors and proprietors, think right and proper, is protected by the fundamental principles of republican government and by the Constitutions of the State and of the United States....[11]

They also argued that the court had absolutely no power to issue an injunction that would abridge that right, and they claimed that such action would go beyond the court's jurisdiction. Furthermore, if the question was whether the publications were or were not libelous, the operators of *The Mascot* insisted that they were entitled to a hearing and a trial by jury. Finally, they argued that they had no intention of committing a contempt of court, and they asked the judge to dismiss the charges against them. Their defenses, though, fell on deaf ears; the judge sentenced them to ten days imprisonment for contempt.[12] They then asked the Supreme Court of Louisiana to grant them relief.

Supreme Court Justice Charles Fenner first considered the idea of press freedom and its meaning. The Louisiana constitution's Bill of Rights specifically stated that no law could be passed abridging the freedom of the press.[13] He quickly concluded this meant that prior restraints were an anathema to press freedoms; the press was free to

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[9] Ibid., 2.
[10] Ibid.
[11] Ibid., 2-3.
[12] Ibid., 3.
[13] Ibid., 5.

publish as it saw fit; and it could only be subjected to corrective action after the publication.[14] Having considered the meaning of the term "free press," Justice Fenner then inquired "whether any court can have power, authority or jurisdiction to restrain, suspend or abridge the exercise, by any citizen, of a right declared absolutely to belong to him by the Bill of Rights embodied in the fundamental law of the State."[15] Freedom of the press was a fundamental right of all Americans, he said, and he offered the following scenario: suppose the state legislature passed a law giving anyone the right to petition the court for an injunction against a newspaper out of fear that it would publish libelous or defamatory matter concerning the individual.[16] The court continued:

> How should defendants determine whether their publications were innocent or offensive? What they consider innocent, the judge might consider libellous [sic]. There would be no safe course, except to take the opinion of the judge beforehand, or to abstain entirely from alluding to the plaintiff. What more complete censorship could be established? Under the operation of such a law, with a subservient or corrupt judiciary, the press might be completely muzzled, and its just influence upon public opinion entirely paralyzed. Such powers do not exist in courts, and they have been constantly disclaimed by the highest tribunals of England and America.[17]

The court was thus "compelled to hold that if there existed any law authorizing a court to issue such an injunction, it would be grossly unconstitutional," the justice determined. "The exercise of such authority by a court is a direct violation of the Constitution ... and is absolutely null and void." Having nullified the injunction that brought about the contempt charges, Justice Fenner concluded that "the defendants cannot be punished for contempt for its alleged violation."[18] When the Constitution recognizes the existence of a fundamental right, and a court restricts someone from exercising that right, the person is

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[14] Ibid., 6.
[15] Ibid., 8.
[16] Ibid., 9.
[17] Ibid., 10.
[18] Ibid., 12.

"authorized, always at his risk, to follow the Constitution and not the order of the court."[19] However, he made it clear that

> this is not meant to authorize resistance to the orders or processes of the court while the same are operative. He must endure the consequences of his disobedience until, in some orderly course of procedure, he procures from competent authority the annulment of the mandate claimed to be unconstitutional and void; but the moment such annulment is pronounced, his condemnation for contempt falls with it, and his sentence, though not completely executed, expires.[20]

Chief Justice Edward Bermudez filed a dissent, arguing that the lower court did have the authority to punish *The Mascot*'s proprietors and publishers for contempt because the order to withhold future publications was, in his opinion, lawful.[21]

The final case of the 1880s that recognized statutory restrictions on contempt occurred in Indiana in 1887. *Cheadle v. State* determined that newspaper comments that referred to previous and completed court actions could not be considered as contempts of court. Joseph B. Cheadle, editor of the *Frankfort Banner* in Indiana, found himself facing a judicial contempt charge when he criticized a Clinton Circuit Court judge for throwing James A. Spurlock into jail.[22] Spurlock had been charged with assault and battery with intent to commit murder. According to Cheadle's report, the first day of the trial ended before the case was decided, but Spurlock could not afford to rent a room in town.[23] He decided to spend the night at his home, which was about fifteen miles away.[24] When the trial resumed the following morning, Spurlock was not there – he had overslept. He woke up, realized he was late, and began walking to the courthouse.[25] In the meantime, the

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[19] Ibid., 12-13.
[20] Ibid., 13.
[21] Ibid., 18.
[22] *Cheadle v. State*, 1887 Ind. LEXIS 56, 1.
[23] Ibid., 2.
[24] Ibid., 7.
[25] Ibid., 3.

judge concluded that Spurlock had skipped the trial; so he dismissed the jurors and issued a warrant for Spurlock's arrest.[26] When Spurlock arrived in town, he was arrested and taken to jail. In the December 12, 1885, issue of the *Banner*, Cheadle condemned Spurlock's incarceration with the following observation:

> His attorneys pleaded to let the trial go on. The court no doubt thought it a ruse, and finally discharged the jury. When he did that, at that moment Spurlock stood acquitted; the bond became inoperative, and the forfeiture of the recognizance was absolutely void, and his incarceration in jail illegal. It is simply an outrage to keep him there.[27]

Cheadle also wrote that the public had just as much right to place the judge in jail as the judge had authority to arrest Spurlock.[28] Two days later, the prosecuting attorney accused Cheadle of publishing "a certain false, scurrilous and malicious article" concerning the trial.[29]

However, Cheadle continued to hammer his point in print during the following days. "Persons, who are conversant with history, have read about the 'Star Chamber proceedings,' where men and women were imprisoned and never given a trial – never knew why they were imprisoned," he wrote.[30] Personal liberty, he said, was priceless, and as long as he was in charge of the *Banner*, the newspaper could "always be depended upon as a fearless advocate of the right, as its editor is given to see the right, and it will, at all times, demand the enforcement of the laws."[31] The prosecuting attorney filed even more complaints, including charges that the most recent articles "reflected upon the

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[26] Ibid., 4.
[27] Ibid., 7.
[28] Ibid.
[29] Ibid., 2.
[30] Ibid., 9-10.
[31] Ibid., 10.

integrity of the court, and were, as well for that as for other reasons assigned, in further contempt of the authority of the court."[32]

Cheadle was called before the judge to explain himself. He admitted that he wrote the articles based on what he considered to be reliable information, and he told the judge that he truly believed the prosecution against Spurlock had been legally terminated once the jury had been discharged. He also argued that the events were not only newsworthy, but his articles were also intended to be fair criticisms of the court.[33]

Indiana law had established that "every person who shall falsely make, utter, or publish any false or grossly inaccurate report of any case, trial, or proceeding, or part of any case, trial, or proceeding thereof, shall be deemed guilty of an indirect contempt of the court...."[34] The statute also allowed punishment of actions that interrupted the course of justice. Cheadle, though, insisted that he had no intention of "imputing corrupt motives to the court or any of its officers, or of interrupting or in any manner obstructing the administration of justice." Despite his arguments, the judge found him guilty of contempt and ordered him to pay a $50 fine and court costs. He appealed the conviction to the Supreme Court of Indiana.

Justice William Niblack recognized that the judiciary once had a common law power to punish publications concerning pending or past proceedings. In the United States, though, he said that "the courts are more circumscribed in their jurisdiction in that respect, and their power to punish is confined to publications concerning pending cases."[35] All of the points Cheadle made in his publication "had reference entirely to past

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[32] Ibid., 10-11.
[33] Ibid., 11.
[34] Ibid., 12.
[35] Ibid., 16.

occurrences, merely incidental in their nature, and not involving in any way the merits of the prosecution against Spurlock."[36] Even Cheadle's comments that the judge had lost his temper badly, "whether falsely or truthfully made, might tend to vex and annoy a judge, but it would not rise to the grade of either a libel or a contempt."[37] In addition to considering Cheadle's contempt conviction, Niblack seemed to provide other courts with a compass to navigate the increasingly dangerous waters of contempt by publication. The court decided that

> it must be borne in mind that the force of public opinion in this country, in favor of the freedom of the press, has of late greatly restrained the courts in the exercise of their power to punish persons for making disrespectful and injurious publications. In many jurisdictions statutes have been enacted depriving, or assuming to deprive, the courts of their power in that respect.[38]

Though Justice Niblack doubted the Indiana legislature's authority to restrict judicial contempt through statutes, he warned that the contempt authority was "an arbitrary power, and hence one which ought to be kept within prudent limits.... No one ought to be found guilty upon a doubtful charge of indirect contempt, and especially so in a case in any manner involving the freedom of the press."[39] The Indiana Supreme Court reversed the judgment against Cheadle.

The decision in *Cheadle v. State* was rare in that it referenced a growing regard for press freedoms among the general public and seemed to appeal to that sentiment in overturning Cheadle's contempt conviction. However, Justice Niblack's comments that America's courts had been "greatly restrained" in exercising their contempt authority did

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[36] Ibid., 17.
[37] Ibid., 17-18.
[38] Ibid., 19-20.
[39] Ibid., 20.

not reflect what was actually occurring in the legal record. The 1880s proved to be the busiest decade to date for contempt by publication litigation.

Though the cases of *State ex rel Liversey et al. v. Judge of Civil District Court* and *Ex parte Steinman and Hensel* occurred at the beginning of the 1880s, they proved to be false harbingers of what was to come. These two cases adhered to a judicial philosophy – the recognition of legislative restrictions on the judicial contempt power – that was practically dormant during the rest of the decade. *Cheadle v. State* was the only other contempt by publication case during this period to favor the press. These decisions were crowded out by cases that adhered to another philosophy – one that recognized an expansive judicial contempt authority. It had already begun rooting itself in American judicial practice.

Contempt By Publication Reemerges

By the middle of the 1880s, the resurgence of contempt by publication cases seemed irreversible. For the rest of the decade, judges consistently upheld their authority to cite publications for threatening the administration of justice or for ridiculing the court and its officers. Judges increasingly moved away from the geographic restrictions that Congress and most states had implemented to curb an expansive contempt power. Judges – and others – also expressed a growing discontent for America's press, which by then had become a powerful cultural force.[40] It was an industry that was maturing professionally and economically, perhaps leading to a sense of self importance. Whatever the reasons for the increase in contempt by publication cases, though, judges were less inclined to show the press any deference.

The 1884 case of *State v. Frew* upheld the doctrine that questioning a court's

[40] *Infra* note 119.

character and its ability to render a proper verdict was punishable as a contempt. The *Wheeling Intelligencer* published an editorial on June 18, 1884, that caught the attention of an attorney who was involved in a case pending before the Supreme Court of Appeals of West Virginia.[41] The issue concerned the constitutionality of a state order. The attorney requested that the court take immediate action against the publishers of the newspaper because the editorial suggested that the court had already made up its mind about the case.[42] "It might be thought strange that anybody could know what the decision of the Supreme Court is to be on any question," the article stated. "But it seemed equally strange that three out of four judges of the Supreme Court told the Democratic caucus more than a year ago to go ahead and rely on the backing of the Court."[43] The newspaper concluded that

> it was not intended that the purpose of the Court should be made public, and publicity may induce the Court to change its mind, just to show that somebody has been taking liberties with the text and misrepresenting the Court. We shall see what we shall see.[44]

The court ordered John Frew, A.W. Campbell, and C.B. Hart, the proprietors and publishers of the *Intelligencer*, to appear before the court "to show cause, if any or either of them can, why they and each of them shall not be attached for their contempt of this Court in publishing the aforesaid article."[45]

When the men submitted their responses later that month to answer the charges, the court learned that Campbell had been away from the state for several months and

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[41] *State v. Frew*, 1884 W. Va. LEXIS 72, 1.
[42] Ibid., 2.
[43] Ibid., 5.
[44] Ibid., 5-6.
[45] Ibid., 6.

dismissed him from the case.[46] Frew defended himself by quoting the Code of West Virginia, arguing that the publication did not "constitute misbehavior in the presence of the Court, or so near thereto as to obstruct or interrupt the administration of justice," and he said the editorial also did not meet any of the other standards West Virginia had outlined in its judicial contempt statute.[47] Frew said he had no idea the case was actually pending before the court at the time of the publication, and he told the court that he was not aware of the contents of the editorial in question until he actually saw it in print.[48] The circumstances, he believed, were sufficient for his discharge.

C.B. Hart, the *Intelligencer*'s chief editor, made nearly identical arguments to Frew's, with the exception of ignorance of the publication. He also challenged the court by citing a previous publication in which the same court did nothing to its publisher. In August 1883, the *Greenbrier Independent* had published an editorial related to the same issue, and it had implied that three members of West Virginia's Supreme Court of Appeals had essentially given their approval on the matter.[49] At the time, the editor and publisher of the *Independent* was B.F. Harlow, a successful lawyer, a member of the same political party as the appeals court judges, and a close personal friend to one of them.[50] Hart said it was clear that Harlow's article was not meant to be unfriendly to the court. "That article, however, in effect, said, that three members of this Court had in advance expressed their opinion upon cases which might come before them as judges," he said. "It contained a serious charge against those judges."[51] Hart also argued that

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[46] Ibid.
[47] Ibid., 8.
[48] Ibid., 9.
[49] Ibid., 13.
[50] Ibid., 14.
[51] Ibid., 14-15.

> if anything published in the Wheeling Intelligencer of June 18, 1884, could be construed as a contempt of this Court, that publication in the Greenbrier Independent was likewise such [a] contempt. No proceedings against Mr. Harlow for contempt, however, have been instituted in or by this Court or by any of its judges.[52]

Hart also noted that the judges had never even questioned the truth of Harlow's editorial.[53] If those statements were true, he said, "it was the duty of the Wheeling Intelligencer ... to make public those statements, and ... they were ... justified in believing the truth of those statements."[54] Hart recognized that the publication date may have been untimely, but he assured the court that the article "was not made with a view to induce any particular decision by the Court, or to affect in any way its determination of the case," saying he was "unable to see how it could be construed by any one as being so intended."[55]

The Supreme Court rendered its verdict on July 7, 1884. After a lengthy consideration of previous court decisions from other states and West Virginia's contempt laws, Supreme Court President Okey Johnson concluded that the court had "unrestricted power, uncontrolled and unregulated by statute to punish for direct or constructive contempt by fine or imprisonment or both."[56] West Virginia had statutes regulating courts and their use of contempt, but Johnson concluded that such laws were written for the state's inferior courts, not the Supreme Court. State law allowed courts to punish direct contempts without a jury, but it also enabled courts to empanel a jury to determine what fine or prison sentence should be imposed in such cases. The West Virginia Supreme

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[52] Ibid., 15. This passage incorrectly listed the publication year as 1874 instead of 1884, and the author took the liberty to correct the mistake.
[53] Ibid.
[54] Ibid., 16.
[55] Ibid., 19-20.
[56] Ibid., 92.

Court could not empanel a jury, Johnson argued, and it did not have the legal machinery to carry out the statute's requirements. Therefore, the legislature clearly "did not intend the statute to apply to this Court," he wrote.

Moving on to the question of whether the *Intelligencer*'s editorial was a contempt of court, he said it was apparent that there was not "a clearer case of contempt" to be found anywhere.[57] Johnson said the publication was a contempt

> because it charges three of the judges of this Court, acting in their judicial capacity, with an offence, which, if true, is just ground of impeachment; with an offense calculated to degrade the Court and destroy all confidence of the people therein.... If to charge a court or a majority of its members with having prostituted their high and sacred trust to base political purposes is not a contempt, then we may truly say that such a thing does not exist.[58]

Though Frew had said that he did not know of the editorial until after it was published, Judge Johnson believed he should still be punished, though not severely. He viewed Hart's answer, however, as an aggravation of his contempt. "He does not express the slightest regret for his act," Johnson said, "nor does he exhibit a particle of regard for good order nor indicate in any degree appreciation of those great principles that lie at the foundation of good government."[59] The court also expressed its anger that Hart used another newspaper's publication in an attempt to mitigate the charges against him. The court answered with the following:

> And he says if this article is libelous so is that; and further, that one of the judges of this Court was an intimate friend of the editor of the other paper, living in the same town, and the Court had not denied the truth of *that* statement. The Court had not denied it? The Court does not deny any charge made in the papers in reference to it. It can deny a libelous charge in only one way, and that it has done in this instance, in the only way in which it ever denies such a charge.[60]

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[57] Ibid., 93.
[58] Ibid.
[59] Ibid., 96.
[60] Ibid., 97.

Furthermore, the judge rejected Hart's contention that the editorial was not intended as a contempt of court, and Johnson convicted both him and Frew of contempt. He then determined that because this was the first case of its kind in West Virginia, he and his colleagues on the court would "dislike to be severe."[61] Because Frew did not know about the article before it was published, the court ordered him to pay a fine of $25.[62] Because Hart was responsible for the publication and did not apologize for it, he was ordered to pay a fine of $300.[63] Judge Johnson ordered the sheriff to keep both men in custody until the fines and court costs were paid.

The decision in *State v. Frew* reaffirmed that the contempt authority – at least for West Virginia's highest court – was uninhibited by legislative restrictions. It relied heavily on contempt by publication rulings from other states and ultimately became the definitive ruling on the subject in West Virginia case law. It also struck another blow in favor of the philosophy that America's judiciary had a right to use its contempt powers without regard to legislative intervention. At least eleven other cases cited the decision during the following decade-and-a-half.

State v. Frew also was the lengthiest contempt by publication decision of the century (147 pages by LEXIS standards), prompting *The Central Law Journal* in 1884 to suggest that "the only person who experiences pleasure in reading [the Supreme Court of Appeals of West Virginia's] 'windy,' prolix, scattering opinions is the printer who is paid by the thousand 'ems.'" The *Journal* noted that the court had become "considerably excited recently over a contempt of its feelings by an imputation of its impartiality," but the *Journal* sarcastically observed that "it would not require the worst pessimist to

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[61] Ibid., 100.
[62] Ibid., 124.
[63] Ibid., 124-125.

suspect that this court is in the employ of the printer and paid for matter by the yard."[64]

The Massachusetts case of *Cowley v. Pulsifer* determined in 1884 that publishing the contents of a court document before it was presented to the judge, even if the publication was accurate, could be contemptuous. The *Boston Herald* had published the contents of a petition that had been filed with the Supreme Judicial Court for Middlesex County, Massachusetts. It requested the removal of attorney Charles Cowley from the Massachusetts bar. The *Herald* had printed "a fair and correct" report on the matter, the Massachusetts Supreme Court concluded, but the petition apparently never was "presented to the court or entered on the docket." Furthermore, the petition included an alleged libel against Cowley, "which would be actionable unless justified."[65] The defendants had argued in the Middlesex court that they had reporters' privilege to publish the petition's contents because it was part of a legal proceeding, and they made that argument again on appeal to the Massachusetts Supreme Court.

Justice Oliver Wendell Holmes, Junior (who later served as Massachusetts' chief justice before joining the United States Supreme Court), determined otherwise, saying that privilege extended only to the parts of the judicial process that were public. Preliminary claims or charges did not constitute a proceeding in open court, as he explained in the following terms:[66]

> Knowledge of them throws no light upon the administration of justice. Both form and contents depend wholly on the will of a private individual, who may not be even an officer of the court. It would be carrying privilege farther than we feel prepared to carry it, to say that, by the easy means of entitling and filing it in a

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[64] "Current Topics," *The Central Law Journal*, Nov. 21, 1884, 401, reproduced in American Periodicals Series Online 1740-1900.
[65] *Cowley v. Pulsifer*, 1884 Mass. LEXIS 279, 1.
[66] Ibid., 4-5.

> cause, a sufficient foundation may be laid for scattering any libel broadcast with impunity.[67]

Holmes noted that in the English Chancery, it was a contempt to publish case information before the matter was heard in court.[68] "A contempt of court cannot be privileged," he said, "and we see no reason to doubt that an action could be maintained for such a publication."[69] However, he also recognized a dearth of case law on this particular matter. The few similar cases that concerned "the question of contempt have been placed on grounds not perhaps convincing with regard to the present question," he said. "But they lend strong support to our decision." He continued:

> It may be objected that our reasoning tacitly assumes that papers properly filed in the clerk's office are not open to the inspection of the public. We do not admit that this is true, or that the reasons for the privilege accorded to the publication of proceedings in open court would apply to the publication of such papers, even if all the world had access to them. But we do not pause to discuss the question, because we are of opinion that such papers are not open to public inspection.[70]

Holmes noted that while Massachusetts' laws required public records to be open and available for inspection, those statutes contained "no reference to the records of the courts."[71] The privilege to cover Massachusetts' judiciary, he concluded, did not extend to filings that had not yet been presented in open court.

The 1886 case of *In re Cheeseman* was New Jersey's first contempt by publication case, and it determined that state courts had the authority to use the contempt power to punish publications. The jury in the Cumberland County Oyer and Terminer Court of New Jersey could not reach a verdict on several charges facing John Cheeseman, and a new trial was required. Shortly afterward, on January 30, 1885, his

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[67] Ibid., 5.
[68] Ibid., 7.
[69] Ibid., 8.
[70] Ibid., 8-9.
[71] Ibid., 9.

newspaper published an article that, according to the case record, was "intended to cast discredit upon the members of the grand jury that had indicted him, upon the sheriff who had summoned the jury, and upon the judge who had presided at his trial, and who, in the regular course of official duty, would preside when he should be again tried."[72] The court found Cheeseman guilty of contempt and fined him $100. He appealed the conviction to the New Jersey Supreme Court.

Cheeseman's attorney provided a lengthy argument in his defense, one portion of which insisted that the publication could not be considered a contempt of court in New Jersey.[73] The state did not have a statute concerning judicial contempt. If the contempt power existed in New Jersey, he argued, it was inherited from English common law, which should no longer apply. The New Jersey Supreme Court, though, rejected that argument as false and offered a host of legal decisions to support its conclusion.[74] It then offered the following considerations:

> So far as our courts are modeled after English courts of common law, a presumption arises that they possess all the powers which their prototypes lawfully exercised, and the burden of establishing the contrary rests upon him who asserts it. Counsel endeavors to maintain his position upon the ground that the power now denied is contrary to the spirit of our institutions, and so far as our reports show has never been exercised in this state.[75]

The court rejected the argument that it was "contrary to the spirit of our institutions that our courts should have the same power as their predecessors to defend themselves against abusive words...."[76] It was true that there were no known instances in New Jersey in which words were punished as a contempt, "but this by no means indicates that the power

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[72] *In re Cheeseman*, 1886 N.J. Sup. Ct. LEXIS 18, 39.
[73] Ibid., 13.
[74] Ibid., 40.
[75] Ibid., 45-46.
[76] Ibid., 46.

has not been employed."[77] It was the court's judgment that the power existed, "notwithstanding the apparent infrequency of its exercise."[78] The New Jersey Supreme Court ultimately affirmed Cheeseman's contempt conviction.[79]

In a first-of-its-kind decision from 1887, the case of *Territory v. Murray* determined that Montana's territorial courts were not United States courts and therefore were not subject to contempt restrictions approved at the congressional level. James Murray of Butte City, Montana, had received favorable rulings in a series of legal causes known as the Smokehouse cases. As those cases were pending on appeal to the Montana Supreme Court, someone suggested making a bet with Murray that the court would reverse the earlier decisions in the matter.[80] Perhaps hoping to have some fun, Murray secretly set up a bet between two people – both of whom used Murray's own money – and arranged for the following item to be printed in the *Helena Independent* on January 11, 1887:

> Cannon & Murphy, real estate agents, to-day made a wager of five hundred dollars that, owing to the influence of some surface claimants on the Smokehouse lode, the supreme court would reverse their former decision in the Smokehouse case.[81]

The publication earned Murray a citation for contempt of court. The Montana Supreme Court paid little heed to the actual bet, stating that the publication of the wager "presents a much graver question for our consideration."[82] Murray's affidavit stated that he "intended no disrespect or improper conduct towards the court; but, on the contrary, was prompted solely to so publish the same as an item of news, and apprise the court of what

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[77] Ibid., 47.
[78] Ibid., 48.
[79] Ibid., 51.
[80] *Territory v. Murray*, 1887 Mont. LEXIS 72, 1.
[81] Ibid., 2.
[82] Ibid., 4.

had transpired, that it might act in the premises as it saw proper."[83] The justices were hardly impressed with that defense. "It is seldom we find as many contradictions and as much falsehood in so short a record as the case before us contains," Chief Justice N.W. McConnell wrote. He said Murray deliberately tried to influence the court's decision in the suits in which Murray was involved in order to maintain the favorable results.[84] "His purpose to reach each one of the judges, and to influence him to stand firm in his former holding," McConnell noted, "is as obvious as if he had sent the dispatch to each of them personally, instead of publishing it in a newspaper, where he knew they were bound to read it." Must a court be insulted by a covert and cowardly insinuation of official corruption, he asked, yet not have the power to punish such actions for contempt?[85] "To deprive them of such power is to take away from them the right of judicial self-defense," and the chief justice had no doubt that Murray's conduct was a contempt of court.[86]

Montana's Supreme Court also carved out an exception to the Congressional Act of March 2, 1831. The law restricted contempt punishments to actions occurring in the immediate environs of the courtroom and limited citations for events – such as publications – that occurred away from the court. The Montana Supreme Court rendered the following decision:

> The contempt under consideration does not come within the classes enumerated in the statute ... hence if this court is a United States court, within the meaning of this statute, it has no jurisdiction to punish the defendant for said contempt. We do not think this statute embraces the territorial court. It applies to the courts of the United States alone.[87]

Furthermore, McConnell determined that Montana's Code of Civil Procedures allowed a

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[83] Ibid., 5.
[84] Ibid., 7-8.
[85] Ibid., 8.
[86] Ibid., 8-9.
[87] Ibid., 12-13.

contempt charge for "contemptuous behavior towards the judge while holding court, tending to interrupt the due course of a trial, or other judicial proceeding," but he also observed that it did not require that the "contemptuous behavior towards the judge shall be in his presence."[88] The Supreme Court found Murray guilty of contempt and fined him $500.

The case of *Territory v. Murray* was unique in contempt by publication law because it was the first to establish an exception to the restrictions Congress had passed fifty-six years before. Montana was still a territory in 1887, and its Supreme Court determined that the congressional restrictions applied only to United States courts, not territorial courts. The decision also supported the long-standing practice of punishing publications that suggested corruption among judges or judicial officers.

A publication that tended to influence a pending legal matter, even if it was published in another city, was a contempt of court under the 1888 ruling in *State v. Myers*. The *Cincinnati Enquirer* published a scathing account of the Court of Common Pleas of Franklin County, Ohio, in March 1888. Allen Myers wrote an article that claimed "the judge, the clerk of the court and prosecuting attorney packed the grand jury that found the indictments" in a series of cases, one of which was still pending.[89]

Judge Pugh of the Court of Common Pleas considered the publication not only libelous, but contemptuous, as well.[90] He rejected Myers' argument that he must be tried by a jury and could not be punished by the judge alone. Pugh considered the Illinois Supreme Court's 1875 decision in *Storey v. People* – which held that a libel could not also be a contempt, and a libel prosecution must be done before a jury – to be a legal

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[88] Ibid., 18.
[89] *State v. Myers*, 1888 Ohio Misc. LEXIS 137, 2.
[90] The judge is only referred to by his last name in this and other records about this case.

anomaly.[91] Considering numerous decisions and scholastic opinions that reached a different conclusion, he determined that "this court is not prepared to follow one solitary court on the question raised by that claim...."[92] Referring heavily to the Arkansas Supreme Court's decision in *State v. Morrill*, Pugh used it to refute the defense attorney's argument that there was no common law case in which a person was held responsible in a contempt proceeding for libeling a court. The defense also argued – unsuccessfully – that the court had no common law power to punish anyone for committing such an act.[93]

Judge Pugh also considered claims that the court's actions against Myers would constitute an infringement on the freedom of the press. "But freedom of speech and licentiousness of speech are not synonymous," he argued. "Freedom of speech and liberty of the press are not absolute. They are like all other rights, subject to regulation and restraints of law."[94] He also declared that

> there is as much danger, and more danger in fact, from the abuse of the right to speak and write by scandal-mongering writers, than there is from the exercise of any discretionary power in contempt cases by an elective judiciary. There is more peril to our free institutions from the first source than from the second.[95]

He recognized a person's right to criticize the actions of courts and judges through argument, comment, or ridicule, but only as long as the criticism was done with "respectful language."[96] He believed the case against Myers was not really about the freedom of the press. "He is not charged here with ... availing himself as a member of the press, of its liberty," he said. "He is charged with abusing that right and that liberty."[97]

Pugh consulted recent changes in Ohio law to support the position that his court

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[91] Ibid., 2-5. See Chapter Four for an explanation of *Storey v. People.*
[92] Ibid., 5.
[93] Ibid. 14. See Chapter Four for an explanation of *State v. Morrill.*
[94] Ibid., 10.
[95] Ibid., 9-10.
[96] Ibid., 10.
[97] Ibid., 13.

did have the authority to punish Myers. The contempt statutes that the Ohio legislature passed in 1834 had been modeled on the Congressional Act of March 2, 1831. In fact, he said that Ohio's law was "an exact counterpart of the United States Statute," which prohibited judges from using the contempt power to punish actions that were committed away from the courtroom.[98] Ohio's 1879 legislative revisions, however, removed some of those restrictions, and "the courts were left to exercise their power to punish summarily in other cases at common law."[99] According to the judge, the legislature repealed the geographic restrictions that had been placed on a judge's contempt authority. That allowed Ohio's courts to have "broad discretion in determining whether an act is near enough" the court to obstruct the administration of justice.[100] Myers' screed against the court fell within that category, as the judge noted with the following:

> Its publication was calculated to destroy the respect and confidence of the people in the court. It was calculated to obstruct and dishonor the administration of law and justice in this court. That is its character as it is photographed in the charge, and whether it either produced an obstruction to the administration of justice by this court, or [tended] to do so, is a question that can only be determined conclusively when the case is heard upon the evidence.[101]

If a publication "either produced that effect in fact, or [tended] to produce that effect," he said, "it is an act of contempt within the meaning of this statute, and must be construed to have occurred, either in the presence of the court, or in the language of that statute, 'near to the court.'"[102] Determining that the case against Myers would proceed, the judge delivered his final opinion on the matter in May 1888.

Myers's attorney had argued that his client did not intend to commit a contempt of

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[98] Ibid., 22. See Chapter Three for an explanation of the Congressional Act of March 2, 1831.
[99] Ibid., 24.
[100] Ibid., 25.
[101] Ibid., 27.
[102] Ibid., 27-28.

court, thereby purging himself of the charge, but Judge Pugh disagreed. Perhaps the court would have passed the case "with a nominal fine" had Myers admitted that the article was not true and was based on misinformation, the judge said.[103] By giving the answer he gave, though, Myers had

> aggravated his original offense, because he says in his answer that its statements of fact were made upon facts which had come to his knowledge, and information communicated to him which he believed to be true, and that he believed the inferences or deductions which he drew from such information to be correct. This is simply an aggravation and not a purging of the contempt.[104]

As far as the charge of packing the grand jury was concerned, the judge believed "that no more atrocious libel was ever uttered by tongue or printed by type."[105] The ruling that the libel in this case was also a contempt seemed to need no vindication, according to the judge.[106] Myers knew that the newspaper would be circulated and read widely, Pugh said. "The tendency of all this was precisely the same as if he had stood up in the court room and orally said what he uttered in this article," the judge concluded.[107] Allowing Myers' act to go unpunished "would be construed as a license to every person of irascible temper and of turbulent propensities, against whom a court should decide a cause ... to rush into print with hot haste...."[108] Rendering his verdict not from "personal resentment ... but from a sense of duty," Pugh sentenced Myers to spend ninety days in jail and pay a $200 fine.[109]

State v. Myers provided a clear example of a judge going to great lengths to justify his use of the contempt power, and the final outcome turned on two cases. The

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[103] Ibid., 51.
[104] Ibid., 52.
[105] Ibid.
[106] Ibid., 53.
[107] Ibid., 55.
[108] Ibid., 57.
[109] Ibid., 59.

judge rejected the decision in *Storey v. People*, the case from Illinois that determined a libel could not also be punished as a contempt of court. That court had ruled that a libel case must be handled through the process of a jury trial. In the *Myers* case, though, Judge Pugh chose to adhere to the philosophy of *State v. Morrill*, the case from Arkansas that justified the common law practice of treating libels as contempts. Under that doctrine, a judge was empowered to summarily punish a libel as a contempt without sending the matter to a jury. Though Myers' conviction was soon overturned by a superior court, the principles outlined in the case were not.

The 1889 case of *Myers v. State* reversed Allen Myers' contempt conviction, but the reversal was made on a technical issue, not on the judge's authority to cite him for contempt. Myers had appealed the verdict against him to the Supreme Court of Ohio.[110] His attorneys argued that the lower court judge had no authority to punish Myers for contempt, citing Ohio's incorporation of the 1831 congressional act that placed a geographic restriction on the power of contempt.[111] They raised the question about whether a judge hearing a trial in Columbus could cite for contempt an article written and published in Cincinnati.[112] Myers' lawyers also expressed deep concern about what they considered to be the abuse of a court's contempt power, which they called an arbitrary power.[113]

The Ohio Supreme Court, in an opinion written "By the Court," immediately recognized Myers' publication as a libel upon the Court of Common Pleas judge.[114] Myers' case seemed to go downhill quickly from there, as the following suggests:

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[110] *Myers v. State*, 1889 Ohio LEXIS 93.
[111] Ibid., 6.
[112] Ibid., 6-7.
[113] Ibid., 11.
[114] Ibid.

> The intention of the publication was to insult and intimidate the judge, degrade the court, destroy its power and influence, and thus to bring it into contempt; to inflame the prejudices of the people against it; to lead them to believe that the trial then being conducted was a farce and an outrage, which had its foundation in fraud and wrong on the part of the judge and other officers of the court, and, if communicated to the jury, to prejudice their minds, and thus prevent a fair and impartial trial.[115]

The Supreme Court put it bluntly – the article "tended directly to obstruct the administration of justice in reference to the case on trial, and its publication was a contempt of court."[116] Even though the article was not written or circulated in the presence of the court, the actual publication was in the courtroom and affected the business of the court, the justices determined.[117] The Supreme Court also agreed that, based on the facts of the case, the lower court had made the correct decision in convicting Myers of contempt.

The Supreme Court, though, noted a fatal flaw in the Common Pleas judge's method. When rendering his verdict, the judge had also considered a previous contempt proceeding against Myers – which was not legally allowed – and the Ohio Supreme Court believed that consideration had a "potent influence in determining the sentence imposed." When the original punishment seemed justified, the Supreme Court wrote, "a reviewing court might not feel it a duty to disturb the judgment for an error of the character referred to." In Myers' case, however, where the penalty was considered both discretionary and severe, the Supreme Court felt "compelled to reverse the judgment" and sent the case back to the lower court for further proceedings.[118]

Though the legal record of this case appears to be silent on what action, if any, the

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[115] Ibid., 12.
[116] Ibid.
[117] Ibid., 13.
[118] Ibid., 18.

lower court took after the Supreme Court's review, it was irrelevant to the decision's impact. "This case is one of considerable importance, on the subject of contempt, in this great newspaper age, when the power of the press seems to be the great king before whom all must bend its knee," William Rockel wrote in *The Central Law Journal*, just five months after the Ohio Supreme Court's decision.[119] His comment reflected a growing concern among the nation's judges and lawyers that an increasingly powerful and aggressive press was becoming a threat to proper – and fair – judicial procedure. The *Myers* ruling was cited in at least eight other cases during the following decade, as it represented a powerful reassertion of the judiciary's inherent right to employ the contempt authority in the manner that courts had practiced for centuries.

Cooper v. People ex rel. Wyatt, decided in 1889, was another case in which the court decided that it was a contempt to publish an article that tended to impede or delay justice. *The Denver Republican* had decided to take a stand against what its proprietors believed to be a judicial outrage. Thomas Stuart, a judge on the criminal court of Arapahoe County, Colorado, had granted a bond to release John Wyatt from jail while his legal case was pending.[120] The *Republican* disliked that move, but it was even more incensed about the repeated delays in Wyatt's case, which allowed him to remain free even longer. On July 13, 1889, under the headline "A Judicial Outrage," the newspaper published the following statements:

> Judge Thomas B. Stuart of the district court dug his official grave both wide and deep when he issued a writ of *habeas corpus* on Thursday night for the liberation of Deputy Secretary of State Wyatt from the jail of Arapahoe county.... No wonder the people lose faith in the administration of justice when courts and

[119] William M. Rockel, "Contempt—Libel of Presiding Judge—Judicial Notice. Myers v. State, Supreme Court of Ohio, May 21, 1889," 29 *The Central Law Journal* 310 (Oct. 18, 1889): 310, reproduced in American Periodicals Series Online 1740-1900.
[120] *Cooper v. People ex rel. Wyatt*, 1889 Colo. LEXIS 154, 3.

> judges can be found ready to stretch their authority until it cracks in efforts to shield culprits from deserved punishment. No wonder the natural sense of justice of men often tempts them to take the law into their own hands for the punishment of criminals, when observation convinces them that the courts cannot be depended upon to insure the administration of justice.[121]

The *Republican* hammered the issue the next day as well, publishing articles that the case record describes as "severely censuring Judge Stuart's action in the Wyatt case...."[122] Having heard that Judge Stuart was not pleased about the previous day's publication, and having heard that the judge appointed two attorneys to consider the matter, the *Republican* struck a bold and defiant tone by declaring that "if the Republican was guilty of contempt yesterday morning, it is still more in contempt this morning, for we not only do not take back a word we have already said in this matter, but repeat it all with emphasis."[123] The newspaper also published an illustration in which ropes were attached to Wyatt; the public was shown trying to pull him into jail, while Judge Stuart and others were tugging in the opposite direction.[124]

Judge Stuart had had enough. Nathaniel Hill, as the majority stockholder of the Republican Publishing Company, Kemp Cooper, as the manager of the *Denver Republican*, and William Stapleton, as the paper's editor, were charged with contempt of court.[125] The men submitted eight arguments against the charges, including the following: the court had no authority to punish publications made away from the immediate vicinity of the court; the publications were not contempts; the articles were not intended to disparage the court, prejudice a pending case, or obstruct the administration of justice; and "they had and still have the right, as editors, managers and publishers of said paper,

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[121] Ibid., 8-9, 10.
[122] Ibid., 13.
[123] Ibid., 14.
[124] Ibid., 15.
[125] Ibid., 16.

to examine, criticise [sic], comment upon or condemn publicly in said newspaper the proceedings of any and every department of the government of this state...."[126] The judge dismissed the charge against Hill, but Cooper and Stapleton were found guilty of contempt, and each was ordered to pay a fine of $300.[127]

They appealed their convictions to the Colorado Supreme Court, which reached the following similar conclusion:

> There can be no doubt that the tendency of the articles and cartoon exhibited in this affidavit ... was to prejudice the public as to the merits of a cause then pending and undisposed of; to degrade the court and judge before whom the same was pending; and to impede, embarrass and defeat the administration of justice in reference thereto.[128]

In the *Denver Republican*'s articles, "grave reflections are cast upon the court and upon the judge," and Justice Charles Hayt wrote in the court's decision that the whole intent of the publications was to "inflame the popular mind against both the petitioner and the judge...."[129] It could take weeks to find an impartial jury, he noted, and all of that care would be in vain "if an editor, a litigant, or those in sympathy with him, should be permitted, through the medium of the press, by promises or threats, invective, sarcasm or denunciation, to influence the result of the trial...."[130] Justice Hayt concluded that the Colorado Supreme Court and the state's lower courts had the authority to hold such publications in contempt, and he affirmed the original ruling against Cooper and Stapleton.[131] In a final attempt to overturn their convictions, both men asked for a

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[126] Ibid., 18-21.
[127] Ibid., 22.
[128] Ibid., 46.
[129] Ibid.
[130] Ibid., 47.
[131] Ibid., 50.

rehearing before the Colorado Supreme Court, but Chief Justice Joseph Helm denied their request.[132]

Conclusions

One of the most important questions during this period was whether the courts actually had the authority to punish publications as constructive contempts. By this time, most states had approved contempt statutes that outlined what offenses were – and were not – contempts of court. These were usually divided into direct contempts, which occured in or near the courtroom, and indirect or constructive contempts, which occured elsewhere. Though not always specifically mentioned within state statutes, editors and publishers consistently argued that their publications were included among those actions that could not be punished as constructive contempts. Judges, however, were very adept at reading between the lines of legislation which, intentionally or not, usually left enough room for judicial interpretation. Nearly unanimously during the 1880s, state courts determined that the power to punish publications as contempts was unquestioned. Three cases – *State ex rel Liversey et al. v. Judge of Civil District Court, Ex parte Steinman and Hensel*, and *Cheadle v. State* – recognized the existence of legislative authority to set parameters on the contempt power, but all other decisions generally viewed such statutes as merely suggestions.

A considerable amount of American case law on the topic had developed by this period, as well. Judicial opinions considered the decisions from other states more often and relied less on British contempt rulings. Precedent, for the most part, did not seem to play a powerful role in most decisions. If a judge agreed with a previous decision from

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[132] *Cooper v. People ex rel. Wyatt*, 1889 Colo. LEXIS 155, 8.

another state, he would cite it. If he disagreed with the outcome, he would either explain why he believed that court was in error or completely ignore the case.

For their part, editors and publishers consistently made similar arguments: judges had no authority under state law to cite their publications for contempt; the reports or editorials were not intended to obstruct the administration of justice, embarrass the court, or influence the final outcome of the case; and the editors and publishers were ignorant of a particular case's pending legal standing. Such arguments usually fell on unsympathetic ears – nearly every editor and publisher charged with contempt by publication was found guilty. However, the punishment was inconsistent, ranging from a small fine and reprimand to a fine of several hundred dollars and time in jail.

The 1880s, though, were only a precursor to the most active decade of the century. The 1890s would see more than two dozen contempt by publication decisions, and the chasm between the expansive and restrictive philosophies of judicial contempt grew even wider. The movement away from legislative restrictions continued to grow as more judges concluded that their contempt authority was not subject to statutory regulations. The decade also experienced a final resurgence of cases that supported the legislative branch's power to define the limits of the contempt authority. The disparate decisions only exacerbated the already unpredictable nature of contempt by publication litigation.

CHAPTER SIX

RESTRICTIVE PHILOSOPHY, 1890-1899

The Nineteenth Century's last decade was the most prolific for contempt by publication cases. It was an indication that America's newspapers and courts were increasingly crossing the dividing line between the constitutional guarantees of a free press and a fair trial. As the contempt by publication case record suggested, though, the exact location of that dividing line was subject to interpretation. Some cases favored the judiciary's use of contempt to control printed accounts of pending trials or criticisms of court officials. Other decisions supported a publisher's privilege to comment on such proceedings. This lack of uniformity occurred even though there was a substantial amount of American case law on the subject, and the majority of states had statutory guidelines in their civil and criminal codes concerning contempt. Instead of creating a clear legal picture of contempt by publication, these factors contributed to the formation of two general ideologies – a restrictive view of courts' contempt power and an expansive one. This chapter concerns the former category. During the 1890s, more than a dozen contempt by publication cases carved out exceptions to the seemingly all-powerful authority. These decisions upheld statutory restrictions on contempt, considered the intent of the publications, reinforced the need for proper judicial procedure, and supported the right to comment on completed judicial decisions.

Upholding Statutory Restrictions

The recognition of statutory restrictions on contempt by publication was one of the largest categories under the restrictive philosophy of the 1890s. Such recognition had roots in the Nineteenth Century's first decade, when the Pennsylvania Assembly approved laws in 1809 that curbed the state judiciary's contempt power. The U.S. Congress approved similar federal legislation in 1831. These ideals were evident in four cases during the final years of the century.

According to the 1891 ruling in *In re Shannon*, Montana's inferior courts had to adhere to statutory restrictions concerning contempt convictions. The *Daily Miner* of Butte published a letter to the editor in which J.W. Shannon made several disparaging remarks about the local police court.[1] The court considered the publication as a contempt against it and called Shannon to answer for his actions. He told the court that it did not have the jurisdiction to punish him for contempt, and he insisted that his letter to the editor was not a contempt of court.[2] The court paid little heed to Shannon's opinions, though, and the police magistrate found him guilty. Shannon was ordered to pay a $50 fine and court costs totaling $10. He also was ordered to stay in the county jail until the fine and costs were paid.[3] Shannon appealed his conviction to the Montana Supreme Court.

"The power of inferior courts to punish persons for contempt, in cases where the act for which the punishment is adjudged did not occur in the presence of the court, is questioned by some authorities, and denied altogether by others," Supreme Court Justice

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[1] *In re Shannon*, 1891 Mont. LEXIS 49, 3-4.
[2] Ibid., 4-5.
[3] Ibid., 5.

Edgar Harwood wrote.[4] Montana's Code of Civil Procedure, he noted, had clearly defined what was considered to be an out-of-court contempt, and publications were not on the list. The "expression of sentiments through the medium of the public press or otherwise regarding the practice of the court, or of results or abuses alleged to flow from the past administration of such court," he said, was protected from prosecution. "A power to punish for such utterance, or to silence the voice of comment upon such matters, would be the discovery of an unknown quantity in jurisprudence, and the exercise of it would be a menace to a free and spirited people."[5] Montana's constitutional right of free speech, Harwood concluded, "would be set at naught by the exercise of such a power, whenever that freedom of speech happened to be directed to the action of public courts."[6] The Montana Supreme Court, expressing surprise that the police court even bothered pursuing a contempt citation in this matter, dismissed the charge against Shannon.[7]

It was not very long before the Supreme Court of Montana considered another case of contempt by publication, and the 1891 decision in *In re MacKnight* was similar to *In re Shannon*. James MacKnight had been imprisoned for publishing a contempt against the District Court of the Second Judicial District, located in Silver Bow County, Montana.[8] In its July 7, 1891, issue, the *Helena Daily Journal* published an article titled "Why There's Prejudice."[9] It purported to contain the comments of a man who spoke not only about a case pending before the district court, but also about the state of justice in that part of Montana. According to the source, "nothing like a fair trial can ever be had in

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[4] Ibid., 8-9.
[5] Ibid., 10-11.
[6] Ibid., 11.
[7] Ibid., 13.
[8] *In re MacKnight*, 1891 Mont. LEXIS 45, 1.
[9] Ibid., 5.

Silver Bow County, as neither a judge nor a jury could be obtained there that would render a decision in accordance with the evidence."[10] John McHatton, a judge who sat on the District Court of the Second Judicial District, ordered MacKnight to appear before him to answer for the publication. MacKnight admitted that he was the *Daily Journal*'s managing editor at the time of the publication, and he told the judge that he had written the article in question.[11] However, he denied that the article was a contempt against the court or the judge, and he said it certainly was not intended to be interpreted as such.

The judge then ordered MacKnight to identify the person who made the remarks, but he refused. Despite being "under peril of commitment for contempt" if he did not reveal the person's name, MacKnight said he would not do so without the person's permission.[12] The court granted a continuance so MacKnight could consult his source, and when the hearing resumed, MacKnight again refused because the source would not grant permission to reveal his identity. The judge declared MacKnight "guilty of contempt for refusing to disclose the name of the person demanded," and the judge refused to rule on the original charge of contempt related to MacKnight's publication.[13] MacKnight appealed to the Montana Supreme Court.

His attorney offered two arguments for consideration. If the publication was a contempt, he said, all relevant inquiries in the case should have stopped when MacKnight admitted that he wrote and published the article.[14] The judge had no right to further question MacKnight about the source of the published comments because that information was irrelevant to the contempt case. The attorney also said that MacKnight

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[10] Ibid., 6.
[11] Ibid., 7.
[12] Ibid., 9.
[13] Ibid., 9-10.
[14] Ibid., 13-14.

had a legal right to refuse to answer the question because Montana's constitution protected witnesses from testifying against themselves.[15] Secondly, the attorney said that the publication at the center of the legal issue could not be considered as a contempt of court under Montana's laws. The state's Code of Civil Procedure excluded publications from a list of contemptuous actions, and he said the lower court exceeded its judicial authority when it pursued the contempt case. Supreme Court Justice Edgar Harwood, who also authored the opinion in the case of *In re Shannon*, agreed, saying that "in this case the law fully sustains both propositions in favor of the prisoner."[16] Montana law was clear that witnesses were not required to answer questions that were not relevant to the issue at hand, the court ruled, and the identity of the person who made the comments was not relevant to the contempt charge. The Supreme Court also concluded that the contempt charge was "not within the acts defined by statute as contempts, nor is it within the general definitions of that offense, as found in the authorities upon this subject."[17]

The attorney who represented the lower court judge in the case cited the works of Blackstone to support the judge's position, but the Montana Supreme Court rejected that argument with the following observation:

> This eminent commentator on the laws of England gave his works to the world many years before the adoption of the Constitution of the United States, and at a time when a censorship of the press was thought to be a proper office of government. It is well known that in his time the English courts assumed a much wider scope on the subject of applying the process of contempt to restrict the freedom of speech and publication than in more recent times. And yet this proceeding cannot be supported by citations from Blackstone....[18]

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[15] Ibid., 3.
[16] Ibid., 14.
[17] Ibid., 16.
[18] Ibid., 18.

The Supreme Court made it clear that while it did not support publications such as MacKnight's article, "we are passing upon a question of law, as between the rights of a citizen and the power of a court to summarily imprison upon a charge of contempt."[19] The contempt power was meant as a means to enforce obedience and respect to the court's authority; "for this purpose the power is given, and to this purpose the power is limited. It is not to enforce sentimental respect," Harwood wrote. The court concluded that MacKnight's publication could not interrupt the progress of justice because "nothing was said in relation to the merits of the case, or the litigants...."[20]

Finally, the Supreme Court reiterated the constitutional guarantee of speech and press freedom with the following:

> What was the purpose of this constitutional guaranty? Was it to grant freedom to ordinary speech and publication which could excite the resentment of no one? ... The history of the struggle for the establishment of the principle of freedom of speech and press shows that it was not ordinary talk and publication, which was to be disenthralled from censorship, suppression, and punishment. It was in a large degree a species of talk and publication which had been found distasteful to governmental powers and agencies.[21]

The people of Montana did not omit that guaranty of freedom of speech and publication from their constitution, Harwood concluded, and he ordered MacKnight to be released from jail.[22]

The 1895 case of *In re Robinson* reinforced North Carolina's statutory restrictions on the power of contempt. Frank Robinson was editor of the Asheville, North Carolina, *Daily Citizen* when he found himself facing jail time for contempt of court.[23] An editorial titled "The Removal," published on July 24, 1895, suggested that the judge of the

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[19] Ibid., 19-20.
[20] Ibid., 20.
[21] Ibid., 22.
[22] Ibid., 22-23.
[23] *In re Robinson*, 1895 N.C. LEXIS 113.

Western Criminal Circuit Court of Buncombe County overreacted when the *Daily Citizen* published a mistake concerning some testimony in an ongoing legal matter. The newspaper noted the minor mistake, which it called an "unintentional error, corrected by the context" of the story, and corrected it the next day.[24] According to the editorial, "the mistake is too shallow and too flimsy to deserve the consideration Judge Ewart seems to have given it."[25] The judge, though, was convinced that the error required the entire case to be moved to another location to ensure a fair trial. Considering the publication to be "a grossly inaccurate report" that was intended to "misrepresent this court and to bring it into contempt and ridicule," he charged Robinson with contempt.[26]

Robinson admitted that he published the editorial, but he insisted that it was not a "grossly inaccurate report of the proceedings."[27] Furthermore, he said the editorial "was written and made in the exercise of the constitutional rights of the press to fairly, justly and in good faith inform the public of the acts and doings of public officers...." Robinson claimed his right "to criticize the action of public officers," and he said that the publication did not contain "any comment as applied to a public elective office not allowed by the freedom of the press...."[28] He also denied any effort to bring public disrespect or ridicule upon the court. The circuit court judge was unmoved, though, and sentenced Robinson to thirty days in jail and ordered him to pay a $250 fine and court costs.[29] He appealed to the North Carolina Supreme Court.

Supreme Court Justice David Furches noted that courts had unrestricted power to

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[24] Ibid., 1.
[25] Ibid., 1-2.
[26] Ibid., 2-3.
[27] Ibid., 3.
[28] Ibid., 4.
[29] Ibid., 5.

punish contemptuous actions that occurred in the courtroom or its immediate environs. However, using the contempt authority to punish acts that were not committed in the presence of the court – such as publications – could be regulated by statute. "The case we are now considering falls under this class," he said, citing North Carolina's 1871 law regulating judicial contempt.[30] The lower court had found Robinson guilty of violating the following part of that law:

> The publication of grossly incorrect reports of the proceedings in any court, about any trial or other matter pending before said court, made with intent to misrepresent or to bring into contempt the said court; but no person can be punished as for contempt in publishing a true, full and fair report of any trial, argument, decision or proceedings had in court.[31]

Justice Furches, however, concluded that there was nothing in the *Daily Citizen*'s article that was grossly incorrect. The following passage suggested that his fellow justices agreed:

> We do not see that that part of the publication purporting to give an account of the proceedings, of itself, is calculated to produce disrespect and contempt for the court.... We must hold that, under the statute of 1871, the respondent cannot be punished for contempt for the language used in his comments upon the court....[32]

The North Carolina Supreme Court reversed Robinson's contempt conviction.

The New York Court of Appeals' 1895 decision in *Barnes v. Court of Sessions of Albany County* also supported legislative curtailment of the judicial contempt power. The April 12, 1894, edition of the *Albany Morning Express* in New York included two articles concerning the Albany County Court of Sessions.[33] An editorial, titled "The Disgrace of Clute," and a news report, titled "His action needs explanation," suggested that the local

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[30] Ibid., 7.
[31] Ibid., 7-8.
[32] Ibid., 9.
[33] *Barnes v. Court of Sessions of Albany County*, 1895 N.Y. LEXIS 948, 6.

judge had forced two prosecuting attorneys to defend two men who had been charged with violating election laws. The editorial included the following:

> County Judge Jacob H. Clute added to his unsavory notoriety yesterday by assigning Arthur L. Andrews and Henry A. Peckham to defend men who were arrested on election day charged with attempting to vote illegally. Messrs. Andrews and Peckham have been prominent among the lawyers whose services have been given freely and without charge to prosecuting violators of the election laws.... In the light of these facts the low-down character of the judicial trick to which Jacob H. Clute descended may be realized.[34]

District Attorney James Eaton requested that Judge Clute charge William Barnes, Jr., George Southwick, and Arthur Lucas, the editors and publishers of the *Morning Express*, with contempt of court.[35] New York's Code of Civil Procedure defined the "publication of a false, or grossly inaccurate report of [a court's] proceedings" as a contempt of court.[36] When they appeared before the judge, all three men denied that the article was false or grossly inaccurate.[37] Judge Clute, though, declared the men guilty of contempt and ordered each of them to "pay a fine of one hundred dollars, or in lieu thereof to each stand committed to the Albany county jail for the period of thirty days."[38] Barnes, Southwick, and Lucas appealed to the New York Court of Appeals.[39]

Judge Albert Haight's opinion concluded that the newspaper publications were to be regretted, as he noted in the following passage:

> The publication of the articles was exceedingly harmful. They tended to bring into disrepute the administration of the law, and to destroy the confidence of the public in and its respect for the proceedings of our courts. If the judge is guilty of the acts charged complaint should be made to the proper officers, and proceedings

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[34] Ibid., 6-7.
[35] Ibid. 8.
[36] Ibid., 10.
[37] Ibid., 7.
[38] Ibid., 8.
[39] The Court of Appeals of New York was the state's highest appellate court at the time of this case. It was first established by a constitutional convention in 1846 and was modified in 1869 by another convention. Its members were given the title of "judge" instead of "justice." A short history of the Court of Appeals of New York is available at http://www.law.cornell.edu/nyctap/court/background.htm.

> instituted for his removal. If he is not guilty, the dignity of the court should be preserved by the prompt punishment of the offenders.[40]

The punishment, however, must be carried out within the law, he said. New York's contempt statute required the court to specifically identify the offending portions of a publication before reaching a contempt verdict. Judge Clute's decision did "not specify the particular circumstances of the offense."[41] Haight made the following conclusion:

> The articles published, as we have seen, contained numerous accusations and denunciations of the judge. These accusations and denunciations may be libelous, but they were not within the statute [on] contempts of court.... The publication of these proceedings could not be a contempt if it were true and fair. The appellants, therefore, had the right to know whether they were adjudged guilty because of the publication of such proceedings of the court, or whether they were adjudged guilty by reason of other matters that appeared in the articles.[42]

The New York Court of Appeals ordered that the convictions be reversed and dismissed the case.

The previous four cases clearly indicated that some courts were still willing to concede to the legislative branch's authority to regulate the contempt process. Such interpretation had been eroding since the Arkansas Supreme Court's *State v. Morrill* decision in 1855, which eschewed legislative oversight of the judicial contempt authority. Despite being among the largest class of restrictive decisions during the 1890s, the cases that upheld statutory limits were just a fraction of the decade's total number of cases. Barely 14 percent of them (four out of 28) supported some kind of codified restraint.

Intent of Publication

A subcategory of cases equal in number to that of above was the one that considered the publication's intent. This consideration had been evident in contempt by

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[40] Ibid., 9.
[41] Ibid., 12.
[42] Ibid., 14-15.

publication cases throughout the 1800s, but it experienced a final resurgence at the end of the century. The judges or justices who decided these cases considered an intangible aspect of contempt law – the intent of the publications' authors. Some state contempt statutes recognized a judge's authority to cite a publication that "tended" to obstruct the administration of justice or bring a court into disrepute. However, virtually no statute included a provision requiring a judge to ascertain the intent of the editor or publisher who was responsible for the publication. This was an area of contempt law in which judges recognized an inherent authority to make that determination themselves. Some judges relied on the editors' sworn testimony that they had not intended to insult a court or interfere with the administration of justice. Other cases simply determined that a publication had no intelligible meaning and therefore could not be definitively declared as a contempt. All of these decisions ultimately relied on the discernment of the presiding judge.

Under the 1892 decisions of *Fishback v. State* and *Allen v. State*, an act (or publication) had to have been coupled with the intent to disobey the court or bring it into public disrespect in order to be contemptuous. Though both cases were listed separately in the legal record, they concerned the same set of circumstances. Rumors of corruption had been circulating around Terre Haute, Indiana, about the bid process for a city sewer project.[43] In March 1892, the Vigo County grand jury convened to investigate the sewer contracts. The grand jury itself became the subject of new rumors when it was believed that the panel had ceased its investigation and had no plans to pursue the matter.[44]

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[43] *Fishback v. State*, 1892 Ind. LEXIS 184, 2.
[44] Ibid., 3.

William Fishback, the editor of *The Terre Haute Express* daily newspaper, published the following editorial comments on March 30:

> The array of lawyers to defend those who are to be investigated in this city scandal increases day by day, and the array of democratic fine-workers, who are doing day and night work in the case under the direction of the democratic bosses, is also increasing. Some days ago the Express called attention to the fact that it had been demonstrated that in every instance where unusually excessive profit was to be secured by the action of public officials, that democrats were the beneficiaries.[45]

The *Express* also stated that "certain influences are being brought to bear to shut off serious investigation."[46]

The Vigo Circuit Court charged Fishback with contempt of court, saying his editorial suggested that the entire affair had political overtones and that the local political bosses held "undue and improper influence over the grand jury and Judge Taylor of the Vigo Circuit Court...." Fishback also was accused of purposefully suggesting to his readers that the circuit court, including the court officers and the grand jury, could not be trusted to investigate the case properly.[47] The court was forced to make public statements that the grand jury had not completed its investigation and was still in session.[48]

Ordered to appear before the court to explain himself, Fishback entered several arguments in his defense. He told the court that at the time he wrote the article, "he honestly believed from his information that the investigation of the said sewer cases was stopped for political reasons, affecting both Democrats and Republicans, and he desired the examination to proceed...."[49] He also said he had no intention of "imputing corrupt motives to the court or of interrupting, embarrassing or obstructing the administration of

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[45] Ibid., 4.
[46] Ibid.
[47] Ibid., 6.
[48] Ibid., 7.
[49] Ibid., 8.

justice; but on the contrary, was laboring in good faith to aid in the furtherance of justice...."[50] He asked the Vigo Circuit Court to dismiss the charge. It did not grant Fishback's request and instead found him guilty of contempt. The court sentenced him to spend thirty days in the county jail and pay a $100 fine.[51] Fishback unsuccessfully requested a new trial; so he appealed to the Indiana Supreme Court.

Supreme Court Justice Walter Olds determined that even if the grand jury had stopped the investigation, it could have been renewed at any time. Publishing an article that tended to bring the grand jury "into disrepute and embarrass and interrupt a legitimate investigation by them ... would be subject to the cognizance of the court, and the author subjected to punishment if guilty of a contempt."[52] Justice Olds, however, coupled his observation with the following caution about overusing the contempt power:

> It must be remembered that while the right to punish for indirect contempt does and ought to exist in the court, and that in proper cases of clear and unqualified contempt, where parties seek by the publication of articles clearly and manifestly intended to bring the court into disrepute and to destroy confidence in it and embarrass the administration of justice, a court should not hesitate to exercise such power and punish the offender, yet such power is an arbitrary one, and if wantonly exercised would have a tendency rather to detract from than add to the respect and confidence reposed in the courts.[53]

The press had rights with which the court had no power to interfere, he said.[54] "It is legitimate and proper for the press to call the attention of the judiciary, the grand jury, and the officers of the law, to violations of law believed to have been committed," Olds

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[50] Ibid., 10-11.
[51] Ibid., 11.
[52] Ibid., 15.
[53] Ibid., 17-18.
[54] Ibid., 18-19.

wrote, explaining that the "acts of the judiciary are subject to fair and honest criticism the same as those of other public officers."[55]

The Indiana Supreme Court noted that Fishback claimed he never intended to embarrass or obstruct the administration of justice, and he did not intend to question the lower court's motives.[56] In the following passage, Justice Olds noted that that was a key component of Fishback's defense:

> To constitute a contempt there must be an act coupled with an intended disrespect or defiance of the court. Language may be used which conclusively proves such intent, but where the intent is uncertain from the language, and an intended ... disrespect to the court [is] disavowed under oath, and it is asserted that an innocent and consistent use of the language was intended, it purges the contempt.[57]

The Indiana Supreme Court reversed Fishback's contempt conviction and released him from jail.[58] In the related case of *Allen v. State*, the outcome was identical.[59]

In the *Fishback* and *Allen* cases, the Indiana Supreme Court relied on a legal philosophy that had been evident in the early part of the Nineteenth Century. Though a publication may have been considered as a contempt of court, the publisher's intent determined whether he was punished. Believing Fishback had not intentionally brought disrespect onto the Vigo Circuit Court or its grand jury, the Supreme Court overturned his conviction. Justice Olds also took the increasingly rare stance that the contempt power should be used with extreme care.

The 1893 Colorado case of *People v. Stapleton* provided another example in which contempt charges were dismissed because a publication was not intended to bring

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[55] Ibid., 19.
[56] Ibid., 22.
[57] Ibid., 23.
[58] Ibid., 25.
[59] *Allen v. State*, 1892 Ind. LEXIS 237. Fishback had based his editorial comments concerning the grand jury's suspended investigation on information he had received from George Allen.

a court into disrespect. The events that prompted the publication at the center of this case occurred about four years earlier. James Connor, Charles Connor, and James Marshall were sentenced to jail after being convicted of conspiracy to rob a train.[60] They appealed their convictions to the Supreme Court of Colorado, which scheduled the case for review. The review was indefinitely delayed, though, and the Connors and Marshall remained free during the intervening years.

While the case was still technically open for Supreme Court review, the *Denver Republican* published a series of articles concerning the Connors. In its April 14, 1893, edition, the *Republican* reported that a recently elected city alderman had taken a bribe. The article suggested that James and Charles Connor, "notorious political thugs who walk the streets of Denver as living examples of the law's delay, engineered the plot."[61] The article further stated that it was

> a disgrace to the courts that the Connors should be allowed to remain at large to prey upon the political cancers and failings of humanity. Jim Connor is under conviction for train robbery, and he is also under sentence of penal servitude for having stolen a ballot box. His brother, Charles Connor, participated in the train robbery.[62]

It was "humiliating to the whole state that a man like Jim Connor could have influence enough to prevent the highest tribunal from handing down a decision in his case," the editorial stated. "There must be influence of some kind at work somewhere." The article also openly wondered "what mysterious but evidently powerful influence has retarded the machinery of justice so strikingly in this case."[63] The next day, the *Republican* tackled the subject again with the following comments:

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[60] *People v. Stapleton*, 1893 Colo. LEXIS 260, 1.
[61] Ibid., 2.
[62] Ibid., 3.
[63] Ibid., 4.

> Every day the supreme court allows to pass without its taking action on the appeal of the Connor brothers is an encouragement to commit crime. The city should have been rid of these men long ago. There can be no earthly excuse for the supreme court in any manner shielding them from the punishment they so richly deserve.[64]

Charles Connor's attorney brought the publications to the Colorado Supreme Court's attention, saying that the allegations against Connor were "false, defamatory and malicious, and were designed to prejudice his cause so pending before this court." The attorney also argued that the publications meant to convey the idea that "the judges of this court had been improperly and corruptly influenced" and that the assault on the court's honesty and integrity was "meant to intimidate, influence, and coerce the judges, and to embarrass them in the administration of justice."[65] He asked the court to initiate a contempt proceeding against the *Republican*'s editor, William Stapleton, and its manager, Kemp Cooper.[66]

The Supreme Court granted the request, based on the grounds that the charges were

> designed and intended to interfere with, intimidate and embarrass this court in the due and impartial administration of justice, and that said charges, if allowed to pass unnoticed, may injure the standing and usefulness of this court by impairing public confidence in the honesty and integrity of its members.[67]

Supreme Court Justice Victor Elliott noted that the contempt proceeding "was not instituted or instigated by this court of its own motion" but by a party whose cause was pending before the court.[68] Therefore, it was obligated to grant the motion based on the law, not on the status of the people involved. He also noted that the case was the first of

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[64] Ibid., 5-6.
[65] Ibid., 6.
[66] For a previous contempt case against Stapleton and Cooper, see *Cooper v. People ex rel. Wyatt* in Chapter Five.
[67] Ibid., 7.
[68] Ibid., 9.

its kind for the Colorado Supreme Court. "A few cases have been brought here for review involving contempts against other courts of record; and in such cases, the law has been carefully considered and conservatively declared," he wrote. The court had made no attempt to abridge the liberty of the press, he said, and punishments had been handed down only when a person had abused that liberty.[69]

In the case against Stapleton and Cooper, Justice Elliott said neither man expressed regret for any of the articles. "On the contrary," he wrote, "they seek to defend them all upon various grounds."[70] They first argued that, as managers, they had neither knowledge of nor direction over the published articles. Those statements could have been true in a literal sense, but Elliott concluded that

> the views of the editor supplement and indorse [sic] the language of the reporter; and the very next day the columns of the paper are again made use of by the reporter to repeat the attack thus made upon this court. When the act of an employee is either directed or afterwards ratified by his employer, it becomes the act of the employer....[71]

Stapleton and Cooper also argued that the publications were meant to draw attention to the slow nature of the judicial process in the case against the Connors, "not for the purpose of casting any reflection whatever in the premises upon the court itself, or upon any judge thereof."[72] Elliott also rejected that claim, saying it would be obvious to any intelligent person that the articles were not written solely for that purpose. He asked the following question:

> How can it be claimed that respondents did not intend by said article to impute anything dishonorable to this court, when in their paper they charge that a convicted criminal ... *has influence enough to prevent this court from handing down a decision in a case wherein he had been convicted of crime?* The next

[69] Ibid., 8.
[70] Ibid., 12.
[71] Ibid., 13.
[72] Ibid., 14.

> article charges that this court is *shielding convicted criminals* from the punishment they so richly deserve; and yet respondents say, that such charges imply nothing dishonorable on the part of this court! Can it be that respondents are insensible to the significance of such language?[73]

Elliott's response suggested that he had taken the accusations personally. "The attack upon this court was as cruel and malignant as if the judges had been severally stabbed with a dagger, without provocation and without warning," he wrote. "If the attack did not wound so deeply, it was not because of the means employed, but because the people did not believe the aspersions cast upon the integrity of their judges."[74] Justice Elliott then noted that after the contempt case had been filed, the case against the Connors finally was decided. Though the justices did not believe that the *Republican* had intimidated or coerced them in the matter,

> the conduct of respondents in making charges and imputations against the integrity of this court in and about the Connor case was well calculated to embarrass, was undoubtedly intended to embarrass, and to some extent did embarrass the court in rendering its decision in that case; and thus a most serious offense against the administration of justice was committed.[75]

With all due respect for the profession of journalism, and with no desire to restrict or interfere with its sphere of usefulness, he said, "we must declare that the courts possess advantages superior to the journalist in the matter of hearing, trying, and determining causes affecting public and private rights."[76]

In their final argument, Stapleton and Cooper had insisted that it was their duty as newspapermen to "examine, criticise [sic], comment upon or condemn publicly" all judicial proceedings, and their articles "were published with just, legal and proper

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[73] Ibid., 17-18.
[74] Ibid., 19.
[75] Ibid., 20.
[76] Ibid., 30.

motives, and without any intention whatever to reflect upon this honorable court."[77]

Justice Elliott, however, believed differently, as the following suggests:

> It would be a very pleasant way to dispose of this proceeding for us to accept these oft-repeated assurances that respondents did not intend or design by their publications to convey the impression that this court had been actuated by unworthy motives or controlled by dishonorable influences in the Connor case. But it would be an affectation of credulity on our part to profess to believe such assurances.... We do not believe ... that persons capable of writing such articles did not intend to convey the meaning which their own words import.[78]

The Colorado Supreme Court ordered Cooper and Stapleton to be arrested and brought before the court to make any final arguments in their defense against a charge of contempt.[79] When Stapleton appeared before the court (Cooper was out of state at the time), he admitted that the language used in the articles "was fairly and reasonably open to the construction put upon it by this honorable court, though no such construction was intended or thought of when the same was written and published."[80] He said he regretted having published "language seemingly, though unintentionally, calculated to question the motive or independence of this court, or the honorable justices composing the same."[81] Showing deference to the state's highest judicial authority, he said that he "respectfully submits to the finding and judgment of the court."[82] Because of Stapleton's regrets and retraction, Justice Elliott concluded that no further proceedings were necessary, and he ordered Stapleton to pay his share of the court costs.[83] Cooper later expressed similar regrets concerning the publications. The Supreme Court also dismissed his contempt charge and ordered him to pay the remaining court costs.

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[77] Ibid., 33.
[78] Ibid., 33-34.
[79] Ibid., 37.
[80] Ibid., 38.
[81] Ibid., 39.
[82] Ibid., 40.
[83] Ibid., 41.

A couple of cases in the "intent" category considered how a newspaper publication was to be interpreted. The Nebraska case of *Percival v. State*, decided in 1895, concluded that if a publication's precise meaning was difficult to determine, and the article did not blatantly impugn the court or judge, it could not be considered as a contempt. Washington D. Percival got into trouble when he published a news report in the March 9, 1894, edition of the *Omaha Evening Bee*.[84] The offending article began with the following excerpt: "Justice without equality. Sentences adjusted to fit the men. One party to a crime gets a five-year sentence in the penitentiary, while another gets the benefit of a pull." The rest of the paragraph referred to the previous day's decision from the district court's criminal section. Judge Cunningham R. Scott, fearing the publication caused the *Bee*'s readers to view him as "corrupt, and influenced by corrupt motives," charged Percival with contempt.[85] Given the chance to defend himself, Percival claimed that he had no involvement with either the writing or the publication of the paragraph's first three sentences. However, he admitted that he wrote the rest of the article.[86] He also denied any intention to embarrass or impede the judicial process. His excuses fell on unsympathetic ears. The judge convicted him of contempt, and Percival appealed to the Nebraska Supreme Court.

In a relatively short decision, Justice Thomas Harrison ruled that Percival's report did not contain anything that could be interpreted as accusing the district court of being corrupt or influenced by corrupt motives.[87] He also concluded that the term "pull" had no

[84] *Percival v. State*, 1895 Neb. LEXIS 276, 3.
[85] Ibid., 4.
[86] Ibid., 4-5.
[87] Ibid., 8-9.

intelligible meaning and did not imply that the district court was corrupt.[88] The Nebraska Supreme Court overturned Percival's conviction. The outcome was the same in the case of *Rosewater v. State*, which was decided the following year.

The 1896 case of *Rosewater v. State* also determined that if a newspaper article could be interpreted in different ways, and the court could not fully determine that the language was intended to be contemptuous, the publisher was not liable for contempt. The facts of the case were similar to those in *Percival v. State*. The District Court of Douglas County, Nebraska, had convicted Edward Rosewater of contempt of court for the same article published in the *Omaha Evening Bee*.[89] Though he was the newspaper's editor and manager, Rosewater claimed that he had not written the article and did not know it existed until after it was published.[90] The judge held him responsible anyway and sentenced him to pay a fine of $500 and spend thirty days in the county jail.[91] Rosewater appealed to the Nebraska Supreme Court.

Justice T.L. Norval wrote the majority opinion and referred to the decision in the *Percival* case. "We are fully satisfied with the conclusion there reached," he wrote. "That decision therefore controls this...."[92] He explained in the following manner:

> The comments in question, unaided by innuendoes, cannot be said to be of a character tending to influence the decision of the court, or to impede, interrupt, or embarrass it in the exercise of its proper functions, and as the proofs fail to show that they were employed in their culpable sense they do not amount to a contempt of court.[93]

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[88] Ibid., 9.
[89] *Rosewater v. State*, 1896 Neb. LEXIS 639, 1.
[90] Ibid., 3.
[91] Ibid., 1.
[92] Ibid., 6.
[93] Ibid., 7.

Though Justice Norval recognized contempt as a tool necessary to punish publications that interfered with the administration of justice, "no one ought to be found guilty upon a doubtful charge of indirect contempt, and especially so in a case in any manner involving the freedom of the press."[94] Such authority "should only be exercised when it is manifest that the publication was intended to bring the court into disrepute and to destroy confidence in it, and obstruct or embarrass the administration of justice," he wrote.[95] The case against Rosewater did not meet those standards, and the Nebraska Supreme Court reversed his conviction.

By the end of the Nineteenth Century, it had become exceedingly rare for a contempt charge to be dismissed – or a conviction overturned – because the author of the publication claimed he meant no ill will toward the court. Such decisions were more common during the early part of the century, when judges seemed much more willing to take an editor or publisher at his word. However, by the 1890s, America's judiciary generally viewed the press as arrogant, abusive, and irresponsible. Earlier in the century, author Lambert A. Wilmer's *Our Press Gang* had blamed the press not only for causing the acquittals of "the most desperate offenders" but also for bringing "condemnation and punishment" to many innocents. Such criticisms of the press had become common by the end of the Nineteenth Century.[96]

Procedural Error

A third class of restrictive contempt cases during this period consisted of convictions that were overturned because of procedural errors. According to these

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[94] Ibid., 10-11.
[95] Ibid., 11.
[96] Cited in Hazel Dicken-Garcia, *Journalistic Standards in Nineteenth-Century America* (Madison, Wis.: The University of Wisconsin Press, 1989), 192.

opinions, there were prescribed judicial procedures that were necessary to reach a proper verdict in a contempt by publication case. If a judge violated a defendant's right to defend himself or submit evidence in his favor, any subsequent verdict and conviction were in error.

The Kansas case of *State v. Henthorn* determined in 1891 that a contempt proceeding required a judge to follow proper judicial procedure. C. Perry was facing contempt charges for publishing articles about a local court action. On January 7, 1890, the *Daily Telegram* published an account of Perry's arrest. The following day, "without any affidavit, complaint, or information first having been filed therein," the District Court of Cowley County ordered J.H. Henthorn and two others to be arrested on charges of contempt. Henthorn, who was the editor of the *Daily Telegram*, told the court that the article was not meant to prejudice the public against the court or the judge, and he said he had no intention of influencing or obstructing the administration of justice.[97] The district court found Henthorn guilty anyway, ordering him to pay a $100 fine and court costs and to spend time in the county jail until the costs were paid.[98]

Henthorn appealed to the Kansas Supreme Court, which reversed his conviction. It determined that the lower court "had no jurisdiction of the defendant, because no affidavit or information was filed in the court as a basis for the warrant of arrest upon which the defendant was taken into court and tried."[99] *State v. Henthorn* was the first of a few contempt by publication cases during the 1890s in which the conviction was overturned because of a procedural error.

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[97] *State v. Henthorn*, 26 Pac. 937 (Kan. 1891), 937.
[98] Ibid., 937-938.
[99] Ibid., 939.

The decision in the 1893 New Jersey case of *In re Holt* concluded that a court could not convict someone of contempt without first establishing the facts of the case. An article published in the *Camden Echo* questioned the impartiality of the General Quarter Sessions of the Peace of Camden County.[100] The court charged Alfred Holt with libel and contempt and ordered his immediate arrest. His attorney argued that the case should be dropped because the court had not provided "any legal evidence or proof" to support the charges. The judge rejected the claim, convicted Holt of contempt, and sentenced him to pay a $1000 fine and court costs. He also was ordered to stay in jail until all the money was paid.

The case was appealed to the New Jersey Supreme Court. Chief Justice Mercer Beasley ruled that Holt was arrested "on no legal basis whatever" and that the lower court assumed "as a part of its judicial knowledge that the abusive article existed in point of fact.... Such a step was altogether abnormal and illegal."[101] Justice Beasley concluded his opinion with the following observation:

> Thus, from first to last the members of the court were the accusers, witnesses and judges; they took no testimony but convicted the defendant from their own intuitive knowledge. It is not necessary to say that such a course has not, in any respect whatever, the least semblance of a proceeding in a court of law. The arrest and conviction were altogether arbitrary and illegal.[102]

The New Jersey Supreme Court overturned Holt's conviction.

The case of *McClatchy v. Superior Court of the County of Sacramento* also concerned a procedural error. The 1897 California decision ensured that a person charged with contempt by publication had to be given the opportunity to enter evidence in his own defense. The case also recognized truth as a defense against contempt. The Superior

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[100] *In re Holt*, 1893 N.J. Sup. Ct. LEXIS 82, 1.
[101] Ibid., 2.
[102] Ibid.

Court of Sacramento County was hearing a case in the spring of 1896 when the *Sacramento Bee* published what was purported to be some witness testimony.[103] The next day, Judge A.P. Catlin referred to the article in open court, calling it "a grossly false statement, a gross fabrication, and that there was not the slightest ground in the testimony of the witness upon which such a statement could be based."[104] The *Bee*'s editorial column included the following comments later that afternoon:

> The *Bee* will not keep in its employ a reporter who garbles or who misstates, but when a newsgatherer [sic] does his duty and tells the truth it will not stand silently by while an aggregation of attorneys try to make him out a liar, and while a prejudiced and vindictive czar upon the bench aids and abets them in such a purpose. The *Bee* reasserts that in all material details the statement ... as given in the *Bee* of yesterday, was the statement ... made upon the stand at Monday afternoon session.[105]

The editorial also stated that the judge and an attorney involved in the case knew the report was correct but still "unhesitatingly, shamelessly, and brazenly declared it to be a gross fabrication." The *Bee* continued with the following:

> There is no paper anywhere that has a higher regard for fair and impartial courts than has the *Bee*, but there is no paper anywhere that has a supremer [sic] contempt than has the *Bee* for a judge who will approve the unmitigated falsehood of an attorney, as Judge Catlin to-day approved....[106]

That was not the last word from the *Bee*, either. Similar columns appeared on the following two days.

Its editor, Charles McClatchy, was ordered to appear before the court to defend himself against contempt charges. He justified the publication on the ground "that it was in fact a correct report of the proceedings at the trial, and that it was published in order to

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[103] *McClatchy v. Superior Court of the County of Sacramento*, 1897 Cal. LEXIS 913, 1.
[104] Ibid., 2.
[105] Ibid.
[106] Ibid., 2-3.

defend himself from the charge made by the judge of the court...."[107] Judge Catlin, however, did not allow McClatchy's defense the opportunity to prove that the *Bee*'s articles were correct. Catlin determined that the "publications were an unlawful interference with the proceedings of the court" and found McClatchy guilty.[108] He was ordered to pay a $500 fine.

McClatchy asked the California Supreme Court to review the case, and Justice W.C. Van Fleet, who wrote the opinion, proposed that only one issue needed to be addressed. "The publication of the truth as to legal proceedings is not a contempt of court," he wrote, citing the 1893 California case of *In re Shortridge*, "and the criticism of the action of the judge, if made only in proper response to an unjust charge against petitioner's veracity, and without intent to improperly influence the proceedings of the court, would not be contemptuous."[109] Van Fleet concluded that a judge had no more right than anyone else to "cast aspersions upon the character of a person not a party or participant in a case on trial, without a right in the latter to defend himself." McClatchy may not have been able to establish such a defense, he said, "but he was not permitted to make the effort."[110] That deprived him of his right to defend himself, as the Supreme Court noted in the following paragraph:

> Contempt of court is a specific criminal offense ... and a party charged therewith, although the proceeding is more or less summary in character, has the same inalienable right to be heard in his defense, especially in instances like the present, of mere constructive contempt, as he would against a charge of murder or any other crime.[111]

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[107] Ibid., 3.
[108] Ibid., 4.
[109] Ibid., 6. See Chapters One and Seven for an explanation of *In re Shortridge*.
[110] Ibid.
[111] Ibid., 10.

According to Van Fleet, it was "not sufficient that the court shall go through the mere form of citing a party to appear upon the pretense of giving him a hearing while in fact denying him the right in its substance...."[112] McClatchy had been denied due process of law, the court ruled, and the conviction was annulled.

California Supreme Court Justice Ralph Harrison filed a dissent in the case. Quoting California's Code of Civil Procedure, he argued that "any unlawful interference with the proceedings of a court is a contempt of the authority of the court...."[113] McClatchy's first article, which included trial testimony, was not contemptuous, but Harrison considered the subsequent articles as contempts. At that point, he argued, the truth of the original publication was irrelevant, and "the court, therefore, very properly refused to permit the truth or falsity of the publication to be made an issue of fact...."[114] He favored upholding McClatchy's conviction.

The case of *McClatchy v. Superior Court of the County of Sacramento* was the last of a class of cases that determined contempt by publication proceedings had to adhere to proper legal procedures. By the final decade of the Nineteenth Century, many states had implemented civil and criminal codes that included specific instructions regarding contempt. Though judges were often skilled at reading between the lines of such codes to ensure maximum flexibility for contempt's use, those who also tried to streamline legal proceedings were overruled. Even when there was no question that a court had the right to punish a publication as a contempt, appellate courts insisted that the correct legal methods be followed in reaching that conclusion.

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[112] Ibid., 13.
[113] Ibid., 17.
[114] Ibid., 21.

No Pending Legal Issue

The final two decisions that restricted the use of contempt by publication upheld a newspaper's right to publish commentary or criticism of concluded legal cases. The idea was straightforward – a publication concerning a concluded case could in no way affect the case's outcome. It did not prevent both of the following newspapers from having to defend themselves against charges of contempt, but the principle ensured their ultimate victory.

Under the 1890 Oregon ruling in *State v. Kaiser*, a publication could not be considered a contempt if it did not address a pending legal issue or tend to influence its outcome. The Circuit Court of Jackson County had issued a summons against E.J. Kaiser, an editor and publisher of the *Valley Record* in Ashland.[115] In its December 12, 1889, issue, the newspaper published an editorial that strongly suggested that the circuit court – and the entire judicial system of southern Oregon – was corrupt. It included the following observation:

> The practicing condition of jurisprudence in this section of the world is as corrupt and criminal in its methods, in proportion to population, amount and magnitude of crime, and purse of criminals, as it is in the cities where these cases are regularly "handled" by the political boss who "makes" the officials, "fixes" the juries, and attends to the case, for a large sum.[116]

The editorial continued with a question that compared local judicial officers to scavengers. "When will the cupidity, indifference and lack of courage of the people in public affairs cease," the editorial asked, "and an effort made to at least put a check to these grasping vultures?"[117]

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[115] *State v. Kaiser*, 1890 Ore. LEXIS 94, 1.
[116] Ibid., 2-3.
[117] Ibid., 3.

The publication secured Kaiser a date in the Circuit Court of Jackson County to defend himself against a charge of contempt. Oregon's Civil Code placed a heavy burden on a judge to show that an out-of-court action, such as a publication, tended to influence a pending case and could be declared a contempt of court. Kaiser's first answer was that the article did not reference any specific case pending before the court or a grand jury.[118] He also argued that the publication, as far as the courts were concerned, was "a criticism of past acts therein, and the same was not intended to have, and would not have, any tendency to interfere with the proper and unbiased administration of the law in any case or cases then or now pending...." Kaiser also assured the circuit court that he did not intend to bring it or its officers into disrespect, and he further claimed that the court had no jurisdiction to charge or punish him for contempt. The circuit court believed otherwise and sentenced Kaiser to pay a fine of $50 and be imprisoned in the county jail for fifteen days.[119]

The Oregon Supreme Court, considering Kaiser's appeal, explored two issues: whether the lower court actually had the authority to punish the publication and whether the publication was punishable as a contempt of court.[120] Chief Justice William Thayer considered the second question first. Oregon's contempt statutes were very specific about what could and could not be punished as a contempt. He concluded that Oregon's laws "strongly indicate that when the act constituting the contempt is not committed in the immediate view and presence of the court or officer," it must be shown to "affect the right or remedy of a party in a litigation."[121] He said it was logical, considering the

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[118] Ibid., 4.
[119] Ibid., 5.
[120] Ibid., 6.
[121] Ibid., 9-10.

circumstances, to conclude that Kaiser's publication did not come within the purview of Oregon's contempt laws.[122] Thayer also was not convinced that courts had ever possessed an "inherent authority to punish as contempt[s] acts which do not affect causes actually pending before them, although the acts tend to degrade the court and bring the administration of justice into disrepute...." Such a position had "never been conceded in this country," he said.[123] The chief justice also recognized that the legislative branch of government did have the authority to determine how the judicial branch used its contempt authority.[124]

Though Thayer indicated that he favored Kaiser's position, he paused to reflect on the publication itself, and his opinion was less than glowing. "Why any man other than an addle-brained lunatic should print such absurd, ridiculous stuff in a newspaper," he said, "is difficult to imagine."[125] His chastisement continued:

> The indulgence in such shilly-shally by managers of newspapers indicate[s] a mania on their part to abuse, vilify and insult officials selected to administer the affairs of government, however devoted and faithful to the public interests those officials may be.... Instead of attending to his business of imparting useful information,—instead of assisting in building up the community and its institutions,—he acts the part of an iconoclast. The course pursued by such persons is a positive damage and injury to society.[126]

If the publishers of such contemptible articles were left alone to breathe their own fetid exhalations, Thayer concluded, a charge of contempt would be "the most suitable punishment which can be inflicted upon them."[127]

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[122] Ibid., 10.
[123] Ibid., 11.
[124] Ibid., 13.
[125] Ibid., 15.
[126] Ibid., 15-16.
[127] Ibid., 17.

Under Oregon's code, however, and judging from decisions in other states, the chief justice determined that Kaiser's publication did not constitute a contempt.[128] "If it had reflected upon the conduct of the court with reference to a pending suit, and tended in any manner to influence its decision therein, it would, unquestionably, have been a contempt," he concluded, but no such circumstances were present in this case.[129] The Oregon Supreme Court ruled that the circuit court was not authorized to punish Kaiser in this circumstance, and his contempt conviction was overturned.[130]

Toward the end of the decade, the Wisconsin case of *State ex rel Attorney General v. Circuit Court for Eau Claire County*, which was determined in 1897, concluded that publications concerning previous judicial decisions could not be considered as contempts of court. Eau Claire County, Wisconsin, was experiencing a hotly politicized election contest in March 1897 for the judgeship of the local circuit court.[131] Presiding Judge W.F. Bailey was seeking reelection, and two other candidates were challenging him for the seat. The election was scheduled for April 6, and the political contest "had become somewhat heated and acrimonious by the publication of newspaper articles pro and con." Henry Ashbaugh, the editor and publisher of the Eau Claire *Free Press*, opposed Bailey's campaign and published an article about him on March 11.[132] The article, which had been written by a local lawyer who also opposed Bailey's reelection, charged the judge with "being extravagant in the management of the court, and with being partial and unfair in respect to his official conduct in the trial of

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[128] Ibid., 16.
[129] Ibid., 16-17.
[130] Ibid., 18.
[131] *State ex rel Attorney General v. Circuit Court for Eau Claire County*, 1897 Wisc. LEXIS 5, 1.
[132] Ibid., 2.

causes, and with being influenced by corrupt motives."[133] The article referred to cases that had already been decided and not to matters that were still under consideration. Later that month, the March 31, 1897, edition of the *Free Press* included an editorial against Bailey's campaign that summarized the previous article's complaints against him.

On April 2, the judge charged Ashbaugh and L.A. Doolittle, the original publication's author, with contempt of court and ordered them to appear before him at three o'clock that afternoon.[134] During the twenty-eight hours that followed their initial court appearance, both men requested – and received – several delays in order to prepare their defense. They filed sworn statements during that time, however, claiming that the information contained in the articles was true.[135] By 7:30 on the night of April 3, Ashbaugh and Doolittle had acquired a writ of prohibition from the Supreme Court of Wisconsin forbidding Judge Bailey from pursuing the contempt charges.[136] Bailey, announcing that he would not continue the contempt proceeding, "at once made an order adjudging both Ashbaugh and Doolittle guilty of a new contempt in the immediate presence of the court, by reason of having filed their affidavit alleging the truth of the articles...."[137] He sentenced both men to spend thirty days in jail.

The Wisconsin Supreme Court took the case under consideration. Justice John Winslow wrote the court's opinion, which began with an immediate recognition of the case's importance. The first paragraph included the following statements:

> The importance of the questions arising in this case, and the imperative necessity of a wise and just decision, can hardly be overestimated. These questions involve not only the right of a court to enforce due respect for its authority, and punish

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[133] Ibid., 2-3.
[134] Ibid., 3.
[135] Ibid., 4.
[136] Ibid., 4-5.
[137] Ibid., 5.

> acts which tend to diminish such proper respect and interfere with the performance of its important public duties, but they involve as well the preservation of personal liberty as against summary imprisonment, the right of free speech, the freedom of the press, and the proper limit which may be placed upon the discussion of the fitness of candidates for public office.[138]

The first question the Supreme Court addressed was this – "did the publications constitute a criminal contempt of court?"[139] Winslow reviewed the charges, which held that the newspaper articles had been "distributed to various persons residing in this state, and were by them distributed and delivered to the officers 'of said court, and to persons summoned as jurors in said court,' and 'were read by the officers and jurors so in attendance in said court.'" He noted that the articles did not refer to any pending cases but commented only on the general character of the judge and his previous acts.[140] That prompted Winslow to consider the disparate conclusions that epitomized Nineteenth Century contempt by publication case law. He observed the following:

> We come to the cases which involve the consideration of adverse or libelous newspaper comments upon the acts of a court in actions already past and ended, and here we find much contrariety of opinion, not to say confusion, in the utterances of courts and text writers. Cases may be found holding directly that such publications constitute constructive contempts, and may be punished as such.... The reasoning upon which such decisions rest is that such publications tend to diminish the respect due to the court in the trial of future causes, and thus impair its usefulness. This doctrine is certainly extreme. Carried to its ultimate conclusion, it would call for the punishment of any adverse criticism on the official conduct of a sitting judge, and absolutely prevent all public or private discussion of court proceedings. All such discussion, if unfavorable to the ability or honesty of a judge, must tend, in some small degree at least, to undermine public confidence in the court in the future.[141]

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[138] Ibid., 8.
[139] Ibid., 9.
[140] Ibid., 12.
[141] Ibid., 13-14.

Justice Winslow, however, also recognized another set of cases. Those cases determined that such publications did not constitute a contempt of court and, therefore, could not be punished. He continued with the following:

> Some of these cases go upon the ground that, even if such publications were punishable as constructive contempts at common law, ... it was competent for the legislature to limit such power by statute, and that such power has been limited by statutes substantially similar to our own.... [These cases] distinctly hold that under our form of government such publications do not constitute contempt, and that to punish them as such would be a serious invasion of the great constitutional guaranties of freedom of speech and of the press.[142]

It was Winslow's view that "newspaper comments on cases finally decided prior to the publication cannot be considered [as] criminal contempt[s]...." Wisconsin's constitution guaranteed "the right of free speech and of free publication of the citizen's sentiments 'on all subjects,'" he wrote.[143] Citizens also were guaranteed "the right to freely discuss the merits and qualifications of a candidate for public office," and Judge Bailey was a candidate for reelection.[144] Winslow considered the following scenario:

> Had [Bailey] been a candidate for any other office, it would not be contended by any one that the publications in question would afford ground for any other legal action than an action for libel in the regular course of the law; but the claim is that because he was a judge, and was holding court at that time, such unfavorable criticism of his past actions may be summarily punished by the judge himself as for contempt. Truly, it must be a grievous and weighty necessity which will justify so arbitrary a proceeding, whereby a candidate for office becomes the accuser, judge, and jury, and may within a few hours summarily punish his critic by imprisonment.... If there can be any more effectual way to gag the press, and subvert freedom of speech, we do not know where to find it.[145]

Winslow also took a very rare step for a judge or justice – he openly questioned whether a court should use the power of contempt to punish publications. "We feel bound to hold that ... no such power as this is necessary for the due administration of justice ...

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[142] Ibid., 15.
[143] Ibid., 17.
[144] Ibid., 18.
[145] Ibid., 18-19.

and it seems clear to us that so extreme a power is inconsistent with, and would materially impair, the constitutional rights of free speech and free press."[146] The Wisconsin Supreme Court dismissed the contempt conviction against Ashbaugh and Doolittle for declaring the truth of the original publication. "Certainly the defendants had a right, when summoned into court, to allege its truth," he said. "It cannot be endured that a court, by unauthorized summary proceedings, should wring from a man such a declaration, and then abandon the original proceedings, and punish this forced declaration as contempt."[147]

The case of *State ex rel Attorney General v. Circuit Court for Eau Claire County* was arguably the most insightful contempt by publication decision of the second half of the Nineteenth Century. It had the advantage of a century's worth of case law to consider, and it accurately articulated one of contempt's most vexing questions – how to treat publications that reported or commented on concluded cases. The Wisconsin Supreme Court noted the "contrariety of opinion" on the matter in the case record while also adopting the truly unique stance that the judicial contempt power was a danger to free speech and a free press.

The cases of *State v. Kaiser* and *State ex rel Attorney General v. Circuit Court for Eau Claire County* carved out protected territory for editors and publishers who wished to publish commentary or criticism of concluded court decisions. However, as the Wisconsin Supreme Court's decision revealed, this was a murky corner of contempt by publication law. There were no prevailing standards. An 1896 decision from Michigan, *In re Chadwick*, reached the opposite conclusion. It determined that a publication could still

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[146] Ibid., 19.
[147] Ibid., 22.

be contemptuous even if the legal matter in question had already been decided. That decision – and several others that expanded the judiciary's contempt authority – will be explored in the next chapter.

Conclusions

The 1890s were a time in which a restrictive view of the judicial contempt power made one final push for domination. The previous decade had witnessed the balance tip overwhelmingly in favor of an expansive interpretation of contempt, which had been gaining popularity since the middle of the Nineteenth Century. However, the thirteen decisions in this chapter suggested a faithfulness to the values of an earlier era in which a charge of contempt did not necessarily mean an automatic conviction. Some appellate courts defied the current trend by rejecting the notion of an all-powerful authority in favor of adhering to statutory limitations and, in some cases, plain common sense. Almost half of the contempt by publication cases considered during the last decade of the Nineteenth Century supported the restrictive philosophy. However, such legal reasoning was not employed often enough to stem the continuing surge of cases that recognized an expansive contempt authority.

CHAPTER SEVEN

EXPANSIVE PHILOSOPHY, 1890-1899

The last decade of the Nineteenth Century witnessed the continued development of an expansive contempt by publication philosophy. The idea that was born in 1855, when the Arkansas Supreme Court fought back against legislative incursion on the contempt power, had since eroded the statutory and geographic limitations that were intended to keep judges in check. At the heart of the expansive view was the belief that the judicial contempt authority could be used under whatever conditions were necessary. It was much easier to accomplish than the circumstances suggested. Despite the existence of codified regulations, judges were largely able to interpret restrictions in a loose manner. State codes were not always specific, and that allowed judges to infer their own meanings of the laws. There was also a considerable – and divergent – amount of state case law on contempt by publication by the 1890s, and there was no national precedent. Judges therefore were able to cite the opinions with which they agreed and ignore the ones that had reached opposite conclusions. Decisions from this decade showed just how expansive the contempt authority had become. Judges still used it to punish publications that impugned a court or threatened the administration of justice. Courts determined that the power could be used to punish editors who abused their press freedoms and even the corporations that owned such newspapers. There were also a few cases in which the courts upheld their inherent right to possess the contempt authority.

Interference, Disrespect, and Abuse

Judges had become increasingly wary of a press which, by the late 1800s, had grown in stature and power. The job of reporter had become very prominent at the nation's newspapers. City dailies during this time relied heavily upon large numbers of reporters to gather and report the news.[1] The late Nineteenth Century also was a period of growth, and newspapers were experimenting with new styles and techniques of reporting. Mass communication professors Walter Brasch and Dana Ulloth suggested that journalists began reporting more often on the unfairness they saw in business, government, and social institutions.[2] The style of reporting known as "yellow journalism," which was a sensationalist take on the news and newsmakers of the day, was also in full bloom by the late 1890s. All of these factors contributed to a rise in litigation against America's newspaper industry. Some scholars also noted that the courts, in an effort to control what many judges believed to be an unaccountable bully, began punishing the press for a variety of offenses deemed prejudicial to a case or disrespectful toward the court.[3] These types of offenses comprised the largest category of cases under the expansive philosophy of contempt.

The case of *Burke v. Territory* in Oklahoma supported the legal doctrine that it was a contempt to publish anything that interfered with the judicial process. The 1894 decision also excluded territorial courts from federal contempt legislation. J.J. Burke and E.E. Brown were charged with contempt for publishing two articles in *The Oklahoma*

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[1] Ted Curtis Smythe, "The Reporter, 1880-1900: Working Conditions and Their Influence on the News," *Journalism History* 7:1 (Spring 1980): 1.
[2] Walter M. Brasch and Dana R. Ulloth, *The Press and the State: Sociohistorical and Contemporary Studies* (New York: University Press of America, 1986), 159.
[3] See Chapter One for an explanation of these views. See also the case of *Ex parte Barry* in this chapter for similar judicial sentiments.

Times-Journal and writing a letter to the judge of the local district court.[4] On February 22, 1894, the newspaper published an article in which it questioned why Judge Henry Scott of the District Court of Oklahoma County was refusing to file a grand jury report for the public record.[5] The newspaper typically copied grand jury reports for the next day's edition; so the newspaper's proprietors were puzzled about why this particular report apparently would not be made public. The paper published the following letter that Burke and Brown had written to the judge the day before:

> Dear Sir: It has been our custom to publish in full all grand jury reports upon the condition of the county, and acts of the county officials. We therefore ask you to permit us to make a copy of the report, filed this forenoon, in time for publication in tomorrow morning's issue of the Times-Journal. If you will leave the report with the district clerk in time to be copied before the hour of closing his office you will greatly oblige us. Respectfully, BURKE & BROWN.[6]

The report was never filed, and the *Times-Journal* concluded that "if Judge Scott persists in ... suppressing the report of the grand jury, the act may rightly be characterized as the most flagrant violation of the rights of the people ever undertaken in Oklahoma."[7] Suppressing the report, the article suggested, "is an effort to brow-beat the grand jury. It is an effort to bend the grand jury to the will of the judge. Such an attempt is a serious one. Judge Scott does not recognize how serious."[8]

The judge responded that the grand jury's report included material unrelated to the legal issues under consideration, and he said it also contained questionable comments concerning several local individuals.[9] Needing more time to review the document, but not wanting to interrupt the current jury trial, Scott said he considered it unwise to file the

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[4] *Burke v. Territory*, 1894 Okla. LEXIS 46, 1.
[5] Ibid., 7.
[6] Ibid., 7-8.
[7] Ibid., 8.
[8] Ibid., 9.
[9] Ibid., 4.

report with the clerk before he had more time to consider it.[10] The judge also stated that his court's proceedings were delayed when he was required to sign for the letter that Burke and Brown had sent to him by special delivery.[11] Scott considered the delay, along with the newspaper publication, as an attempt to "to impede and obstruct and embarrass the administration of justice in said court, and to impeach the integrity of said court, and the judge thereof."[12] He charged them with contempt of court, and he gave both men the opportunity to defend themselves. "All of these matters alleged to be contempt of court were published in the absence of Mr. Burke," Brown said. "He was out of the city and knew nothing about them, and was not in the city until two days after. I have no apology to make."[13] Burke made the following statement: "May it please your honor, I have no apology to make. I am one of the publishers of the Times-Journal, of course, and I shall take medicine along with the other parties."[14] The judge found both men guilty of contempt and sentenced each of them to pay a $250 fine and spend ten days in the county jail.[15] They appealed their convictions to the Oklahoma Supreme Court.

Supreme Court Justice A.G.C. Bierer rejected Burke and Brown's argument that the lower court could not punish them for contempt without an indictment and without a jury trial. Another point of appeal was that they had been given no opportunity to refute any evidence presented against them.[16] Justice Bierer, though, noted that neither man denied the acts of publishing the articles and writing the letter. "The defendants admitted the doing of them, but sought to excuse themselves from the consequence of the acts by a

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[10] Ibid., 5.
[11] Ibid., 11.
[12] Ibid., 9-10.
[13] Ibid., 13-14.
[14] Ibid., 14.
[15] Ibid., 12.
[16] Ibid., 18.

denial consisting of legal conclusions, and by the allegation of matters which could in no way be a defense," he wrote. "All of the matters of fact which the court found, were matters that were either admitted by the defendants' answer or of which the court could take judicial knowledge."[17] Burke and Brown also appealed on the claim that their actions could not be considered contempts of court because they did not come within the provisions of the Congressional Act of March 2, 1831, which limited contempt citations to actions occurring in or near the courtroom.[18] The Oklahoma Supreme Court ruled that the federal act was "not applicable to territorial courts and does not limit the inherent power given by congress to this court to punish contempts against its authority."[19] Justice Bierer ultimately supported the lower court's decision that Burke and Brown had committed a contempt, and he issued the following statement:

> If anything further than the language published was necessary to show the intention and purpose of the defendants in publishing these articles to ascribe to the action of the court dishonorable and corrupt motives and to attempt to influence the action of the court, it was shown by the defendants in open court, when this matter was under consideration, and when the court offered to exercise its magnanimity, even in the face of all the conduct of the defendants, if they would retract these improper publications, when the impropriety of their action was called squarely to their attention. With the falsity of the statements of the publications made being shown by the findings of the court, they stood up in open court and admitted their publication but refused to retract anything therefrom [sic].[20]

Refusing to join "in the too often repeated discussion of a perverted application of our beneficent heritage of freedom of speech and liberty of the press," the Supreme Court upheld the district court's contempt ruling.[21] *Burke v. Territory* was only the second known case to grant territorial courts an exemption from the 1831 federal contempt

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[17] Ibid., 18-19.
[18] Ibid., 26. For an explanation of the Act of March 2, 1831, see Chapter Three.
[19] Ibid., 27.
[20] Ibid., 37-38.
[21] Ibid., 38-39.

statute.[22] It also upheld the long-standing tradition that any action that disrupted the judicial process or degraded the court, no matter where it occurred, was punishable as a contempt.

The decision in the 1896 Ohio case of *In re Press-Post* also concluded that if a newspaper published anything that could potentially jeopardize a pending case, the publication was liable for contempt. It was a very short opinion in which neither the publication nor the offending articles were identified. The judge of the Court of Common Pleas of Franklin County, Ohio, referred only to the fact that the *Press-Post* had been charged with "publishing matter calculated to obstruct the administration of justice" in a pending case. It was widely accepted that an editor who criticized "the court or any of its officers, attorneys, witnesses or parties, unjustly or intemperately" or published "a false or unfair report during the pendency [sic] of the case" was liable for contempt.[23] The judge also listed the following transgressions:

> It is just as pernicious and reprehensible for either the editor or reporter, by such publications, to cast unjust reflections on the conduct of witnesses, parties, counsel, jurors or judges during the pendency [sic] of the trial or in any other way to unlawfully seek to influence the administration of justice, when such publications are liable to be read by the jurors, as it would be for an individual to write a letter containing such reflections which would be liable to be read by the jurors.[24]

Such conduct, he said, was "calculated to destroy that benign and humane principle which presumes that the accused are innocent till [sic] the proof establishes their guilt." Such behavior also tended to "deprive the accused of his imperishable right to be tried by an unprejudiced court and an impartial jury."[25] While the judge considered the *Press-*

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[22] See *Territory v. Murray*, 1887 Mont. LEXIS 72, in Chapter Five.
[23] *In re Press-Post*, 1896 Ohio Misc. LEXIS 263, 1.
[24] Ibid., 1-2.
[25] Ibid., 2.

Post's editorials to be "on the windward side of the law," he did not reach the same conclusion for one particular news report and its headline.[26] "They are inflammatory in their character," he wrote. "If they have been read by the jurors, or if they should be read by them, as they may have been, or may be--a thing which the court can not prevent, they would tend to prevent that calm, deliberate and impartial judgment on their part to which the defendants are entitled."[27] However, the judge still concluded that the publication was "not of such a magnitude that the court should pause in the trial of this case long enough to hear a contempt case based upon it." He then offered the following thoughts on the value of press freedom:

> The abuses of the freedom of the press are not as dangerous as its suppression would be. The press is a necessary, important, and valuable institution in imparting information with respect to the conduct of every department of government--the judiciary as well as the legislative and executive authorities--information to which the people are entitled; but the preservation of the rights of persons who are accused of crime to a fair and impartial trial is just as essential and important in our democratic system of government.[28]

The judge urged that his opinion "serve as a warning against the repetition of the encroachment upon the law, and as an admonition that if it is repeated the court will be obliged to adopt one or more of the remedies found in the armories of the law."[29] Even though the judge declined to hold the *Press-Post* liable for contempt, it was clear that he recognized no restrictions on his authority to do so. It was his right as a judge to make that determination, and he offered a stern warning at the end of his opinion that he would not be inclined to be so forgiving if again confronted with a similar situation.

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[26] Ibid., 3-4.
[27] Ibid., 4.
[28] Ibid.
[29] Ibid., 4-5.

The 1898 Iowa case of *Field v. Thornell* upheld a court's authority to hold a publication in contempt when the article in question could reasonably be considered as an attempt to influence the outcome of a trial. The *Mills County Tribune* had been closely monitoring a criminal case before the District Court of Mills County, Iowa, in June 1896.[30] During an adjournment, jurors William Van Doren and James Galbraith went to visit the *Tribune*'s editor, N.C. Field, who gave them the most recent copies of the newspaper.[31] An article titled "A Put-Up-Job" commented on the trial in general, "the apparent conclusiveness of the evidence, and the public indignation" about the case.[32] It included the names of the jurors, disparaged the prosecutor's case, and praised the defendant's attorney.[33] It also included the following observation:

> Of course, there is no telling what the jury's verdict will be, as juries are an uncertain quantity sometimes; but there is no doubt in our mind what it ought to be, nor do we think there is any doubt in the mind of every intelligent man who has familiarized himself with the facts in the case.[34]

Both Galbraith and Van Doren read the article. Galbraith gave his copy of the paper to another juror, and "Van Doren read a part of the article aloud in the jury room when the jurors were deliberating on their verdict." The prosecuting attorney requested that Field be held in contempt for publishing "a false and scurrilous article concerning the trial ... and willfully and corruptly, and with the malicious intent of influencing the jury in said cause, thereby preventing the decent and orderly administration of justice, handed a copy of said paper to each of two jurors in said cause."[35] Field was found guilty and ordered to pay a $30 fine. He requested a review from A.B. Thornell, judge of the Fifteenth Judicial

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[30] *Field v. Thornell*, 1898 Iowa Sup. LEXIS 186, 1.
[31] Ibid., 1-2.
[32] Ibid., 2.
[33] Ibid., 1.
[34] Ibid., 4.
[35] Ibid., 1.

District of Iowa, but the judge dismissed the petition. Field then asked the Iowa Supreme Court to review the case.

Supreme Court Justice Scott Ladd delivered the court's opinion. The trial was pending when the *Tribune*'s article was published, he wrote, and Field "had every reason to believe it would fall into the hands of the witnesses and jurors. Its natural tendency was to intimidate the witnesses in attendance of court, and to influence the jury in reaching their verdict."[36] The Supreme Court decided that the judgment against him was "fully warranted by the evidence and the law." Iowa's code allowed for the punishment of "contemptuous or insolent behavior toward such court while engaged in the discharge of a judicial duty which may tend to impair the respect due to its authority."[37] However, Ladd insisted that Iowa's courts had neither the power nor desire to control the press. "It enjoys the utmost latitude in reviewing the action of the courts, and may, after the particular litigation is ended, assail, with just criticism, opinion, rulings, and judgments with the weapons of reason, ridicule, or sarcasm," he wrote. "Let the courts perform their duties unmolested, but their final judgments, as well as the manner of reaching them, are thereafter open to the world for such criticism or condemnation as taste or necessity may require."[38]

The 1898 case of *State v. Tugwell* in Washington reached a similar conclusion. It determined that Washington's constitutional freedom of publication did not prevent courts from pursuing contempt citations against publications whose articles concerned a pending case. The February 24, 1898, edition of the *Tacoma Sun* featured an article concerning the Supreme Court of Washington. A.P. Tugwell and F.R. Baker, the *Sun*'s

[36] Ibid., 13.
[37] Ibid., 4-5.
[38] Ibid., 14.

editor and associate editor, respectively, published an unflattering critique of a Washington Supreme Court justice who was presumed to have written the majority decision for a case in which, during a previous hearing, he had voted the opposite way. His change of mind displeased the *Sun*'s editors, who wrote that the justice "can now sit snugly up alongside some other supreme simpletons and suck the hind teat of plutocracy."[39] The editorial continued with the following observations:

> We speak of . . . more particularly because he flopped. What made him flop, he knows best, but every one else has a good idea. There is only one thing about . . . that pleases me, and that is his term soon ends, and he will be relegated to that everlasting oblivion that awaits all of these last rotten articles of republicanism. How long, O Merciful Creator of the Universe, are we to still suffer for the misdeeds of dishonest, corrupt and disreputable public servants?[40]

One week later, both men were called before the Supreme Court to defend themselves against contempt charges. They made several arguments, including the following: the case to which the article referred was no longer pending before the court; Washington statutes and its constitution allowed them to freely publish facts and comments; and the publication was not a contempt of court.[41]

Washington's constitution guaranteed that "every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right," and its contempt statute allowed punishment for "disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to impair its authority, or to interrupt the due course of a trial or other judicial proceedings...."[42] The Supreme Court, in a *per curiam* opinion (meaning that no specific author was cited), concluded that the *Tacoma*

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[39] *State v. Tugwell*, 1898 Wash. LEXIS 355, 2.
[40] Ibid., 3-4. The court record omitted the name of the justice, and the passage appears here as it does in the record.
[41] Ibid., 7.
[42] Ibid., 9.

Sun's publication was a contempt because the case to which it referred was still pending. According to the opinion, it was clear that the publication came "within all the authorities as tending to embarrass and disturb the conclusion of the tribunal in the determination of the cause pending before it."[43] However, the Supreme Court also sought to blunt its decision with the following explanation:

> In such conclusion it is not intended to intimate or suggest that any citizen of the state has not a legal right to comment upon, criticise [sic] and freely and without restriction from any lawful authority discuss any cause determined by any of the courts of this state after the final disposition of such case; or that any restriction of fair and impartial reporting of cases pending in courts, unless forbidden by rule, is now imposed by our laws.[44]

Despite being found guilty of contempt of court, the Washington Supreme Court decided that it would not impose the maximum penalties on Tugwell and Baker because theirs was "the first [contempt by publication] offence [sic] formally brought to [the court's] attention in the history of the state...."[45]

The case of *Post v. State*, which was decided in 1897 in Ohio, appeared to be an initial victory for the press. However, it ultimately ended in favor of a court's expanded contempt authority. The original decision upheld the right of a court to use its contempt power to punish a publication, but the opinion required the court to do so through proper legal procedures. The March 17, 1897, edition of *The Cleveland Recorder* contained an article titled "Judicial Autocracy."[46] Written by Louis Post, it was a scathing commentary of judges and the power their position afforded. It included the following:

> Judges hold a position which makes them seem and often makes them feel like autocrats. Their commands are for the time being, law. They are invested with the

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[43] Ibid., 34.
[44] Ibid., 32.
[45] Ibid., 35. The record included neither the maximum penalty allowed nor the sentences both men received.
[46] *Post v. State*, 1897 Ohio Misc. LEXIS 391, 1.

> autocratic power, lodged in no other official, of arbitrarily ordering men into prison--of being at once accusers, juries and judges.... Some judges then ignore the incidental obligations of their position. Forgetting that they are arbitrators bound to be gentle to everyone, and especially to be solicitous for the rights of all whose quarrels come before them, they play the part of the querulous pedagogue. Invested with a little brief authority, they use it as if no one's rights were superior to their whims.[47]

Post cited a recent legal case and named a local judge on the Court of Common Pleas of Cuyahoga County as an example of such behavior.

The court soon became aware of what it considered to be the "contemptuous article of and concerning this court," and almost immediately thereafter it declared him guilty of contempt.[48] The court did so without filing any legal paperwork charging Post with an offense and without allowing him to come before the court to defend himself. He was arrested and sentenced to spend ten days in the county jail, pay a $200 fine, and pay the costs of the prosecution. [49] Post was also ordered to stay in jail until the fine and costs had been paid. He appealed his conviction, and Ohio's Eighth Circuit Court took the case.

The circuit court determined that the Court of Common Pleas had made a procedural error. When the alleged contempt did not occur within the personal cognizance of the court, "the better practice would seem to be to require an information to be filed by a proper representative of the state, and permit the accused to file an answer to the charge made against him...."[50] The Eighth Circuit also concluded that even though the law was not specific on the matter, it would be a good idea if "all facts not within the personal knowledge of the court ... be established in open court upon the sworn

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[47] Ibid., 2.
[48] Ibid., 4.
[49] Ibid., 1.
[50] Ibid., 5.

testimony of witnesses, or other competent evidence, in the ordinary manner of other judicial investigations."[51] Before anyone accused of committing a contempt could be arrested, the court decided, the "fullest opportunity should be given to him to show cause why he should not be punished for contempt and his guilt should not be determined before such opportunity is given to him."[52] The Eighth Circuit Court then determined that Post's publication could not be considered as a contempt because it referenced a legal action that had already taken place. The court issued the following explanation:

> The theory that, although the trial had ended, the time within which a motion for a new trial could be made had not expired and, therefore the case was pending in court, has but little weight. There is not the slightest intention disclosed in the language of the article, to in the least degree influence or embarrass the court in the disposition of such motion, if one should be made.[53]

The newspaper publication was "an unjust criticism of a faithful and upright judge," the court concluded, "but not a contempt of court."[54] Post's conviction was overturned.

The case of *Post v. State* was another of a few Nineteenth Century contempt cases that were overturned based on procedural errors. However, the case still recognized the lower court's authority to punish publications as contempts. "There is no doubt that the power to punish for contempt, is inherent in a court of general jurisdiction, independent of legislation, and has always existed in the courts of England and in this country," the Eighth Circuit concluded. "The legislature may regulate the procedure under this, but they can in no way abridge that power of the court."[55] Such comments foreshadowed the ultimate conclusion of this matter because Post's legal victory did not last very long.

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[51] Ibid., 6.
[52] Ibid., 9.
[53] Ibid., 18-19.
[54] Ibid., 19-20.
[55] Ibid., 8.

The second case, titled *State v. Post*, also was decided in 1897 in Ohio, but this time the decision broadened the class of actions that could be determined to obstruct the administration of justice. The Court of Common Pleas of Cuyahoga County, Ohio, revisited the case against Louis Post several weeks later.[56] In the second trial, the court gave him the opportunity to defend himself against the contempt charge. As the editorial writer for *The Cleveland Recorder*, he said, "his purpose was to educate a public sentiment which would correct what he considered certain abuses in judicial proceedings."[57] He also argued that the Court of Common Pleas could not punish him for contempt because the publication occurred away from the courtroom, and Ohio law excluded such actions from contempt citations.

The court disagreed, noting that it had been "claimed on the one side that the legislature may abridge that [contempt] power, and on the other that it cannot. It is sufficient in this connection to say that we do not think the legislature has attempted in this state to abridge that power."[58] The court concluded that whatever acts were calculated to impede, embarrass, or obstruct the court in the administration of justice, they were to be considered as if they had been done in the actual presence of the court.[59] The Court of Common Pleas also essentially ignored the Eighth Circuit's previous ruling that it was a weak position to assume the case in question was still pending because the time frame to request a new trial had not yet expired. Instead, it determined that Post's editorial had damaged the prospects of a new trial. The judge asked Post to stand and then delivered the following remarks:

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[56] *State v. Post*, 1897 Ohio Misc. LEXIS 119.
[57] Ibid., 1.
[58] Ibid., 5.
[59] Ibid., 6.

> You are an entire stranger to me. I never met you before. Without any personal feeling whatever in regard to you, and with the kindest of feeling toward you and your interests, it becomes my most important and solemn duty to sentence you in this proceeding. It is a duty, but an unpleasant one. No man invested with power to deprive one of his property or his liberty, ever exercises that power, if rightly constituted, without regret and without sorrow.[60]

The judge then issued the same sentence as before – ten days in the county jail, a $200 fine, and payment of all court costs.[61]

The case of *State v. Post* established an expanded interpretation of the phrase "administration of justice," determining that a contempt did not have to be committed in the presence of the court to obstruct judicial duties. The case also represented the first known instance in which an appeals court reversed a contempt citation, only to have the court of original jurisdiction retry the case and reach the same conclusion.

The California case of *In re Shortridge* was another unique case. The 1893 opinion determined that a publication that did not embarrass the court or interfere with the administration of justice could not be declared a contempt. However, it also refused to recognize statutory restrictions on the contempt power. The Superior Court of Santa Clara County, California, was hearing a divorce case and was concerned that the testimony would be of a "filthy nature." The judge ordered that the public be excluded from the courtroom and that "no public report or publication of any character of the testimony in the case be made."[62] The next day, Charles Shortridge, the editor and publisher of the *San Jose Mercury*, published an article referring to the order, and the account also contained what was presented as witness testimony. Called before the court to explain his actions, Shortridge said he did not intend to show any disrespect toward the

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[60] Ibid., 28-29.
[61] Ibid., 29.
[62] *In re Shortridge*, 1893 Cal. LEXIS 706, 3.

court. He said by publishing a fair and true report of the testimony and proceedings, he was simply exercising his constitutional right to publish freely. Shortridge also said that the judge could not interfere with that right by order or by any other means.[63] The Superior Court, however, in upholding "the honor of the state and the dignity of the court," found Shortridge guilty of contempt and ordered him to pay a $100 fine.[64] Shortridge then asked the California Supreme Court to consider the case.

The Supreme Court concluded that the lower court had misinterpreted a California law concerning publications related to legal cases. "In this country it is a first principle that the people have the right to know what is done in their courts," Justice A. Van Paterson determined. "The old theory of government which invested royalty with an assumed perfection, precluding the possibility of wrong and denying the right to discuss its conduct of public affairs," he wrote, "is opposed to the genius of our institutions in which the sovereign will of the people is the paramount idea."[65] Justice Paterson stated that if the California legislature had intended to prohibit the publication of proceedings in cases tried behind closed doors, it would have done so in clear terms.[66] Except in rare occasions, "the public have the right to know and discuss all judicial proceedings...."[67]

Shortridge's defense team had also argued that a recently passed California law did not allow the lower court to punish the publication as a contempt. A recent act of the legislature provided that

> no speech or publication reflecting upon or concerning any court or any officer thereof, shall be treated or punished as a contempt of said court, unless made in

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[63] Ibid.
[64] Ibid., 4.
[65] Ibid., 7.
[66] Ibid., 8.
[67] Ibid., 9.

> the immediate presence of such court while in session, and in such manner as to actually interfere with its proceedings.[68]

The Supreme Court did not recognize the limitation. "No authority has been found which denies the inherent right of a court ... to punish as a contempt an act -- whether committed in or out of its presence -- which tends to impede, embarrass or obstruct the court in the discharge of its duties," Paterson concluded.[69] An unrestricted contempt power was recognized by all of America's courts, he said. However, concerning Shortridge's publication, the California Supreme Court noted that the constitutional right for someone to publish his sentiments on any subject was dear to all Americans, and courts could take action against it "only when the publication or the speech interferes with the proper performance of judicial duty."[70] If no such interference could be found, no contempt was committed, as the court noted in the following:

> In the article complained of we find nothing which could have interfered with a full and fair investigation of the merits of the case then on trial. The case was before the court without a jury. It is not claimed that the petitioner, in his report, mutilated the testimony, misrepresented or reflected upon the judge, attempted to intimidate or swerve any witness, or to dictate to any one connected with the trial what his action should be in regard to any matter. How, then, could such an article interrupt the orderly conduct of a trial, or tend to induce a failure of justice?[71]

Furthermore, Justice Paterson suggested that it was not the judiciary's role to be the "conservator of public morals." That was the legislature's duty, he said, and it was no excuse to prohibit the publication of trial testimony.[72] The California Supreme Court

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[68] Ibid., 10.
[69] Ibid.
[70] Ibid., 13.
[71] Ibid., 14.
[72] Ibid.

ruled that Shortridge's publication "could not, under any circumstances, constitute a contempt," and the judgment against him was annulled.[73]

In re Shortridge, in some respects, was a victory and a defeat for both the press and the judiciary. The California Supreme Court clearly demonstrated that in almost all cases, a lower court could not bar the publication of trial testimony. Such orders violated the country's free press heritage and the public's right to know. However, the Supreme Court also refused to recognize a California statute that placed a geographic restriction on the use of judicial contempt. Calling it an inherent right, the Supreme Court determined that no authority could curb a judge's power to protect himself and his court from ridicule or embarrassment.

There were a few contempt by publication cases during this time that primarily concerned the possible effects that newspaper articles or editorials would have on the public's perception of a judge. The 1895 New Mexico case of *In re Hughes* upheld the authority to punish a publication that impugned a court or its officers. The Supreme Court of New Mexico was considering charges of unprofessional conduct against attorney Thomas Catron.[74] While that action was still pending, the Albuquerque *Daily Citizen* published an article titled "Is it Honesty or Partisanship?"[75] Nearly three columns in length, the editorial accused the chief justice of executing a vendetta against Catron. An excerpt follows:

> Judge Smith ... descended from the high position which he should have commanded, so as to appear in the partisan effort to ruin the character of an attorney whose only crime is that he was, at the last election, selected by a majority of about three thousand votes to represent New Mexico in congress. In his zeal to cripple the influence of Catron to aid New Mexico and her people,

[73] Ibid., 18.
[74] *In re Hughes*, 1895 N.M. LEXIS 30, 1.
[75] Ibid., 3.

> Judge Smith ... would see that [certain accusations against Catron] were referred to a special committee of the bar, composed of a majority who would be hostile to Catron, either politically or personally, or both, but that it should be so done that it should be made to appear to the other members of the supreme court that it was intended to be nonpartisan....[76]

The article stated that the publication was not intended to influence the Supreme Court or its members, but it was intended to "state the facts as we have heard them, for the information of the public."[77] The article, though, also insisted on making demands of the New Mexico Supreme Court. "We do demand that politics shall be eliminated; that personal hostility and enmity shall be set aside, and nothing but the strictest kind of justice and honesty shall prevail," it stated.[78] Because the *Daily Citizen* circulated in Santa Fe, where the Supreme Court was located, proprietors Thomas Hughes and W.T. McCreight were charged with contempt of court and ordered to answer for their actions.[79]

McCreight's responses indicated "that he had no personal knowledge of the publication of the said article, or that it was to be published until it appeared in said newspaper, and that he was more immediately connected with the local work on said paper than the editorial department."[80] The New Mexico Supreme Court fined him $25 and ordered him to pay court costs. Hughes, however, fled the New Mexico territory and was later arrested by a U.S. marshal in Winslow, Arizona. When he was brought before the court, his statements included the following defense:

> The article was found, as I have stated, upon my office desk. It was typewritten and unsigned. I read it very hurriedly; hung it on the copy hook; and, as I was extremely busy on that day, I sent the article in 'takes' to the printers, and did not read the article until the proof sheets came down; and then, in the hurry of the day, it was placed on the editorial page in making up the forms. I did not read all

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[76] Ibid., 3-4.
[77] Ibid., 5.
[78] Ibid., 9.
[79] Ibid., 9-10.
[80] Ibid., 10.

> the proof.... I never read the entire article until after it was printed in the paper. I had no knowledge or information at that time or since of the authorship of the article.[81]

Hughes also told the justices that "he had no intention or desire to reflect upon the supreme court of the territory of New Mexico, its chief justice, or any member of said court, nor any intention or desire to impede or obstruct the course of justice in any cause or matter pending before it...."[82] Had he read the article more carefully before it was published, he said, or had he been fully aware of the nature of its contents, the editorial would not have been published. His arguments did not mitigate the circumstances, and the Supreme Court convicted him of contempt. During the period before his sentence was announced, Hughes published the following retraction:

> An article appeared in the Daily Citizen on the ninth day of this month reflecting on Chief Justice Smith, of the territorial supreme court. Investigation shows that the article was false in many particulars. The article appeared as an editorial, though it was not written by the editor of this paper. We are now convinced that the objectionable language referred to in the article was fairly and reasonably open to the construction put upon it by the supreme court, though no such construction was intended or thought of by the editor of this paper when the same was published.[83]

The retraction also emphasized the importance of allowing courts to be unimpeded by newspaper reports that were critical of a court's actions or its members. It continued with the following:

> We wish to reiterate our regret that said publication should have appeared, and we desire to give this public assurance that hereafter no such article shall appear in these columns. It appeared and was published through gross carelessness, and without any malicious intent on the part of the editor of this paper; and we desire in this public manner to make apology to Chief Justice Smith and the members of the territorial supreme court of New Mexico.[84]

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[81] Ibid., 11.
[82] Ibid., 12.
[83] Ibid., 13.
[84] Ibid., 13-14.

The New Mexico Supreme Court noted the retraction but believed Hughes' publication was too outrageous to go unpunished. He was sentenced to spend sixty days in jail and pay a $1 fine and court costs.[85] Justice N.M. Laughlin, who wrote the court's majority opinion, stated that he and his fellow justices "would have been guilty of a most flagrant failure to appreciate the dignity of the position which they hold, and their duty to the proper administration of justice, had they shrunk, however unpleasant it might have been to themselves, from meting out to the offender in this case adequate punishment."[86] Political clamor and prejudice should never be permitted to interfere with the administration of justice and the law, he wrote, "and the judge who yields to it is unfit to fill the position which he holds."[87] The New Mexico Supreme Court was divided in this case, though. Two justices filed a dissenting opinion stating that they agreed that Hughes was guilty of contempt, but they believed his imprisonment was unnecessary.[88]

Justice Laughlin's opinion in the case of *In re Hughes* was carefully crafted with decisions that supported the New Mexico Supreme Court majority, including *People v. Wilson* from Illinois; *In re Sturoc* from New Hampshire; *State v. Morrill* from Arkansas; *Burke v. Territory* from Oklahoma; and *State ex rel Haskell v. Faulds* from Montana, which had been decided just a few weeks before *Hughes*. The decision reflected the considerable amount of contempt by publication case law on record by the end of the Nineteenth Century. However, it also implied that contempt by publication was still hit-and-miss. There was no precedent from the U.S. Supreme Court on the matter, and judges were free to cite whichever opinions supported their own philosophies of contempt.

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[85] Ibid., 16.
[86] Ibid., 37.
[87] Ibid., 40.
[88] Ibid., 44.

The 1897 Colorado case of *Bloom v. People* also upheld the traditional view that an article was contemptuous if it maligned the character of a judge or his court. John H. Bloom was charged with defaming and "impeaching the honor, integrity and purity" of the Twelfth Judicial District of Colorado and its judge, C.C. Holbrook, through several newspaper publications.[89] The articles included the following:

> Judge Holbrook is still advising with himself upon the case of *Zook v. Rio Grande County.* No decision in the case has been handed down yet. The next judge of the twelfth judicial district of the state of Colorado will not be a political judge, who will consider the political effect of his decisions before rendering them.[90]
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> Holbrook is the weakest and most unpopular man the republicans can possibly nominate for district judge. The story of the Empire Canal receivership and Captain Campbell's loan of $800 should haunt him as long as he lives.[91]

The judge charged Bloom with contempt and ordered him to answer for his publications. Bloom denied that he wrote all of the articles he had printed, and he also "denied substantially that there was any malice in said articles, or any intention or design in their publication to cast any reflection upon the court or judge...." He admitted, however, that he opposed the judge politically and that "these articles were written for the purpose of defeating said judge in case he should become a candidate for reelection."[92] Judge Holbrook declared him guilty of contempt and sentenced him to thirty days in jail.[93] The decision was appealed to the Supreme Court of Colorado.

Bloom's attorney had suggested that the "allegations are so vague, unintelligible and uncertain that they are not sufficient in law to put the defendant upon his answer."[94]

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[89] *Bloom v. People*, 1897 Colo. LEXIS 186, 1.
[90] Ibid., 6.
[91] Ibid., 6-7.
[92] Ibid., 2.
[93] Ibid., 1.
[94] Ibid., 12.

Justice John Campbell, however, rejected previous court decisions that considered more than one interpretation of an article as a defense against contempt. He declared that such doctrine was "not authority in this state."[95] The Supreme Court quickly concluded that the "the articles were contemptuous" and affirmed the lower court's decision.[96]

The case of *Bloom v. People* holds a unique position among contempt by publication cases for another reason, though. The Colorado Supreme Court made an unprecedented decision when considering Bloom's arguments against his conviction. "The fact that the defendant denies generally that he was actuated by malice and denies any intention to cast any reflection upon the judge, must be taken in connection with the language which we have quoted," the decision stated. "To any fair and candid mind it must be evident that, in making these publications, the defendant's object was to insult the court and to degrade the judge in the eyes of the community."[97] The Supreme Court considered Bloom's answers to be a contemptuous act committed in the presence of the court. "The unnecessary and wholly uncalled for attempted explanation of the reasons that actuated him in making the publication, tended to scandalize and insult the judge, and was a direct contempt for which summary punishment might be inflicted," Campbell wrote.[98] It was the first time in Nineteenth Century contempt by publication law in which a defendant's answers to a contempt charge were upheld to be contemptuous, as well.[99]

The California case of *Ex parte Barry*, which was decided in 1890, established that a newspaper publication that degraded a judge and tended to interfere with the

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[95] Ibid., 7.
[96] Ibid., 9.
[97] Ibid., 12.
[98] Ibid., 13.
[99] See Chapter Six for an explanation of *State ex rel Attorney General v. Circuit Court for Eau Claire County*, 1897 Wisc. LEXIS 5. In this case, the lower court judge convicted the defendants for committing a contempt of court by alleging the truth of their publication. However, the Wisconsin Supreme Court overruled the conviction.

administration of justice was a contempt of court. It also touched on another common philosophical theme – the abuse of free press liberties. James Barry was the editor of the *Weekly Star*, a newspaper published in San Francisco.[100] In August 1889, he published a report concerning a case that had come before the Superior Court of San Francisco. Titled "A Criminal Judge," the following article pulled no punches:

> We charge Francis W. Lawler, judge of the superior court of San Francisco, with deliberate lying about the law, deliberate intentional falsification in his official capacity, and deliberate intentional denial of justice. He is not merely a fool, but an impudent rascal; a criminal on the bench. He ought to be impeached and removed from office, and disfranchised, indicted, and punished by fine and imprisonment; made a convict of.[101]

Barry was incensed that Judge Lawler had essentially dismissed a politically sensitive case by using what Barry considered to be a ridiculous line of legal reasoning. "If the information which we have received is wrong, let the editors of the Weekly Star be at once arrested on a charge of criminal libel," he wrote.[102] He got his wish. Convicted of contempt of court, he was sentenced to spend five days in jail and pay a $500 fine.[103]

Barry appealed to the California Supreme Court, arguing that the publication could not have been a contempt of court because the legal case that the article discussed had already been decided. Because the article could not "in any way affect or interfere with the proceedings of the court," Barry believed his contempt conviction was illegal.[104] The California Supreme Court disagreed, determining that the case was still active because the deadline to file an amendment had not yet passed at the time of the

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[100] *Ex parte Barry*, 1890 Cal. LEXIS 957, 2.
[101] Ibid., 2-3.
[102] Ibid., 3.
[103] Ibid., 5.
[104] Ibid.

publication.[105] Furthermore, Justice John Works said there was no question that the article was "calculated to intimidate or improperly influence a timid judge, or one unduly sensitive to public feeling or censure."[106]

Barry's counsel had also argued that America's promise of free speech and a free press essentially guaranteed – and protected – the publication. "The liberty of speech and of the press *is unlimited and unrestrained upon all subjects whatsoever*," he argued, "whether it be the decision of the court or the character of the judge. The only check upon this liberty is the responsibility for the abuse of it."[107] That prompted Justice Works to ask two questions: was Barry's publication an abuse of press liberties, and did it interfere with the court's proceedings?[108] The Supreme Court had already concluded that the publication did interfere with the case, and Works was equally convinced that Barry had abused his liberties to operate a free press.[109] He considered Barry's actions as representative of a press culture that was out of control, as the following comments suggest:

> The great trouble with the freedom of the press at the present day, so far as it affects the courts, is that it is used indiscriminately in many cases, not with the laudable purpose of correcting abuses and exposing wrong-doing, but to gratify ill will and passion, or pander to the passions or prejudices of others. This tendency should be severely condemned and punished, not only for the protection of the courts and the preservation of a pure and independent judiciary, but as a means of upholding the liberty of the press in its true sense.[110]

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[105] Ibid., 5-6.
[106] Ibid., 6.
[107] Ibid., 6-7.
[108] Ibid., 7.
[109] Ibid., 7-8.
[110] Ibid., 8.

The Supreme Court declared Barry's publication "a most flagrant abuse of the liberty of the press," concluding that the lower court had "justly punished [it] as such."[111] Barry's appeal was denied.

Though he was not specifically mentioned in the decision, the case of *Ex parte Barry* suggested the renewed influence of Sir William Blackstone, the Eighteenth Century legal scholar whose *Commentaries on the Laws of England* was published in 1769. Having a press that was unrestrained by government intervention was an essential component of a free society, he had declared, "but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published."[112] Under Blackstone's logic, everyone had the right to publicly publish his views, whatever they were. "To forbid this," he wrote, "is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity."[113] Blackstone's views had been controversial in early America, but they had regained a foothold by the 1890s.

The 1893 Louisiana decision in *State ex rel. Phelps v. Judge of Civil District Court* upheld a lower court's contempt citation, stating that the guarantee of press freedom did not shield editors and publishers from punishment for the abuse of that freedom. Ashton Phelps and Page Baker, president and chief editor, respectively, of the Times-Democrat Publishing Company in New Orleans, Louisiana, ran afoul of the local Civil District Court with the March 19, 1893, edition of the New Orleans *Times-*

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[111] Ibid., 8-9.
[112] William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765-1769, Of Public Wrongs* (1769), 4 vols. (Chicago: The University of Chicago Press, 1979), 4: 151.
[113] Ibid., 151-52.

Democrat.[114] It included some criticisms of a case before the Civil District Court for the parish of Orleans. The lawyers involved in the case complained that the publishers influenced the jury when they gave "their opinion for the public's perusal, of the relative positions of the parties to this controversy, and their comments upon the testimony of the witnesses who had testified in said case."[115] They also argued that the "statements contained in said article are in many respects not true and not justified by any evidence received in the case."[116] The attorneys requested that Phelps and Baker be charged with contempt, and the men were ordered to appear before the civil district court to answer the charges against them.

Their first defense was that the court had no jurisdiction in the matter, saying any attempt "to inflict punishment would involve an unwarranted assumption and usurpation of judicial power not conferred by the Constitution and laws of this State."[117] Secondly, they argued that the attempt "to invoke the power of the court to punish for contempt the publishers of said article is in direct violation of the freedom of the press guaranteed by the laws and Constitutions of the State and of the United States." For these reasons, they believed, the contempt proceeding against them was "absolutely null and void and unconstitutional" and should have been dismissed.[118] Judge Francis Monroe, however, did not share the same opinion and found both men guilty of contempt.[119] He decided to delay his decision concerning their punishment. In the meantime, Phelps and Baker asked the Louisiana Supreme Court to grant them relief.

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[114] *State ex rel. Phelps v. Judge of Civil District Court*, 1893 La. LEXIS 597, 1.
[115] Ibid., 4.
[116] Ibid., 5.
[117] Ibid., 7.
[118] Ibid., 8.
[119] Ibid., 13.

The Supreme Court determined that the civil district court did have the power to punish for contempts.[120] Chief Justice Francis Tillou Nicholls disagreed with the argument that the constitutional guarantee of a free press prevented newspaper publishers from being charged with contempt for publishing the routine proceedings of a court, saying such an argument was "not true as a general proposition."[121] The Louisiana Supreme Court referenced a well-worn aspect of English and American press law – publishers and editors were free to print what they chose, but they were liable for any abuses of that freedom. In this case, the right of the *Times-Democrat* to publish an account of a pending case was not in question; "it was precisely the *abuse* of the right which was charged in the present case against the defendants."[122] In another example of a return to Blackstonian logic, the Louisiana Supreme Court refused to rehear the case.[123]

Judicial Authority

A few cases that were decided during the final decade of the Nineteenth Century concerned the general authority a judge or court held in issues related to contempt. The 1894 ruling in the Connecticut case of *Clyma v. Kennedy* held that a judicial official was not legally disqualified from hearing a case in which he was the target of a libelous or contemptuous publication. Edmund Clyma was accused of "unlawfully and wickedly contriving and intending to bring into hatred and contempt the administration of justice" in Naugatuck, Connecticut, by using *The Naugatuck Citizen* to print a "false, scandalous

[120] Ibid., 25.
[121] Ibid., 26.
[122] Ibid., 30.
[123] Ibid., 31.

and malicious defamatory libel" against the local justice of the peace.[124] A grand juror had requested the action against Clyma, and the justice of the peace, John Tuttle, found Clyma guilty of criminal libel. The article was also considered as a contempt against the court, and Tuttle ordered him to pay a $7 fine and court costs.[125]

Clyma refused to comply with the judgment; so he was sent to the New Haven jail. He appealed to the District Court at Waterbury, which determined that the justice of the peace had no jurisdiction to try the action because it involved him personally.[126] The case was finally appealed to the Supreme Court of Errors of Connecticut. Chief Justice Charles Andrews wrote that the lower appellate court had erred in its decision. He concluded that even though it was unwise for Tuttle to try the case because "it exposed him to the appearance of seeking to revenge an insult to himself," there were no legal or financial restrictions against him from doing so.[127] The original conviction against Clyma stood.

The Montana Supreme Court, in the 1895 case of *State ex rel Haskell v. Faulds,* ruled that it had the inherent authority to punish a publication as a contempt. The *Northwest Tribune* of Stevensville, Montana, used its October 25, 1894, edition to take aim at the state Supreme Court.[128] An article accused the justices of entering into a "dirty deal" to determine the outcome of three pending cases.[129] Considering the publication to be a "false and grossly inaccurate report" that was "done with the intent to hinder, embarrass, and defeat the administration of justice, and to insult and degrade the court,

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[124] *Clyma v. Kennedy*, 1894 Conn. LEXIS 27, 2-3. The case record states that the original case was determined in 1890.
[125] Ibid., 4.
[126] Ibid., 6.
[127] Ibid., 14-15.
[128] *State ex rel Haskell v. Faulds*, 1895 Mont. LEXIS 69, 1.
[129] Ibid., 2.

and to expose it and the members thereof to contempt," the Montana Supreme Court charged J.R. Faulds, the newspaper's editor and publisher, with contempt.[130] Called before the court, he said that the article was not intended "to refer to the court or to the judges thereof, but was intended to refer to other persons and things involved in a controversy with other persons in the town and vicinity where the same was published." Faulds also said that he did not mean "to insult the court or bring it into obloquy or contempt" by publishing his comments.[131]

After a lengthy reference to *State v. Morrill*, the 1855 decision from the Arkansas Supreme Court that reasserted the judiciary's expansive contempt authority, Montana Supreme Court Chief Justice William Young Pemberton concluded that his court could punish Faulds' publication as a contempt. However, the chief justice also considered Faulds' statements that he did not intend "to insult this court or bring it into contempt...."[132] Pemberton said the Supreme Court addressed the issue only to "defend the court and its proceedings from unwarrantable, contemptuous, and calumnious attack...." Having "no shadow of a desire to oppress or punish the respondent," he said, "even though he be guilty as charged, we are willing, in this instance, to accept his sworn answer and explanation of his conduct as true...."[133] The Supreme Court discharged the case against Faulds, even though the court had made clear that its contempt authority could not be restricted.

The Supreme Court of Michigan also determined that a court's power to punish for contempt was an inherent right. The 1896 decision in *In re Chadwick* also concluded

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[130] Ibid., 1-2.
[131] Ibid., 3.
[132] Ibid., 16.
[133] Ibid., 17.

that a publication could still be contemptuous even if the legal matter in question had already been decided. Anson Chadwick had written a letter to the editor of the *Port Huron News*, and its contents were published on November 8 and 9, 1894.[134] The letter concerned the outcome of a recent case that had been tried before the St. Clair County Circuit Court. Chadwick, who had represented the defendant in the case, questioned the wisdom of the decision and urged his fellow citizens "to look closely after their public servants, to see that the cold-blooded and silent lobby does not overrule them."[135] Three local attorneys filed a petition that asked Judge James Eldredge to charge Chadwick with contempt. When called before the court to defend himself, Chadwick said that he believed that the facts contained in his letter were true, and it was "a justifiable criticism upon the decree of the court...." He also argued that the proceeding against him was "partisan, oppressive, and unlawful, and that the letter does not reflect upon the judge, but upon complainants and other persons."[136] Chadwick denied having

> any--the slightest--doubt, but that Judge Eldredge is a man of high and pure motives and incorruptible integrity, and denies that his letter either does, or that by it he intended to, state otherwise, or reflect upon him in any manner; and [he] believes that no member of this bar has ever had at any time or at all times a higher respect or regard for Judge Eldredge than [him].[137]

He also expressed deep regret over the possibility that he had written anything that would "detract from [Eldredge's] high character as a man and lawyer, his usefulness on the bench, or raise a shadow of doubt of his perfect integrity, or wound his feelings as a man and gentleman, or that any portion of said letter could be so differently construed than he

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[134] *In re Chadwick*, 1896 Mich. LEXIS 906, 2-3.
[135] Ibid., 9.
[136] Ibid., 10.
[137] Ibid., 12.

intended."[138] The contempt hearing went forward, however, and Chadwick was found guilty. He appealed his conviction to the Supreme Court of Michigan.

Supreme Court Justice Claudius Grant wrote the opinion in the case, noting that Michigan's contempt statute allowed a conviction for "the publication of a false or grossly inaccurate report of its proceeding; but no court can punish as a contempt the publication of true, full, and fair reports of any trial, argument, proceedings, or decision had in such court."[139] The state statute, though, said nothing about the status of the case at the time of the publication. Virtually all contempt by publication cases throughout the century had recognized the right to publish anything about a legal matter after it had been settled. The idea was that it would have been impossible for the publication to influence the outcome. Justice Grant departed from that traditional viewpoint, as the following explains:

> Under respondent's contention, a party may threaten to do an act, or charge corruption upon the judge, or that he has submitted to private interviews with the litigants, and, if the case is then pending, he will be subject to summary punishment by the court, but, if the decree has been pronounced, or judgment rendered, or order made, he may, the next moment, with impunity do the same acts or utter the same statements, and leave the judge to the sole remedy of an action for libel or slander. This is too narrow a construction of the law of contempts....[140]

The justice determined that the case still could have been appealed and was not yet complete.

He then considered the nature of the publication. As long as critics confined their criticisms to the facts, he said, they committed no contempt, "no matter how severe the

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[138] Ibid., 13.
[139] Ibid., 20.
[140] Ibid., 26-27.

criticisms may be...."[141] When the publication included charges of official corruption, though, "the tendency is to poison the fountain of justice, and to create distrust, and destroy the confidence of the people in their courts, which are of the utmost importance to them in the protection of their rights and liberties."[142] He concluded that there was no doubt that Chadwick had intended to condemn the circuit court's decision and bring public odium upon the judge. He included the following anecdote: "A public meeting was called and held ... to raise money to assist them in appealing their case to this court. At that meeting the name of Judge Eldredge was hissed, and there were cries from some in the audience, 'To hell with Judge Eldredge!'"[143] It was enough to convince the Michigan Supreme Court to uphold Chadwick's conviction.

The California case of *People v. Durrant* was not a contempt by publication case, but the 1897 decision concluded that litigants had no right to appeal a judge's decision concerning a request for contempt. William Henry Theodore Durrant was on trial for the April 1895 murder of Blanche Lamont.[144] It was a crime that captivated San Francisco, and the city's newspapers used both the murder and Durrant's trial as daily fodder to feed the public's curiosity. He asked the judge of the Superior Court of the City and County of San Francisco to cite several newspaper editors with contempt for publishing information related to the trial.[145] The court postponed considering the action until a later time. While the jury was being empanelled, Durrant renewed his application for contempt, but the court's response was the same, and he made no further requests. The jury eventually convicted Durrant of murder, and he appealed to the California Supreme Court.

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[141] Ibid., 28-29.
[142] Ibid., 29.
[143] Ibid., 31-32.
[144] *People v. Durrant*, 1897 Cal. LEXIS 528, 29.
[145] Ibid., 42.

Durrant appealed on several counts. One of them concerned the amount of negative coverage he and his trial had received in local newspapers and his inability to secure a contempt citation against them. He believed that the publications had prejudiced his case. Supreme Court Justice Frederick Henshaw recognized the following concerning contempt by publication:

> A publication during the course of a trial which reflects on the court, or assails the litigants, or seeks to intimidate witnesses, or spreads before the jury an opinion upon the merits of the controversy, or threatens them with public odium, or attempts to dictate the decision, or in any improper way endeavors to influence the determination, is unquestionably a contempt of court....[146]

However, Henshaw concluded that a litigant could not appeal a judge's action – or inaction – concerning a request for a contempt citation. "The litigant may not control this process, which is designed for the protection of the court," he wrote, "and which is to be invoked or not as its discretion may dictate, but which should be employed freely where the interests of justice and the rights of litigants demand it." Henshaw noted that if a court chose not to file contempt charges against newspaper editors, a defendant could appeal on the grounds that the publications prevented him from receiving a fair and impartial trial. The California Supreme Court was already aware that Durrant had presented this argument, too. He claimed that because of the "repeated publications in the newspapers of San Francisco, public feeling was unjustly aroused to bitter hostility against" him.[147] Justice Henshaw observed that the murder of Blanche Lamont was

> a crime of so atrocious a character that the community was greatly aroused. Its ghastly and sensational features were seized upon with avidity by the newspapers, and daily paraded and exploited before their horrified readers. When Durrant was arrested for the crime there was no reservation of judgment upon their part, but they proceeded with unanimity to hold him up to the public as the guilty man. During the trial of the case they vied with each other in sensational discoveries

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[146] Ibid., 43.
[147] Ibid., 66.

> and prophecies concerning new evidence and strange witnesses. They maintained throughout the attitude which they originally assumed, and from first to last continued to treat [the] defendant as the undoubted criminal. All this the record presented by [the] appellant abundantly establishes.[148]

Even under such circumstances, Henshaw said, "all men do not forsake reason; some still preserve a dispassionate judgment...."[149] He wrote that Durrant's jury had been "uninfluenced by aught save the evidence," and he concluded that a new trial was unnecessary.

The decision in the case of *People v. Durrant* was the only Nineteenth Century case concerning contempt by publication to consider the litigant's rights in requesting a contempt citation against a newspaper. The decision clearly favored the court's prerogatives in the matter, concluding that a litigant had no legal standing to appeal when a judge refused to pursue a request for contempt.

Corporations Not Immune

The 1899 cases of *Telegram Newspaper Co. v. Commonwealth* and *Gazette Company v. Same* in Massachusetts concluded the Nineteenth Century by considering an issue of contempt by publication that had not arisen at any other time during the previous one hundred years. The decisions determined that corporations, not just individuals, could be held liable for contempt. The Telegram Newspaper Company of Worcester, Massachusetts, and the Gazette Company, which was incorporated in Maine but was also based in Worcester, published articles concerning a local trial on January 13 and 14, 1898, respectively.[150] Silas H. Loring was suing the town of Holden for damages he had suffered when the town took his land, and the Superior Court at Worcester was hearing

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[148] Ibid., 67.
[149] Ibid., 68.
[150] *Telegram Newspaper Co. v. Commonwealth; Gazette Company v. Same,* 1899 Mass. LEXIS 775, 2.

the case. The *Worcester Daily Telegram* printed the following note about the case: "The town offered Loring $80 at the time of the taking, but he demanded $250, and, not getting it, went to law."[151] The *Worcester Evening Gazette* followed with a similar report: "The town offered the plaintiff $80, but he wanted $250." The Superior Court judge had determined such information as inadmissible at trial and accused the publications of being "calculated to influence [the jury] upon the amount of the damages to be given...."[152] He soon after convicted both corporations of contempt of court and ordered them to pay a $100 fine. He further ordered that if the fine was not paid within 24 hours, he would issue an order to seize their properties.[153] The corporations appealed to the state's highest court, arguing that a corporation could not be guilty of a criminal contempt of court.

Walbridge Abner Field, chief justice of the Supreme Judicial Court of Massachusetts, wrote that a corporation's property could be taken "either as compensation for a private wrong or as punishment for a public wrong."[154] People who published or assisted in publishing a libel in a newspaper owned by a corporation could be punished criminally by fine or imprisonment, he noted, and a corporation should not be allowed to escape criminal liability. "If a corporation publishes the article, we see no reason why it should not be held liable for a criminal contempt," he concluded.[155]

The Supreme Court also recognized that Massachusetts had no statutes that regulated "the trial and punishment of contempt of court." Field's opinion, according to

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[151] Ibid., 3.
[152] Ibid., 3.
[153] Ibid., 4.
[154] Ibid., 5.
[155] Ibid., 7.

the following passage, indicated that it did not matter where the contempt was committed:

> When it comes in any manner to the knowledge of the presiding justice of a court that articles are published in a newspaper circulated in the place where the court is held which are calculated to prevent a fair trial of a cause then on trial before the court, the court of its own motion can institute proceedings for contempt. Such a power in the court is necessary for its own protection against an improper interference with the due administration of justice, and it is not dependent upon the complaint of any of the parties litigant. If the publication amounts to a contempt of court, because it interferes with the due administration of justice in a cause before the court, the contempt is analogous to a contempt committed in the presence of the court.[156]

There was a question, though, about whether the articles were actually contemptuous. They were not defamatory toward anyone involved in the trial, Field wrote, and several people had been discharged from the contempt case on the grounds that they were not directly responsible for the publications. Field also noted that the Superior Court had found no intent to influence the case, and he concluded that the objection to the articles centered on the amount of money that the plaintiff had demanded for his land and how much the town had actually offered him.[157] That information was inadmissible at the trial, and the Supreme Court of Massachusetts considered it to be enough to constitute a contempt. According to the opinion,

> cases before a court should be determined on evidence presented in court. It is an inevitable perversion of the proper administration of justice to attempt to influence the judge or jury in the determination of a cause pending before them by statements outside of the court room, and not in the presence of the parties, which may be false, and even if they are true are in law not admissible as evidence.[158]

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[156] Ibid., 8.
[157] Ibid., 9-10.
[158] Ibid., 12.

The Supreme Court upheld the Superior Court's contempt convictions against the Telegram Newspaper Company and the Gazette Company, and it affirmed the court's right to seize the corporations' properties if the fines were not paid.

Conclusions

The cases of *Telegram Newspaper Co. v. Commonwealth* and *Gazette Company v. Same* were the Nineteenth Century's last contempt by publication decisions. They were unique in that they established a first in contempt by publication case law – the corporations that owned and published newspapers could be held liable for a contemptuous publication. The groundbreaking decision foreshadowed for the Twentieth Century what had been occurring during the late 1800s. An increasingly expansive interpretation of the judicial contempt power was underway, and there was a deteriorating adherence to the geographic restrictions that Congress and many states had placed on the contempt authority. The expansion was most evident in cases that determined a publication had potentially prejudiced a pending trial or caused irreparable harm to a judge's public perception. Two-thirds of the decisions that exhibited an expansive philosophy during the 1890s belonged to that category. When combined with similar previous decisions, the case record from the late Nineteenth Century clearly indicated that judges were rebuilding their contempt authority. This expansion continued unabated until the middle of the Twentieth Century.

CHAPTER EIGHT

CONCLUSIONS

Contempt by publication has been an understudied, but important, subset of American judicial contempt. In the Nineteenth Century, it was an area of the law in which some of America's fundamental rights and beliefs intersected: an unfettered press, an independent judiciary, a fair trial, and coequal branches of government. Contempt by publication represented more than a mere intersection of ideas, though. It was a legal landscape where some of the basic tenets of American democracy were tested against each other. The conflicts involved in balancing these rights led to legal decisions that were neither consistent nor conclusive on the question of contempt by publication.

Contempt by publication litigation exhibited three primary eras during the Nineteenth Century. From the beginning of the century until 1831, this area of the law depended heavily on English precedent and the common law. America's judicial system was still in its developmental stages, and there was no significant amount of American case law on contempt by publication. Judges were largely unregulated in their use of the contempt authority. Editors and publishers who avoided a contempt conviction did so only at the discretion of the judge. The second era commenced after the passage of the 1831 federal contempt statute. During the following quarter century, contempt by publication cases virtually disappeared from the federal court system, and state courts showed a willingness to follow the spirit of the law. There were very few cases during this period. The final era began in 1855, when the Arkansas Supreme Court rebuked

geographic restrictions on the judicial contempt power. The case *State v. Morrill* reestablished a contempt philosophy that was expansive in scope and could not be curtailed by legislative authority.[1] That decision marked the development of two distinct philosophies that continued to diverge for the rest of the century. One recognized statutory limitations on the contempt power while the other resisted legislative oversight.

As the Nineteenth Century progressed, judges moved away from English influences because a purely American interpretation of contempt by publication was maturing. Judges had developed three primary rationales to determine whether a publication was contemptuous: it tended to threaten the administration of a fair trial; it tended to damage a judge's or court's credibility in the eyes of the public; or it was an abuse of the freedoms of the press. The word "tended" was a crucial aspect of judicial interpretation of contempt by publication law. Judges were not actually required to show that a publication had damaged the prospects of a fair trial or that members of the public actually had changed their opinions of the local court system because of the publication. The determination was left entirely to the judge, who often decided that the publication in question had tended to damage the judicial process. The extent of the damage, though, was practically unquantifiable.

Judges, however, were not the only ones with a vested interest in holding newspapers accountable for their coverage of trials and court systems. Both defense attorneys and prosecutors requested contempt proceedings against a publication if they believed the information contained in the report or editorial was detrimental to their clients' cases. Such reports often concerned evidence that had been deemed inadmissible at the trial or included unflattering accounts of those involved in the case. Prosecuting

[1] *State v. Morrill*, 1855 Ark. LEXIS 73. See Chapter Four for an explanation of this case.

attorneys requested contempt citations more often than the defense, presumably because prosecutors (as representatives of the local government) had just as much professional credibility at stake as the local judge. A critical publication, if left unanswered, could damage a prosecutor's future prospects for employment or advancement.

Judges often used the contempt authority as a way to restore public confidence in the local court system. Numerous contempt by publication decisions indicated that a court would have preferred to ignore a critical publication if not for the potential damage it had caused to the court's reputation. These decisions suggested that the public would view a court as weak, ineffective, or, even worse, corrupt if it did not refute the publication and punish it accordingly. Some judges considered the loss of respect for judicial authority as the first step toward a lawless society. They expressed hope that by severely punishing an editor or publisher for contempt, the example would serve as a deterrent to others who might consider challenging or criticizing the court.

Contempt citations were also used against those who abused their free press liberties. Many state contempt statutes allowed judges to punish publications that were considered to be outside the bounds of the constitutional guarantees of press freedoms. The concept had been first introduced to America's judicial system through Sir William Blackstone's *Commentaries on the Laws of England*, which had been published in 1769. Exactly what constituted abuse, however, and the precise location of the boundaries of the free press guarantee were ill-defined. It was very difficult to defend oneself against such a charge. Judges were practically unchallenged in Nineteenth Century contempt by publication cases to define exactly what was meant by the phrase "abuse of press liberty."

The final decision was left to the whims of the court, and the press had no defense other than to deny the charge.

Contempt by publication played a significant role in America's development of a legal tradition for journalism. The last two decades of the Nineteenth Century were the most interesting for considering how the issue of contempt by publication shaped America's press. The 1880s and the 1890s were the century's most prolific decades for such litigation. More publishers and editors were cited for contempt than ever before, but they continued to publish their articles and, at times, to directly challenge judicial authority. Were journalists simply unruly and disrespectful of the law, or did they actually base their actions on the law? Did journalists incorporate a belief in the sanctity of press freedom into their arguments?

Almost without fail, editors and publishers stood before judges, admitted publishing the articles in question, and defended themselves against the contempt charges. Their reasons were very similar, even though the details of each case were different. They often argued that their reports or editorials were not contempts because the publications had not been intended to bring the judge or his court into disrespect. Editors often insisted that their publications were not contempts because the articles concerned cases that had already been decided and, therefore, could not affect the final outcome of the trial. They also argued that citizens had a right to criticize authority figures, including judges, and journalists had a constitutional right to publish freely and fairly in order to inform the public.

Court records suggest that this period of the Nineteenth Century was a confusing time in the development of judicial contempt by publication. Many decisions reached

opposite conclusions about the nature of the issue. Some cases favored the judiciary's use of contempt to control printed accounts of pending trials or criticisms of court officials. Other decisions supported a publisher's privilege to comment on such proceedings. Yet despite the conflicting case law, editors and publishers continued using similar defenses, even if those arguments had failed to keep journalists out of jail or avoid a steep fine in previous cases. Why?

It was possible that the editors and publishers who found themselves facing contempt charges simply did not know about other similar cases. Almost all of these cases were decided in state courts, and news of such legal activity may not have been circulated regionally or nationally very often. Therefore, journalists might have been unaware that claiming a right to freely publish trial testimony or criticisms of a judge had proven ineffective in other cases. Had editors and publishers known this, perhaps they would have tried to use other defenses. This scenario, however, was unlikely. By the end of the century, a significant amount of contempt by publication case law had been determined, and there had been a sufficient amount of legislative debate over the issue. It was most likely that journalists were well aware of contempt by publication and recognized it as an occupational hazard.

Other factors that could have shaped the defenses used against contempt citations were the state laws concerning press freedoms and judicial authority. The First Amendment protected the freedom of the press, but journalists rarely referred to its prohibitions against government restrictions. Instead, editors and publishers usually cited state constitutions that included similar press protections. In fact, those charged with contempt by publication rarely referred to any federal regulations concerning contempt,

including the restrictions Congress had approved in 1831. That act stated, in part, that federal courts could not punish for contempt any cases except "the misbehavior of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice...."[2] Congress had passed a geographic restriction on the scope of the federal judiciary's contempt powers. However, states were exempt from the law and were left to develop their own contempt guidelines. Many of them did, and it was those statutes that carried the most weight in the majority of contempt by publication cases. It is conceivable that editors and publishers developed their contempt defenses based almost entirely on state statutes and ignored federal guidelines already in place.

A third possible reason for the similarity of defense arguments was a sense of professionalization among journalists. By the end of the Nineteenth Century, many journalistic practices had become well established. Beat reporting, editorial writing, and publishing had become somewhat of a routine, but journalism was flexible enough to incorporate new ideas and technological advancements. Standards and ethics began to emerge as important considerations among journalists. It is not difficult to surmise that a common journalistic philosophy had also developed. This philosophy viewed journalists as those who reported on the powerful, the weak, the bizarre, the routine, the joyous, and the tragic on behalf of the people. Journalists, just as all citizens, had the right to publish freely on all subjects and would not submit to government restraints. They fought to defend this belief, when necessary, and considered it one of the cornerstones of American democracy. This sentiment often was evident in the arguments given against contempt citations.

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[2] Act of Mar. 2, 1831, chap. 99, 4 Stat. 487. See Chapter Three for an explanation of the events surrounding this legislation.

There may always be uncertainty surrounding the reasons why journalists were willing to fight for their right to publish articles and editorials concerning courts. However, there is no doubt that they believed such coverage was important. Editors and publishers defied judicial orders, criticized judges, and commented on the general operations of their local judicial systems. When such activities brought them before a judge, most argued that it was their right to publish such accounts, and they could do so freely under established guarantees of press freedom. Their arguments were not always successful, but the willingness to fight for their legal rights suggests that by the dawn of the Twentieth Century, journalists had developed uniform beliefs about their rights, duties, and freedoms. Contempt by publication case law provided a window into that process.

Despite the large number of convictions, a contempt charge was by no means indefensible. Some editors and publishers escaped serious repercussions simply by apologizing for the offensive publication and convincing the judge that they had not intended to harm the court or a pending trial. This was not always a successful approach, but a few judges accepted the excuses while simultaneously determining that a publication was contemptuous. These cases proved that it was possible to be guilty of contempt but avoid punishment because the intent of the publication was in question.

The legal battles concerning contempt by publication were fought primarily in state courts. Journalists had practically all of their successes using state laws as protection against a contempt conviction. As mentioned above, contempt by publication was primarily a state issue during the Nineteenth Century. The United States had two clearly defined systems of government at that time – the federal system and the state systems.

Even though the First Amendment guaranteed that the press was not to be abridged, it was enforceable only on the federal level. That was also true for the Judiciary Act of 1789, which recognized federal contempt power in America. The act gave the federal courts the power "to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same."[3] Even Congress' Act of March 2, 1831, which geographically limited the use of the judicial contempt authority, was applicable only to the federal court system.

State constitutions and statutes, however, closely mirrored those of the federal government. By the end of the Nineteenth Century, thirty-four of the forty-five states had statutes that placed some restrictions on the use of judicial contempt.[4] It made sense that journalists used state laws to defend themselves because almost all of the contempt by publication cases originated in local circuit or district court systems, not federal court systems. State laws were the prevailing source of authority in such cases. However, these statutes were not infallible. Some of them were not specific enough concerning the boundaries of the judicial contempt authority, and judges often interpreted the laws as favorably toward their position as possible.

A growing fear of the judicial contempt authority was what led to the creation of contempt statutes in the first place. The legislative branches of government at both the state and federal levels expressed deep concern about the implications of an expansive judicial contempt authority. They soon realized the potential threat that a powerful class of judges could present to a democracy. The Pennsylvania Assembly and the New York

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[3] Judiciary Act of 1789, full text cited in Daniel J. Meltzer and David L. Shapiro, *The Judicial Code and Rules of Procedure in the Federal Courts* (New York: Foundation Press, 2001), 721.
[4] Timothy W. Gleason, *The Watchdog Concept: The Press and the Courts in Nineteenth-Century America* (Ames, Iowa: Iowa State University Press, 1990), 85.

Legislature were among the first legislative bodies in America to address significant concerns about the judicial contempt authority as it related to newspaper publications. Fearing judges were abusing the contempt power, both states approved statutes that curtailed its use.

This issue forced lawmakers to consider which was to be the greater right – the right to publish freely on judicial matters or the right of the judiciary to protect itself. While legislators and congressmen expressed support for maintaining a free press in America, they also seemed hesitant to set any kind of precedent that would suggest the erosion of an independent judiciary. The country was founded on a tradition that included press freedom and the right to criticize those in authority. America also prized its judicial system, which was designed to work independently while keeping a check on other branches of government. Lawmakers attempted to achieve a compromise by restricting the use of the contempt power to events occurring in the immediate environs of the court. Under this arrangement, publishers would still be able to comment on court proceedings without the fear of reprisal, and judges would retain their unquestioned authority to maintain decorum within their courtrooms. Congress and other states soon enacted similar legislation, but despite the efforts to balance competing authorities, the statutory restrictions precipitated a showdown between the judicial and legislative branches of government.

The issue of contempt by publication became a Nineteenth Century battleground in the development of separate, but coequal, branches of government. It was an area of the law in which the judicial and legislative branches challenged each other for supremacy. The judiciary viewed the power of contempt as an inherent component of the

law and expansive in scope. It superseded statutory authority and even existed outside of the United States Constitution. Congress and state legislatures exerted their authority to create and maintain the laws of the land, and they considered the judicial contempt power as subject to regulation. In their view, the contempt authority was limited to a specific geographic location, and lawmakers were within their rights to curb it through legislation.

The Nineteenth Century's contempt by publication case record reveals a powerful advantage in favor of the judiciary. Some courts deferred to legislative oversight and accepted a new definition of what privileges the contempt power entailed. Most, though, either flatly rejected any kind of statutory regulation or employed a bit of creativity in determining what was allowable under contempt statutes. For example, judges of the late Nineteenth Century often interpreted the "so near the court" restriction as including any actions that occurred within their court's entire jurisdiction, not just the immediate physical environment. Judges also had the advantage of independence. They could determine how (or if) statutory regulations affected their contempt authority, and they could immediately act on their decision. Unless it was overturned on appeal, the decision stood as a powerful example for future contempt litigation. Legislatures simply could not keep up with that pace and were either unwilling or unable to address contempt decisions that might have stretched a statute's original intent.

The nature of the judiciary also played a key role in contempt by publication cases. A judgeship, unlike any other position in a democratic society, gave an individual the authority to interpret, dispute, or shape the law with absolutely no immediate oversight other than legal precedent. He could charge, convict, and sentence a person for contempt without ever giving the person an opportunity to bring his case before a jury.

Legal historians, along with some judges who were involved in contempt by publication cases, condemned such actions as contrary to constitutional provisions and as a potential threat to democracy. Contempt, which allowed a judge to do whatever was necessary to control his courtroom, was treated differently from libel, which also involved a publication but required a trial by jury. This difference has been among the most scrutinized aspects of contempt by publication law.

It still remains a mystery why the United States Supreme Court never had the opportunity to create a national legal precedent for contempt by publication during the Nineteenth Century. The court obviously never considered such a case during that time. The closest the U.S. Supreme Court came to the issue was in the 1875 Texas case of *In re Chiles*.[5] The justices simply upheld a court's authority to punish contempts against it. The lack of a national precedent created a virtual legal "grab bag" of contempt by publication litigation. It was not until the Twentieth Century that the Supreme Court considered the issue. One hundred thirty years passed between America's first contempt by publication case in 1788 and the Supreme Court's first consideration of the issue in 1918. However, it would be a mere twenty-three years before the court reversed that opinion and established the definitive contempt by publication precedent.

The growth of the expansive contempt by publication philosophy continued during the first two decades of the Twentieth Century, and it finally won the support of the United States Supreme Court. The 1918 Ohio case of *Toledo Newspaper Company v. United States* eliminated the geographic restrictions Congress had placed on contempt by publication in 1831.[6] Chief Justice Edward White delivered the majority opinion, stating

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[5] *In re Chiles*, 1874 U.S. LEXIS 1259. See Chapter Four for an explanation of this case.
[6] *Toledo Newspaper Company v. United States*, 1918 U.S. LEXIS 1863.

that the Act of March 2, 1831, did not place any new restrictions, particularly geographic ones, on a judge's contempt authority. He argued the following:

> ... there can be no doubt that the provision conferred no power not already granted and imposed no limitations not already existing. In other words, it served but to plainly mark the boundaries of the existing authority resulting from and controlled by the grants which the Constitution made and the limitations which it imposed.[7]

The decision reversed eighty-seven years worth of federal contempt law. Justices Oliver Wendell Holmes, Jr., and Louis Brandeis filed a dissenting opinion. Holmes, who wrote it, argued that when the words of the 1831 "statute are read it seems to me that the limit is too plain to be construed away."[8] He continued with the following:

> To my mind they point and point only to the present protection of the Court from actual interference, and not to postponed retribution for lack of respect for its dignity.... Without invoking the rule of strict construction I think that "so near as to obstruct" means so near as actually to obstruct -- and not merely near enough to threaten a possible obstruction. "So near as to" refers to an accomplished fact, and the word "misbehavior" strengthens the construction I adopt. Misbehavior means something more than adverse comment or disrespect.[9]

Though Justices Holmes and Brandeis held the minority opinion in this case, it would be less than a quarter century before their legal reasoning in the *Toledo* dissent became precedent.

The Supreme Court took the rare position in 1941 of reversing one of its previous decisions when it decided the case of *Nye v. United States* from North Carolina.[10] This case determined that the Congressional Act of March 2, 1831, did not simply define the federal judiciary's contempt authority – it significantly curtailed it. Writing for the majority of the court, Justice William Douglas declared that the words "so near thereto,"

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[7] Ibid. The LEXIS pagination is not present in this case. However, using another citation, the case and quote are located at 247 U.S. 402, 418.
[8] Ibid., alternate citation page 423.
[9] Ibid.
[10] *Nye v. United States*, 1941 U.S. LEXIS 1206.

when "read in their context and in the light of their ordinary meaning ... are to be construed as geographical terms."[11] It was not sufficient, he said, that the misbehavior targeted for contempt had some direct relation to the work of the court. "'Near' in this context, juxtaposed to 'presence,'" he said, "suggests physical proximity not relevancy."[12] The decision in *Nye* finally restored Congress' original intent to place a geographic restriction on the judicial contempt authority. Later that year, the Supreme Court sought to clarify the circumstances under which the use of contempt would be acceptable to impair an individual's free press rights. In the case of *Bridges v. California*, the court carved out an exception to the geographic limitations on contempt.[13] When certain circumstances made it clear that reporting on a judicial proceeding posed a clear and present danger to the government or society, the Supreme Court determined that the publication could be blocked legally. The 1941 cases of *Nye* and *Bridges* were the last major court decisions concerning contempt by publication in the United States. They still remain the controlling opinions in this legal arena.

Nineteenth Century judges, editors, and publishers did not have the advantage of foresight, of course, and they could not have known how this area of the law would ultimately conclude. However, the opposing Supreme Court decisions from the Twentieth Century also provided an excellent example of just how vexing the nature of contempt by publication proved to be. There were so many variables involved that it was practically impossible to predict the final decision in any contempt by publication case. A judge had sole discretion whether to cite a publication for contempt. The decision to pursue or not

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[11] Ibid. The LEXIS pagination is not present in this case, but the case and quote can be found in an alternate publication at 313 U.S. 33, 48.
[12] Ibid.
[13] *Bridges v. California*, 1941 U.S. LEXIS 1084.

pursue a case could have depended on numerous unknowns, such as the judge's personality, his political affiliation, his interpretation of the contempt authority and any statutes that may have pertained to it, what he thought about the publication, or his belief that the administration of justice had been harmed, among other possible reasons. It was equally difficult to determine how an appellate court would rule when a conviction was appealed. Sometimes the convictions were overturned, sometimes they were not, and there was no consistent, discernible pattern. Editors and publishers, for their part, had no distinct guidelines to follow, either. Freedom of the press was guaranteed, but so was punishment for abusing that right. There were times when publications flagrantly abused a judge because of his political alignments or unpopular rulings, but there were also many instances in which the article cited for contempt consisted of routine court coverage and criticism.

It has already been established that contempt by publication was primarily a state issue, meaning that judges had only to look to state law or precedents to determine the cases before them. Precedents were hard to find, though. Some states experienced only one such case during the entire century; others reported none. In the absence of an example from their home states, some judges acknowledged decisions from other states. Sometimes judges incorporated those decisions into their own rulings, but judges were under no obligation to follow out-of-state opinions. In fact, contempt by publication became an example of *a la carte* jurisprudence. A judge who wanted to strengthen his argument for or against a contempt conviction would simply choose the cases that supported his position. He would ignore cases that reached an opposing conclusion. This

was especially true during the latter third of the Nineteenth Century, when two distinct interpretations of the contempt authority became evident.

There was also no overarching law concerning contempt by publication that was applicable to the states as a whole. Pennsylvania and New York had passed contempt statutes before Congress approved one in 1831. Even though that law was applicable only to the federal court system, it served as a model for some states' contempt codes. Other states modeled their contempt laws on New York's statute or decided to create their own. Some states, though, chose not to address the issue of contempt at all.[14] With no uniform guiding principles in place, it was no wonder that contempt by publication decisions were neither predictable nor consistent during the Nineteenth Century. All of the statutes and legal cases, though, exhibited one common theme. None of them threatened to invalidate the contempt process. There was never any doubt that judges had a right to exercise their contempt authority, and the existence of the power itself was never questioned. The challenges arose from its use in punishing publications.

Contempt by publication law has not received as much attention as its closest relative – libel law – has received from legal scholars and historians of Nineteenth Century press litigation. However, there are some valuable lessons still to be learned from this understudied area, and contempt by publication should be recognized as an important component of the development of American press law. Benjamin Franklin stated that "if all printers were determin'd not to print any thing till [sic] they were sure it

[14] Walter Nelles and Carol Weiss King, "Contempt by Publication in the United States: Since the Federal Contempt Statute," 28 *Columbia Law Review* 525 (1928): 533. See footnote 30 for a thorough list of state legislative actions regarding contempt and how they related to the federal contempt statute. See the Appendix on page 554 for even more explanation of state contempt statutes.

would offend no body, there would be very little printed."[15] This seems an apt description of the efforts of Nineteenth Century newspaper publishers and editors to expand their press freedoms in the face of considerable judicial oversight. America's journalists were faced with traversing a minefield when they published reports or commentaries on the judicial process. They rankled several judges along the way, suffering stiff financial penalties and incarceration for their actions. However, their trials, both literal and figurative, significantly influenced journalism's legal traditions in America. Nineteenth Century contempt by publication litigation helped set the tone for the continued evolution of America's press freedoms. The vestiges of those efforts can still be seen today in the freedom that modern journalists have to report about, comment upon, and even criticize court systems and the people who administer them.

[15] Benjamin Franklin, cited in Paul P. Ashley, *Say it Safely: Legal Limits in Publishing, Radio, and Television* (Seattle: University of Washington Press, 1966), 93.

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