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CONTEMPT OF COURT BY PUBLICATION: A LOOK AT PHILIPPINE, ENGLISH, AND AMERICAN PRACTICE

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Freedom of expression, a concept unknown to Philippine jurisprudence prior to 1900, is a transplant from American constitutional soil. It was in the *Instruction to the Second Philippine Commission* issued by President McKinley on April 7, 1900, that the rule was laid down "That no law shall be passed abridging the freedom of speech or of the press or of the rights of the people to peaceably assemble and petition the Government for a redress of grievances."[1] The Philippine Bill of 1902 and the Jones Law of 1916, two statutes passed by the United States Congress in the nature of organic acts for the Philippines, reaffirmed these guarantees. Lifted bodily from the American constitution, these guarantees came to the Philippines weighted with all the applicable jurisprudence of American constitutional cases.[1] This paper will review the historical course which freedom of expression has taken in the past sixty years of Philippine jurisprudence particularly as applied to the ever recurring issue of contempt of court by publication. An attempt will also be made to compare it with American and English constitutional doctrine, to criticize it and, in the process, to make tentative suggestions as to the course of future developments.

PRE-COMMONWEALTH PERIOD

The formative period of Philippine constitutionalism took place principally under the tutelage of American members of the judiciary. The first major lesson on contempt by publication

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[1] U.S. v Bustos 37 Phil. 731, 739-40 (1918).

was taught by the case of *In Re Kelly*,[2] a Philippine Supreme Court decision based on the now discredited case of *U.S. v. Toledo Newspaper Co.*[3] Amzi B. Kelly, an American, had been previously found guilty of contempt. He was granted a rehearing and, pending final decision, he caused a letter to be published in "The Independent," a Manila paper, in which he severely castigated the Supreme Court. Characterizing the initial decision as "atrocious," "arbitrary and arrogant and knowingly and maliciously perpetrated . . . for the purpose of terrorizing the people and intimidating the press," he accused members of the Court of "arrogantly misusing imaginary judicial powers [to punish for contempt]," of being made of mud, and of "cowardly shielding themselves behind contempt proceedings." Mr. Justice Johnson, writing for a unanimous court laid down the following rule: "Any publication pending a suit, reflecting upon the court, the jury, the parties, the officers of the court, the counsel, etc., with reference to the suit, or tending to influence the decision of the controversy, is contempt of court and is punishable." The court found that Kelly's letter constituted contempt because it manifested an intentional attempt to bring the Supreme Court and its members "into contempt and ridicule and to lower [their] dignity, standing and prestige . . . and to hinder and delay the due administration of justice." The publication tended "directly to affect and influence the action of the Supreme Court."[4]

The decision, however, for all its crippling implications, was not a foreclosure on the right to criticize judicial action. Two years later, Mr. Justice Malcolm, the man who more than any single American contributed most to early constitutional development in the Philippines, was to assert that "The guarantees of a free speech and a free press include the right to criticize judicial conduct." Said he: "The interest of society and the maintenance of good government demand a full discussion of public affairs. Complete liberty to comment on the conduct of public men is a scalpel in the case of free speech. The sharp incision of its probe relieves the abscesses of officialdom. . . . A public officer must not be too thin skinned with reference to comment upon his official acts."[5] Noteworthy, however, in this

[2] In Re Kelly 35 Phil. 944 (1916).
[3] 220 Fed. 458 (1915). Upheld in Toledo Newspaper Co. v U.S. 247 U.S. 454 (1917) and overruled in Nye v 313 U.S. 33 (1941).
[4] 35 Phil. 944, 947-8, 951-2 (1916).
[5] U.S. v Bustos 35 Phil. 731, 740-1 (1918).

decision was the fact that the official "contemned" was not a member of the Supreme Court but a judge of an inferior court.

Three subsequent contempt decisions penned by Mr. Justice Malcolm still loom large as landmarks in the Philippine judicial scene. The first, *In Re Lozano and Quevedo*,[11] arose out of an article published in "El Pueblo," an Iloilo newspaper, purporting to relate the proceedings in an investigation of a district judge. The investigation had been held behind closed doors in compliance with a resolution of the Supreme Court making such investigations secret and confidential. The editor of the paper and the author of the article were cited for contempt. Malcolm approached the case conscious of its novelty and with the realization that English jurisprudence supported the Supreme Court resolution, that American state courts were divided on the subject, and that there was no authoritative Federal Supreme Court decision he could rely upon. "What is best for the maintenance of the Judiciary in the Philippines," he said, "should be the criterion. Here, in contrast to other jurisdictions, we need not be overly sensitive because of the sting of newspaper articles, for there are no juries to be kept free from outside influence. Here also we are not restrained by regulatory law. The only law, and that judge made, which is at all applicable to the situation, is the resolution adopted by this court."[6] Whereupon the court proceeded to declare Lozano and Quevedo in contempt!

The reasoning behind this decision, which is still law, is easily summarized. The Supreme Court resolution requiring secrecy was intended as a protection "against the practice of litigants and others making vindictive and malicious charges against lawyers and Judges of First Instance, which are ruinous to the reputations of the respondent lawyers and judges." From that, it was only one step to saying that "Respect for the Judiciary cannot be had if persons are privileged to scorn a resolution of the court adopted for good purposes . . ." And disrespect, in the form of disregard of this resolution, prevents the court from proceeding "with the disposition of its business in an orderly manner free from outside interference obstructive of its constitutional functions."[7]

The rule as here applied, by any other name, still smells "prior restraint." There are no juries to be kept free from out-

[6] 54 Phil. 801, 807 (1930).
[7] Id. at 805, 807, 808.

side influence, the court said; yet there are lawyers to be shielded and judges to be respected. Ordinary libel laws are not deemed sufficient for these. And Malcolm was not only to reiterate this rule in *In Re Abistado*[8] but he was also to give it a novel twist in *In Re Torres*.[9]

Torres was the editor of "El Debate," a Manila paper which ran an article anticipatory of a Supreme Court decision. The article claimed knowledge of the actual decision already made, purported to name the writer of the decision, and even pointed out the probable distribution of the votes among the justices. The court declared Torres in contempt. Mr. Justice Malcolm, again writing for a unanimous court, said:

> . . . The proceedings of this court must remain confidential until decisions or orders have been properly promulgated. The reason for this is so obvious that it hardly needs explanation. In a civil case, for example, prior knowledge of the result would permit parties to compromise cases to the detriment of parties not so well informed. In criminal cases, for example, advance advice regarding the outcome would permit the accused to flee the jurisdiction of the court. The court must therefore insist on being permitted to proceed to the disposition of its business in an orderly manner, free from outside interference obstructive of its functions and tending to embarrass the administration of justice.[10]

It is clear from the cases thus far seen that the pre-Commonwealth period of Philippine legal history opened and closed with the "dangerous tendency" rule. We find Justice Malcolm in these decisions thinking the thoughts of children of his time; for even under American law the "clear and present danger" rule, which made its first appearance in a dictum of Holmes in the *Schenck* case in 1919,[11] was not finally and firmly established until *Thornhill v Alabama*[12] in 1940. From 1919 to 1940, the rule subsisted merely in the dissents and concurrences of Holmes and Brandeis.[13] The prevalent Federal Supreme Court view on contempt by publication favored at the time of the Philippine decisions was the "dangerous tendency" rule. Thus, Holmes himself, in

[8] 57 Phil. 668 (1932).

[9] 55 Phil. 799 (1931).

[10] Id. at 800. Thus the stage was set for an embarrassing interlude in which the Court would find itself seventeen years later. See discussion of In Re Subido 81 Phil. 517 (1948), infra.

[11] 249 U.S. 47 (1919).

[12] 310 U.S. 88 (1940).

[13] See Abrams v U.S. 250 U.S. 616 (1919); Schaefer v U.S. 251 U.S. 466 (1920); Gitlow v N.Y. 268 U.S. 652 (1925); Herndon v Lowry 301 U.S. 242 (1937).

Patterson v. Colorado,[14] declared for the Supreme Court that "if the court regards, as it may, a publication concerning a matter of law pending before it, *as tending toward such an interference*, it may punish it as in the instance put."[15] And again in *Toledo Newspaper Co. v U. S.*[16] the test for contempt was "not the influence upon the mind of the particular judge . . . but the reasonable tendency of the acts done to influence or bring about the baleful result . . ."[17] It was not until the 1941 case of *Bridges v California*[18] that the "clear and present danger" rule was applied to contempt by publication.

In the light of this historical fact, a question arises: What effect did the adoption of the Philippine Constitution in 1935 have on the status of the "dangerous tendency" rule? At the time of the ratification of the Constitution, the rule had become solidly entrenched in Philippine jurisprudence not only as applied to cases of contempt by publication but also as applied to other cases involving freedom of expression.[19] Add to this the fact that Professor Aruego, a delegate to the Philippine constitutional convention, relates that the convention was "conservative in its consideration of the Bill of Rights, avoiding insistently the inclusion of any provision whatsoever not tested in the crucible of experience of the Filipino people . . ."[20] Jose P. Laurel, the Chairman of the committee that drafted the Bill of Rights, had this to say in an explanatory note attached to the draft: "Modification or changes in phraseology have been avoided, whenever possible. This is because the principles must remain couched in a language expressive of their historical background, nature, extent and limitations as construed and expounded by the great statesmen of constitutional dogmas."[21] In the end, the provision on freedom of speech and the press which was ratified was an exact replica of the guaranties found in the Philippine Bill of

[14] 205 U.S. 454 (1907).

[15] Id. at 463. Emphasis added.

[16] 247 U.S. 402 (1916).

[17] Holmes' dessent in this case is not a departure from his opinion in the earlier Patterson case. In the earlier case, his decision was on the basis of common law; here on the basis of a statute. See id. at 422-5.

[18] 314 U.S. 252 (1941).

[19] People v Perez 45 Phil. 599; People v Evangelista 51 Phil. 254; People v Nabong 57 Phil. 455; Evangelista v Earnshaw 57 Phil. 255; People v Feleo 58 Phil. 573.

[20] I THE FRAMING OF THE PHILIPPINE CONSTITUTION 151 (1949).

[21] Id. at II 847.

1902 and the Jones Law of 1916, the guaranties on which Philippine jurisprudence had been built. Thus the question: Did the ratification of the Bill of Rights in the Philippine Constitution have the effect of ossifying the "dangerous tendency" rule? Did the grant of "Judicial power" to the courts in Article VIII have the effect of engrafting into our constitutional corpus the whole history of the administration of justice in English, American, and Philippine courts through the centuries?[21a]

Leaving aside the question of whether or to what extent convention records are valid sources of constitutional construction, it can perhaps be said that, at the least, the framers left the matter an open question; at the most, they left revealing signs of acceptance of the "clear and present danger" rule. Laurel, at that time an acknowlegeded authority on constitutional law and the man who piloted the Bill of Rights through the convention debates, clearly advocated the "clear and present danger" rule. In his sponsorship speech, he went to the extent of citing its original formulation in the *Schenck case*.[22] And it is, perhaps, not without significance that in his explanation of the freedom to criticize officialdom the only two cases he cited were *U. S. v Bustos*[23] *and U. S. v Perfecto*,[24] both of them contempt cases which had resulted in acquittal. (It should, however, be added that these were not cases of contempt of the Supreme Court but of inferior courts.)

POST-COMMONWEALTH PERIOD

Laurel became a member of the Supreme Court shortly after the innauguration of the Commonwealth and, in 1939, it fell on his lot to write the opinion on the first case of contempt by publication to reach the Court under the new Philippine Constitution. His language is not unlike that of Laurel of the constitutional convention: "It must however clearly appear that such publications do impede, interfere with and embarrass the administration of justice before the author of the publications should be held for contempt."[25] The impact of this statement, however,

[21a] See Frankfurter 'Power of Congress Over Procedure in Criminal Contempts in 'Inferior' Federal Courts — A Study in Separation of Powers" 37 HARVARD L. R. 1010, 1017 (1924).

[22] Aruego op. cit. 1059.

[23] 37 Phil. 731 (1918)

[24] 43 Phil. 225.

[25] People v Alarcon 69 Phil. 265, 271 (1939).

is lost in the fact that the publication in question was a comment on a case which technically was no longer pending.[26] (Here again the object of criticism was not the Supreme Court but an inferior court.) We only add that Mr. Justice Moran's dissent advocating the application of the "dangerous tendency" rule even to cases no longer pending symbolized the dying gasp of that extreme view. Moran said that while the opposite rule may find justification in the United States, "considering the American temper and psychology and the stability of its political institutions, it is doubtful whether here a similar toleration of gross misuse of liberty of the press would, under our circumstances, result in no untoward consequences to our structure of democracy yet in the process of healthful development and growth."[27] This growing democracy was in fact to meet its supreme test in a war which occasioned our next case of contempt by publication.

To expedite the prosecution of the numerous treason cases which arose out of the war against Japan, a People's Court with special jurisdiction over the crime of treason was established. A resolution of the fifth division of this court denying bail to an accused was reversed by the Supreme Court. Three days after the reversal, Judge Quirino of the fifth division, openly criticized the action of the Supreme Court before a group of newspapermen. Calling the decision the "biggest blunder" and claiming that it "robbed" the People's Court of its jurisdiction, he accused the Supreme Court of lacking "intellectual leadership" and of offering merely "sentimental leadership." He characterized the decision as the result of intellectual dishonesty and of quantitative and not qualitative voting.[28] His remarks were published in the local dailies at a time when, technically, the case was still pending before the Supreme Court.[29]

Although the court said, in declaring Quirino in contempt, that the latter's remarks merely "tended to embarass this Court." it seems that the court meant that they actually did embarass the court. The court said:

[26] The alleged contemptous utterance were made against a judge of a Court of First Instance after he had lost jurisdiction over the case by the perfection of the appeal to the Court of Appeals.

[27] Id. at 279.

[28] In Re Quirino 76 Phil. 631-2 (1946).

[29] The case was considered still pending because the Court had not yet written the extended opinion which it announced would be given and the case was still open to a motion for reconsideration. Id. at 632.

To be specific: At the time of adopting the resolution, the majority members made up their minds to announce . . . that, as a general rule, in cases of abuse of discretion in the matter of bail, our judgment should be to return the case to the People's Court with a direction for the granting of bail; but in this particular case, in view of the long process which the petitioner had to undergo, the majority thought it conformable to equity and justice that she should be bailed immediately. After the criticism had been launched, it became a bit embarrassing for said majority members to expound that view in the full-dress opinion, because the public might suspect they had receded somewhat from this stand, falsely represented as "robbing" the People's Court of its power to grant bail. Again, the minority members proposed to question our authority to grant bail. After Judge Quirino, without waiting for their dissent, had publicity raised the same doubt, said minority felt uneasy to appear as taking the cue from him. And so of other phases of the issue.[30]

One may well wonder whether the judicial embarrassment and uneasiness generated by Judge Quirino's remarks were so substantive an evil as to warrant curtailment of a cherished freedom.

The next case to reach the Supreme Court was a repetition of the *Torres* incident, but with a comico-tragic twist. Pending before the Supreme Court was the historic case of *Krivenko v Register of Deeds*.[31] The question at issue was whether aliens could, under the Constitution, validly acquire residential lands. The case was with the Supreme Court on appeal by Krivenko. When the Secretary of Justice issued a circular amending a previous one, which Krivenko had originally challenged, and directing Registrars of Deeds to accept registration of alien-acquired real estate, Krivenko asked to withdraw his appeal. At this point, Subido, editor of the "Manila Post", on information received from an official of the Supreme Court, published an article saying that the Supreme Court had already voted 8-3 against the right of aliens to acquire residential lands. The article further said:

> My informant told me that the court held three sessions to deliberate on this petition to withdraw [the appeal]. These sessions, he said, were featured [sic] by tumultuous and violent discussions among the justices. He also told me that my series of editorials attacking the unconstitutionality of Justice Secretary Ozaeta's order helped in a big way to make the justices decide against the withdrawal.
>
> This official pointed out that the position of the petitioner was strong because the office of the solicitor general, which represented the government in the case, agreed to the withdrawal. Had the withdrawal been allowed, my informant indicated, the Supreme Court would have culpably

[30] Id. at 633-4.

[31] 79 Phil. 461 (1947).

abdicated its important function as guardian or protector of the Philippine Constitution.[32]

It turned out that Subido's informant was one of the Justices of the Supreme Court. He had "leaked out" the information because he was disturbed by the delay in the promulgation of the decision.

On the strength of the *Torres* ruling, Subido was declared in contempt. The court said that although the information had been furnished by a member of the Court, it nonetheless was unauthorized and therefore constituted contempt "por entorpecer, obstruir o embarazar la administracion de justicia." That the article may have hastened the delayed promulgation of the decision and thus forestalled certain evils was not recognized as a valid defense. Nor did the fact that the source of the information was a member of the court excuse the respondent. His responsibility was considered distinct from that of the Justice concerned. Newspapermen, the court said, should restrain the desire to satisfy the public's yen for news "cuando van de por medio la vida y seguridad de las instituciones."[33]

One would wish that the perfervid utterances made in the name of an outraged dignity and threatened extermination of democratic institutions were but lawyer's rhetorical flourishes, florid but painless; but one who has read up to this point will easily see that the court seriously sees the problem as a matter of life and death "van de por medio la vida y seguridad de las instituciones." The cases of *In Re Parazo*[34] and *In Re Sotto*,[35] the latest in this series of vindications of the dignity of the Supreme Court, may even give the impression that the final nails have been driven into the coffin of critics of such an august body.

Angel Parazo, a reporter for the "Star Reporter," had published an article alleging that the Bar Examination questions for 1948 had leaked out. The examinations were conducted under direct supervision of the Supreme Court in the exercise of a constitutional duty.[36] The court, therefore, ordered Parazo to

[32] In Re Subido 81 Phil. 517, 542-3 (1948)

[33] Id. at 523-7. The Court further added that since the Philippine judiciary had been liberal to the press, the latter should reciprocate with respect. At 528.

[34] 82 Pil. 230 (1948).

[35] 82 Phil. 595 (1948)

[36] Articles VIII, Section 13.

reveal the source of his information. Parazo refused; he was declared in contempt. The Court said: ". . . we have the inherent power of courts in general, specially of the Supreme Court as representative of the Judicial Department, to adopt proper and adequate measures to preserve their integrity, and render possible and facilitate the exercise of their functions, including, as in the present case, the investigation of charges of error, abuse or misconduct of their officials and subordinates, including lawyers, who are officers of the Court."[37]

While the Supreme Court was reconsidering this decision, Senator Vicente Sotto published an article in the "Manila Times" which read partly as follows:

> I regret to say that our High Tribunal . . . is once more putting in evidence the incompetence or narrow mindedness of the majority of its members. In the wake of so many blunders and injustices deliberately committed during these last years, I believe that the only remedy to put an end to so much evil, is to change the members [sic] of the Supreme Court. To this effect I announce that one of the first measures, which I will introduce in the coming congressional sessions, will have as its object the complete reorganization of the Supreme Court. As it is now constituted, the Supreme Court of today constitutes a constant peril to liberty and democracy. . . .[38]

Sotto went the way of Parazo. The court said that "criticism or comment on the correctness or wrongness, soundness or unsoundness of the decision of the court in a pending case made in good faith may be tolerated" and may even "enlighten the court and contribute to the correction of an error." But "to intimidate the members of this Court with the presentation of a bill in the next Congress" and to falsely charge "that this Court has been for the last years committing deliberately 'so many blunders and injustices'" constitute contempt.[39] The Court continued:

> As a member of the bar and an officer of the courts Atty. Vicente Sotto,

[37] In Re Parazo 82 Phil. 230, 244-5 (1948). Parazo's defense was that under Section 1 of Republic Act No. 53 newspapermen could be compelled to reveal the source of their news only when revelation was demanded by the "interest of the State." Parazo claimed that "interest" here meant "security." The Court did not accept this defense. Subsequent to this decision and because of this decision, Congress, by Republic Act 1477, amended the law to read "security of the State." The question may therefore be asked whether such amendment can affect what the Court claims to be its "inherent power."

[38] In Re Sotto 82 Phil. 595, 597 (1949).

[39] Id. at 600-1.

> like any other, is in duty bound to uphold the dignity and authority of this Court, to which he owes fidelity according to the oath he has taken as such attorney, and not to promote distrust in the administration of justice. Respect to [sic] the courts guarantees the stability of other institutions, which without such guaranty would be resting on a very shaky foundation.[40]

The decision was unanimous.

The question may now be asked whether the "clear and present danger" rule, as found in Philippine jurisprudence and as applied to cases of contempt by publication, should be certified as stillborn, and, if stillborn, whether it can experience resuscitation. The course of American constitutional history, already alluded to above, offers a lesson. At the time of the ratification of the First Amendment guaranteeing freedom of speech and of the press, the Blackstonian common law conception of free expression was the prevailing dogma. "The liberty of the press," said Blackstone in his *Commentaries*, "is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publication, and not in freedom from censure for criminal matter when published. Every freeman . . . if he publishes what is improper, mischievous or illegal must take the consequences of his temerity. . . . [To] punish (as the law does at present) any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged *of a pernicious tendency*, is necessary for the preservation of peace and good order, of government and religion, the only solid foundation of civil liberty."[41] When the First Amendment was adopted, it was not the intention of the framers to change the Common Law. Said Frankfurter: "The historic antecedents of the First Amendment precluded the notion that its purpose was to give unqualified immunity to every expression that touched on matters within the range of political interest."[42] Holmes himself was to endorse Blackstone in a case of contempt by publication: "In the first place, the main purpose of such constitutional provisions is 'to prevent all such *previous restraints* upon publication as had been practiced by other governments, and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare."[43] It should be recalled that in this

[40] Id. at 602.

[41] See Corwin ed. THE CONSTITUTION OF THE UNITED STATES OF AMERICA 769 (1953). Emphasis added.

[42] Dennis v U.S. 341 U.S. 494, 521 (1951) in Corwin loc. cit.

[43] Patterson v Colorado 205 U.S. 454, 462 (1907).

case, Holmes had held that to constitute contempt all that was required was that the publication *tend toward an interference with the administration of justice.*[44] But Holmes had also remarked in the same case that "There is no constitutional right to have all general propositions of law once adopted remain unchanged."[45] Thus, in 1919, he forged the "clear and present danger" rule in the *Schenck* case, the rule which was to revolutionize the American Supreme Court's attitude to free speech and press.

A similar change of attitude may yet take place in the Philippine Supreme Court, for the "clear and present danger" rule is not a complete stranger to Philippine jurisprudence. The rule, as was shown above, first came up in the Philippine Constitutional Convention, although its distinctive import may have completely escaped most of the delegates.[46] Again it showed its head, somewhat hesitantly, in *People v Alarcon.*[47] Then it became clearly recognizable in *Primicias v Fugoso* where the court, reasserting the right to free speech, cited the words of Mr. Justice Brandeis in *Whitney v California*: "To justify suppression of free speech . . . there must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one."[48] Eight years later, Mr. Justice Concepcion would comment on this case in a dissent thus:

> The case of *Fugoso vs Primicias* (45 O.G. 3280) cited in the majority opinion, is authority in favor of petitioners herein, for it applied the clear and present danger rule, and no such clear and present danger exists in the case at bar. It is true that said rule has not been consistently adhered to by this Court, and that the same has, in effect, shown its preference for the dangerous tendency rule. However, in every case in which the latter was applied, there had been a *tangible specific act* of the party adversely affected thereby, which incited or tended to incite in a substantial manner a breach of peace. . . .[49]

[44] Id. at 463.

[45] Id. at 461.

[46] See Note 22, supra.

[47] 69 Phil. 265 (1939)

[48] 80 Phil. 71, 87 (1948) citing 71 U.S. (Law. Ed.) 1105.

[49] Ignacio v Ela G.R. L-8858 May 31, 1956; 21 LAWYERS' JOURNAL 391 (1956). Concepcion continues: "Thus, in People v Evangelista (51 Phil. 254), People v Nabong (57 Phil. 455), and People v Feleo (58 Phil. 573), the defendants were found to have advocated the overthrow of the government by the use of force. The defendant in People v Perez (45 Phil. 599) had expressed himself publicly in favor of beheading our then Gover-

But the clearest recognition of the "clear and present danger" rule to come from the Supreme Court was a dictum in the 1957 case of *American Bible Society v City of Manila* where the court bluntly stated that any curtailment of freedom of expression could be justified only on the ground that "there is a clear and present danger of a substantive evil which the state has the right to prevent."[50]

Less unequivocal than the *American Bible Society* case but more pertinent to this paper is the case (also 1957) of *Cabansag v Fernandez.*[51] For all its imperfections in literary draftmanship, this latter case again paid tribute to the clear and present danger rule. Cabansag, chafing at the long delay of his case before a Court of First Instance, wrote a letter asking for relief. The latter was addressed not to a court but to the Presidential Claims and Actions Committee (PCAC), an executive body. The lower court resented this recourse to an extrajudicial forum and declared Cabansag in contempt. On appeal, after discoursing on the existence of two "rules," citing among others the pronouncements in the *Bridges, Pennekamp* and *Craig* cases, the Supreme Court, apparently accepting the applicability of either rule, said: "The question then to be determined is: Has the letter of Cabansag created a sufficient danger to a fair administration of justice? Did its remittance to the PCAC create a danger suffi-

nor-General Wood. In the case of Espuelas v People of the Philippines (G.R. L-2990, Dec. 17, 1951), this Court held that the acts of Espuelas tended to stir up the people against the lawful authorities. In Evangelista v Earnshaw (57 Phil. 255), we upheld the refusal of the Mayor of Manila to grant permit to the communist party to hold further political meetings in said city, after the members of said party had in public meetings incited *the people to rise in arms against the government,* for which reason several criminal cases for sedition were filed against the leaders of said party who, subsequently, were convicted of the crimes charged against them." At 395.

Concepcion does make a point, but one could easily take exception to his "in every case." Espuelas v People, cited by Concepcion, easily stands out as an example of judicial appreciation of substantial threat to order where only tragico-comic material existed. Espuelas, for having caused a picture to be taken depicting himself as hanging lifeless by a piece of rope and for circulating this picture with an accompanying letter to his wife saying that he was immolating his life because of the corruption-ridden government of President Roxas, was found guilty of inciting to sedition.

[50] O.G. 2187 (1957).

[51] G.R. L-8974 October 18, 1957; 23 LAWYERS JOURNAL 236 (1958).

ciently imminent to come under the two rules mentioned above?"[52] In acquitting Cabansag, the Supreme Court found that neither rule was satisfied. For expression to constitute contempt "the danger must cause a serious imminent threat to the administration of justice. Nor can we infer that such act has a 'dangerous tendency' to belittle the court or undermine the administration of justice, for the writer merely expressed his constitutional right to petition the government for redress of a legitimate grievance."

The decision, however, ends with a special note addressed to Cabansag's lawyers: "But they should be warned, as we now do, that a commission of a similar misstep in the future would render them amenable to a more severe disciplinary action."[53] Thus, a further question: Do lawyers, by the very fact of their being lawyers, enjoy a lesser degree of freedom to criticize courts? It is true that Article VIII, Section 13 of the Constitution gives the Supreme Court regulatory powers over "pleading, practice, and procedure in all courts, and the admission to the practice of law;" but the same provision also adds that this power "shall not diminish, increase, or modify substantive rights." What right can be more substantive for a lawyer than the right freely to speak out in the name of justice, and what person is in a better position than lawyers to see whether justice is being done by the courts? Yet the Cabansag case suggests that precisely in this area the lawyer is less free than the ordinary citizen. Two observations here are in point. First, the strict enforcement (by means of contempt proceedings amounting to "prior restraint") of the rule requiring secrecy in the investigation of lawyers and judges together with the warning in the *Cabansag* case constitutes a double wall erected around the judiciary. Second, a recent attempt by a lower court to exclude an attorney in a case from the protection of the "clear and present danger" rule was reversed by the U.S. Supreme Court.[53a]

[52] Id. at 239.

[53] Id. at 240-1.

[53a] Reversing In Re Sawyer 260 F2d, Mr. Justice Brennan said: "But it is said that while it may be proper for an attorney to say the law is unfair or that judges are in error as a general matter, it is wrong for counsel of record to say so during a pending case. The verbalization is that it is impermissible to litigate by day and castigate by night." See 260 F.2d, at 202.

A lawyer does not acquire any license to do these things [castigating]by not bing presentl engaged in a case." In Re Sawyer 27 U.S.L. WEEK 4543, 4547 (1959). Frankfurter, dissenting, said: "Of course, a lawyer is a person and he too has a constitutional freedom of utterance and may exercise it to castigate courts and their administration of justice. But a lawyer actively participating in a trial, particularly an emotionally charged criminal prosecution, is not merely a person and not even merely a lawyer." Id. at 4556.

THE LIWAG "BLAST"

From this brief survey of Philippine decisions, the following preliminary observations may be drawn: (1) Only publication made during the pendency of a case is punishable as contempt. A case is pending not only prior to the promulgation of the decision but even after promulgation when the possibility of reconsideration[54] by the same court[55] still exists. (2) The only test conclusively established by Supreme Court decisions is the "dangerous tendency" rule. However, in certain cases involving contempt of *inferior* courts, the "clear and present danger" rule has been given at least a nodding assent.[56] (3) The danger guarded against in punishing for contempt is either extraneous influence on the court's act of decision making or disrespect and disobedience which can breed popular distrust in courts and court decisions. (4) In every case reaching the Supreme Court where the questioned publication was alleged to be contemptuous of the Supreme Court or its Justices, the publication was declared contemptuous;[57] but in every case where an inferior court or its judge was the target, absolution followed. (5) In the early cases, where the rule for contempt by publication was forged, reliance was had on American state court cases and on Federal Supreme Court cases decided at a time when the guaranties of the First Amendment had not yet been recognized as extending to state actions *via* the Fourteenth Amendment.[58] (6) At least one decision suggests that the freedom of lawyers in relation to courts is less than that of ordinary citizens. (7) Contemporary American jurisprudence on the subject is a departure from the Blackstonian formulation of the common law conception of freedom of expression.

[54] See Note 29, supra.

[55] See Note 26, supra. his and the preceding note are perhaps evidence of a tendency to prolong the "pending" status of a case precisely for the purpose of proscution.

[56] People v Alarcon, Cabansag v Fernandez, supra.

[57] An exception to this is In Re Gomez 43 Phil. 376. But here the charges made by respondent were not in relation to a pending case.

[58] The extension was made in Gitlow v N.Y. 268 U.S. 652, a 1925 case. In Re Kelly, supra, which is still followed, was decided in 1916.

This is the jurisprudential atmosphere within which interest in contempt by publication has been revived in the Philippines within the past year. The revival has political origins. Within one year from President Macapagal's assumption into office, the Liberal administration lost four important and widely publicized cases before the Supreme Court, the last of them containing a concurring opinion which amounted to a censure of the President.[59] The President issued a strong answer to this censure, but, as in all the other three cases, he faithfully saw to the enforcement of tthe Supreme Court decision. On January 9, 1963, however, Juan Liwag, then Secretary of Justice but disavowing Presidential incitement, delivered before the Manila Lions Club a widely discussed speech which gained popular currency as Liwag's "blast" on the Supreme Court. Liwag exhorted his hearers not to look on the Supreme Court "as supermen incapable of committing errors," nor "as sacred cows who are beyond the reach of human touch and beyond reproach," but "as men with feelings, affected by prejudices, possessed of caprices and susceptible to other frailties of human nature." He asserted that citizens must "break away from the kind of sub-conscious indoctrination which seeks to perpetuate a seemingly popish image of infallibility in the Supreme Court." Citing two of the four decisions lost by the administration, he accused the Supreme Court of perpetrating a "veiled assault on purely executive functions," of "judicial exuberance," of a "magnificent obsession" "to poke its finger on the pie" of executive action. "What I cannot understand," he said, "is why the Supreme Court can easily find the faults and mistakes of the other branches of government but does not seem to see its own.[60]

Pending before the Supreme Court now are contempt charges against Liwag.

ENGLISH PRECENDENTS

Philippine jurisprudence on contempt finds itself in a peculiar position. Up until recent years it has fed on food which its progenitor, Anglo-American constitutionalism, has now certified as coming from a poisoned source but on which its more ancient forbear, English law, still thrives. The choice therefore is between the English common law approach and American deviation.

[59] See Garcia v Salcedo, Jr. G.R.-L-19748, September 23, 1962.

[60] The speech is reproduced in full in 28 LAWYERS JOURNAL 3-5 (1963).

A *locus classicus* on the English law of contempt is *Roach v. Garvan* in 1742:

> Nothing is more incumbent upon courts of justice, than to preserve their proceedings from being misrepresented; nor is there anything of more pernicious consequence, than to prejudice the minds of the public against persons concerned as parties in causes, before the cause is finally heard. . . .
>
> There are three different sorts of contempt. One kind of contempt is, scandalizing the court itself. There may be likewise a contempt of this court in abusing parties who are concerned in causes here. There may also be contempt of this Court, in prejudicing mankind against persons, before the cause is heard.[61]

Of these three classes of contempt, the first, "scandalizing the court, is the most important for our study; and a fourth class not found in *Roach v Garvan* but very pertinent to Philippine jurisprudence, is contempt by publication in violation of a court order imposing secrecy.[62] We shall say a few words first about the fourth class and then about the first.

The rationale for punishing publication in violation of a court order imposing secrecy is not altogether clear. In *Scott v Scott*, Lord Shaw said that there is no judicial power "to make proceedings of an English court of justice secret because of something in the nature of the case before it." Three exceptions to this general rule were given: (1) suits affecting wards of the court; (2) lunacy cases; (3) cases requiring revelation of secret processes, documents, etc. The reason given for the first and second exceptions is that "jurisdiction over wards and lunatics is exercised by the judges as representing His Majesty as *parens patriae*. The affairs are truly private affairs. The reason given for the third exception is more evident: "the rights of the subjects are bound up with the preservation of the secret." Lord Shaw then added that the power of the court to exclude the public when court proceedings would involve positive indecency was a statutory power,[63] suggesting thereby that the power was not inherent in courts. It is one thing, however, for a court to have authority to order hearing *in camera* and another thing to

[61] 2 Atk. 469 (Ch. 1742). See Godhart "Newspapers and Contempt of Court in English Law" 48 HARVARD L.R. (1935); Fridman "Contempt of Court by Newspapers" 24 THE SOLICITOR 119 (1957); 226 L.T. 4 (July 4, 1958).

[62] Scott v Scott [1913] A.C. 417; Rex v Editor of the "Daily Mail" [1921] 2.K.B. 733-49.

[63] Id. at 482-485.

have authority to punish one who, not having attended the hearing *in camera*, did nevertheless come to know of what transpired behind closed doors and subsequently disobeyed the court's order to maintain secrecy. The Earl of Halisbury suggests a nexus between these two aspects of the problem saying: "The authority of the Court to treat disobedience in this matter as a contempt the wilful intrusion of a witness after an order has been made that all witnesses shall leave the Court."[64] It is possible to understand this statement as suggesting a legal fiction, a constructive intrusion, or a presumption that one could not have been informed if one had not actually intruded. It is submitted that this explanation is unsatisfactory because it destroys the distinction between *direct* contempt and *indirect* contempt. One therefore must elevate the issue from the level of physical obstruction of court proceedings to the level of moral influence on the action of judicial officers. Lord Coleridge does just this in *King v Editor of 'Daily Mail':* "To make public that which should be secret may be seriously to interfere with the free action of that officer.[65] There is, however, one English decision which seems to deny the relevancy of interference, actual or expected, with the action of judicial officers. In *In Re Martindale*, North, J. says: "It was contended before me that the publication of this paragraph did not interfere with or tend to obstruct the course of justice. In this I agree. *But this does not conclude the question whether it was a contempt or not.*"[66] North, J. thus reduces the case to simple disobedience of an *ipse dixi* of the court, a disobedience, it would seem, of an institution whose command should not be disobeyed because of the halo of majesty which surrounds it. He thus comes close to saying that to disobey is to "scandalize the court."

Scandalizing the court, as an offense, means the criticism of judges or courts precisely in their judicial capacity. The leading case on this subject is *King v Almon*,[67] a 1765 decision which recent historical research has shown to be a freak case in English legal history. It never was promulgated yet its position in English case law is still secure.[68] Its chief value for

[64] Id. at 448.

[65] [1921]2 K.B. 733, 749.

[66] [1894] 3 Ch. 193, 200. Emphasis added.

[67] Wilmot NOTES AND OPINIONS OF JUDGEMENTS (1802) 243; K.B. 1765.

[68] Fox in his THE HISTORY OF CONTEMPT OF COURT (1927) demonstrated that the Almon case was wrong in saying that summary contempt was immemorial usage. He also showed that Wilmot wrote the decision in advance of actual trial and, in fact, the case was dismissed and never tried. Wilmot's son found this unpublished opinion and published it in NOTES AND OPINIONS OF JUDGEMENTS (1802) and it became accepted as authoritative. Fox also showed that Roach v Garvan was the single case out of step with the English cases of the 1740's which regularly required jury trial for out of court contempt. See Oliver "Contempt by Publication and the First Amendment" 27 MISSOURI L. R. 171, 181 (1962); also Goldfarb "History of the Contempt Power" WASHINGTON U L.Q. 1, 12 (1961). Through Blackstone, Wilmot's summary process for this type of contempt became accepted in early American history. See Nelles and King "Contempt by Publication in the United States" 28 COLUMBIA L.R. 401 (1928).

our purpose is the clear link it establishes between contempt of court and the concept of monarchy, a link which should suggest that the English offense of scandalizing the court cannot have a place in a legal system for which disavowal of royalty is a basic tenet.

The case commenced with an application for attachment against a certain Mr. Almon who had published a pamphlet containing libelous passages against the court and imputing to Mansfield, C.J. the introduction of methods of proceeding which tended to deprive subjects of the benefit of *habeas corpus*. It is irrelevant, for the purpose of this essay, to consider whether summary attachment rather than indictment is the proper procedure, or whether summary attachment, as was contended by Wilmot, J., "stands upon the same immemorial Usage as supports the Whole Fabrick of the Common Law."[69] The only question now is: What is the gravamen of the offense? In order to reproduce the aura of royalty which surrounds the decision, it is best to let Wilmot, J. speak:

> "Contempt of Court" involves two Ideas: Contempt of their Power, and Contempt of their Authority. The . . . right of declaring the Law which is properly called Jurisdiction, and of enforcing obedience to it, is equivalent to the word Power: but by the word "Authority," I do not mean that coercive Power of the Judges, but the Deference and Respect which is paid to them and their Acts, from an Opinion of their Justice and Integrity.
>
> Livy uses it according to my idea of the word, in his character of Evander: — "Auctoritate magis quam Imperio pollebat:" It is no "Imperium;" it is not the Coercive Power of the Court; but it is Homage and Obedience rendered to the Court, from the Opinion of the qualities of the Judges who compose it: It is a confidence in their Wisdom and

[69] Wilmot op. cit. 254.

Integrity, that the Power they have is applied to the Purpose for which it was deposited in their hands. . . .[70]

Wilmot, J. adds.

. . . the Principle upon which Attachments issue for Libels upon Courts, is of more enlarged and important nature, — *it is to keep a blaze of Glory around them*, and to deter people from attempting to render them contemptible in the eyes of the Public.

. . . a Libel upon a Court is a Reflection upon the King, and telling the People that the Administration of Justice is in weak or corrupt hands; that the Foundation of Justice itself is tainted, and, consequently, that Judgments, which stream out of that Fountain, must be impure or contaminated.[71]

Thus, libeling the Court "is imputing to the King a Breach of that Oath, which he takes at the Coronation, to 'administer Justice to his people."[72]

We may legitimately doubt whether *King v Almon* still reflects present English judicial climate. As early as 1899, Lord Morris could already say: "Committals for contempt of Court by scandalizing the Court itself have become obsolete in this country. Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them."[73] But even then Lord Morris found it necessary to add that, under certain circumstances, committals for attacks on the Court was still "absolutely necessary to preserve . . . the *dignity and respect for the Court*."[74] In fact, the following year, one Gray, who had used language referring to Mr. Justice Darling in terms which, in Gray's own words of apology, were "intemperate, improper, ungentlemanly, and void of the respect due to his Lordship's person and office"[75]was summarily declared in contempt. But the court had a tempering counsel to offer:

Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court. The law ought not to be astute in such cases to criticize adversely

[70] Id. at 256-7

[71] Id. at 270.

[72] Id. at 271.

[73] McLeod v St. Aubyn [1899]A.C. 549, 561.

[74] He said this with reference to predominantly colored areas, Loc. cit., emphasis added. See also Cockburn, C.J. in Onslaw's and Whalley's Case L.R. 9 Q.B. 219 (1873).

[75] Regina v Gray [1900]2 Q.B. 36, 41.

what under such circumstances and with such an object is published. . . [76]

In spite of this, however, 1928 was to see another "vindication" of the "authority" of a judge to whom a writer had imputed unfairness and a lack of impartiality. The editor of the *New Statesman* had merely stated, in a celebrated birth-control case, that "an individual owning to such views as those of Dr. Stopes cannot apparently hope for a fair hearing in a Court presided over by Mr. Justice Avory — and there are so many Avorys';"[77] the editor was declared in contempt. Again, in 1931, when the editor of "Truth" attributed to a judge *unconscious* bias because of his political conviction, he too was found in contempt, thus evoking the comment that contempt had become stricter than it had ever been in the past.[78]

Whether or not there is at present a liberalizing trend in the English judicial attitude to contempt is hard to say. The relative paucity of English contempt cases in comparison with the Australian situation has been noted; but the explanation has not been found in a change in English attitude but rather in a suggested, but undemonstrated hypersensitivity of colonial courts and, more probably, in that the Australian "Bench has been maligned more often and far less graciously than has been the case in England."[79] Indeed, one can find English judicial statements like the following: "Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men."[80] But how far will the doctrine of *King v Almon* allow the declaustration of justice? Whatever the answer to this question, may be, this much at least is conceded, that the English rule has succeeded in maintaining press decorum and, to that extent, has, it is said, offered better chances of a fair and im-

[76] Id. at 40.

[77] Rex v Editor of the "New Statesman" 44 T.L.R. 301, 303 (K.B.D. 1928). The authority of Regina v Gray, supra, is cited.

[78] See Note on Rex v Colsey (K.B.D. 1931) in 47 LAW Q.R. 315-6 (1931). The writer adds: "The present tendency is all the more remarkable for at no time in the past has the confidence in and respect for his Majesty's judges been as great as it is to-day."

[79] Campbell "Contemptuous Criticism of the Judiciary and the Judicial Process" 34 AUSTRALIAN L.J. 224, 225 (1960).

[80] Ambard v Atty-General for Trinidad 154 L.T.R. 616; [1936] A.C. 322 cited in 226 L.T. 3 (July 4, 1958). See also comment on Debi Prasad Sharma v The King Emperor (1943) in "Scandalizing the Court" 77 IRISH L.T.231-2 (September 18.1943)

partial trial.[81] Should, then, the Philippine courts follow the English pattern rather than the American?

RECENT AMERICAN JURISPRUDENCE

In making our choice, the merits and demerits of one and the other must be carefully weighed; and, in this regard, the words of Mr. Justice Frankfurter, *mutatis mutandis*, are applicable: "It is trifling with great issues to suggest that the question before us is whether eighteenth century restraints upon the freedom of the press should now be revived. The question is rather whether nineteenth and twentieth-century American institutions should be abrogated by judicial fiat."[87]

Our choice is made more difficult by the psychological fact that it is not for Americans nor for Englishmen that the option must be made but for Filipinos. Mr. Justice Malcolm said not long ago that "What is best for the maintenance of the Judiciary in the Philippines should be the criterion."[83] Mr. Justice Moran said not much later that the rule suited to the American temperament was not suited to the Filipino temperament and "structure of democracy yet in the process of healthful development and growth."[84] Was Mr. Justice Moran speaking of the Filipino temperament in general or of Filipino judges in particular?

In weighing present American liberal attitude as against the earlier restrictive approach on which the emerging Philippine democracy was nourished, much can be gained from reading and re-reading the conflicting directions of thought found in Federal Supreme Court decisions. The twin cases which have come to be popularly known as *Bridges v California*[85] is an ideal starting point. Basically, the problem is one of balancing two democratic values, the freedom of speech and press on the one hand and on the other the right to an impartial trial. Mr. Justice Black lays down the guidelines for one direction of thought:

[81] Goldfarb "Public Information, Criminal Trials and the Cause Calebre" 36 N.Y.U. L.R. 810,827 (1961)

[82] Dissenting in Bridges v California 314 U.S. 252, 289 (1941).

[83] U.S. v Bustos 37 Phil. 731, 741 (1918).

[84] Dissenting in People v Alarcon 69 Phil. 265, 279 (1939).

[85] 314 U.S. 252 (1941). Later decisions following Bridges were: Pennekamp v Florida 328 U.S. 331 (1946); Craig v Harney 331 U.S. 367 (1947); Maryland v Baltimore Radio Show Inc. 338 U.S. 912 (1950); Wood v Georgia 370 U.S. 375 (1962).

> What finally emerges from the 'clear and present danger' cases is a working principle that substantive evil must be extremely high before utterances can be punished. Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It must be taken as a command of the broadest scope that explicit language, read in the context of liberty-loving society will allow.[86]

He adds:

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of the American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.[87]

Mr. Justice Frankfurter states the case for the minority view:

> We cannot read into the Fourteenth Amendment the freedom of speech and of the press protected by the first Amendment and at the same time read out age old means employed by states for securing the calm course of justice. The Fourteenth Amendment does not forbid a state to continue the historic process of prohibiting expressions calculated to subvert a specific exercise of judicial power. So to assure the impartial accomplishment of justice is not an abridgment of freedom of speech or freedom of the press, as these phases of liberty have heretofore been conceived even by the stoutest libertarians. In act, these liberties themselves depend upon an untrammeled judiciary whose passions are not even unconsciously aroused and whose minds are not distorted by extra-judicial considerations.[88] It was urged before us that the words 'reasonable tendency' had a fatal pervasiveness, and that their replacement by 'clear and present danger' was required to state a constitutionally permissible rule of law. The Constitution . . . is not a formulary. . . . Nor does it require displacement of an historic test by a phrase which first gained currency on March 3, 1919. . . . The phrase 'clear and present danger' is merely a justification for curbing utterance where that is warranted by the substantial evil to be prevented. The phrase itself is an expression of tendency and not of accomplishment, and the literary difference between it and 'reasonable tendency' is not of constitutional dimension.[89]

In a later case, Frankfurter makes this observation:

> 'Clear and present danger' was never used by Mr. Justice Holmes to express a technical legal doctrine or to convey a formula for adjudicating

[86] 314 U.S. 252, 263.

[87] Id. at 270-1.

[88] Id. at 283-1.

[89] Id. at 295-6.

cases: It was a literary phrase not to be distorted by being taken from its context. In its setting it served to indicate the importance of freedom of speech to a free society but also to emphasize that its exercise must be compatible with the preservation of other freedoms essential to a democracy and guaranteed by our constitution. . . .[90]

The observation made by Mr. Justice Malcolm is apt: "Here, in contrast to other jurisdictions, we need not be overly sensitive because of the sting of newspaper articles, for there are no juries to be kept free from outside influence."[91] Of the impervious quality of judges, much has been said. "Weak characters," Frankfurter said, "ought not to be judges."[92] Mr. Justice Douglas wrote: "the law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate."[93] For a judge to render a decision guided merely by a desire to please, "there must be a judge of less than ordinary fortitude without friends or support, or a powerful vindictive newspaper bent upon a rule or ruin policy, and a public unconcerned with or uninterested in the truth or the protection of their judicial institutions."[94] Mr. Justice Murphy counsels: "Silence and a steady devotion to duty are the best answers to irresponsible criticism; and those judges who feel the need for giving a more visible demonstration of their feelings may take advantage of various laws passed for the purpose which do not impinge upon a free press."[95]

We cannot begin on the premise that the Philippine Supreme Court justices, in consistently declaring themselves subject to the danger of extraneous pressures, are men of less than ordinary mettle. Rather, the underlying reason, perhaps, is their fear of the unconscious. Mr. Justice Frankfurter harped on this a number of times. In the *Bridges* case he said: "In act, these liberties themselves depend upon an untrammeled judiciary whose passions are not even *unconsciously* aroused . . ."[96] In a latter case he was more explicit: "No judge fit to be one is likely to be influenced consciously except by what he sees and hears in court and by what is judicially appropriate for his deliberations.

[90] Pennekamp v Florida 328 U.S. 331, 353 (1946).
[91] In Re Lozano and Quevedo 54 Phil. 801, 807 (1930).
[92] Pennekamp v Florida, supra, at 357.
[93] Craig v Harney 331 U.S. 367, 376 (1947).
[94] Pennekamp v Florida, supra, at 349.
[95] Craig v Harney, supra, 383-4.
[96] Bridges v California, supra, at 284.

However, judges are also human, and we know better than did our forbears how powerful is the pull of the unconscious and how treacherous the rational process."[97] One wonders, however, whether Frankfurter was thinking of men of the stature of Supreme Court justices. All the cases considered by the U.S. Supreme Court involved possible influence on juror or on lower court judges, frequently elective, and not on Supreme Court justices.

Again, we cannot start with the assumption that the Supreme Court considers itself "as a mystical entity or the judges as individuals or anointed priests set apart from the community and spared the criticism to which in a democracy other public servants are exposed."[98] We have the firm assurance of Mr. Justice Malcolm that the guarantees of a free speech and a free press include the right to criticize judicial conduct.[99] Yet, what caused Mr. Justice Briones to write the following lines in dissent? "El que escribe estas lineas no cede a nadie en su celo por mantener incolume el prestigio de esta Corte; pero, al propio tiempo, no puede cerrar los ojos a la realidad, a saber; que no somos mas que uno de los tres poderes del Estado; que estos poderes son iguales y ninguno de ellos tiene mas prestigio que el otro."[100] Did he, perhaps, perceive an attempt to kindle a blaze of Glory" around the Judiciary and thus hedge it with a halo which is not allowed to shine around the Executive and the Legislature? Did he sense in the Court's attitude a vestigial remnant of *lese majeste?*

In conclusion we offer two suggestions. First, the strict enforcement of rules of secrecy relative to the investigation of judges and lawyers by means of contempt proceedings dangerously borders on "prior restraint." Second, it is submitted that Philippine democracy is robust enough and the Philippine Supreme Court is solidly established enough to survive in good health the kind of attacks which the American Supreme Court, serenely uncomplaining, has constantly borne. The demoralizing suspicion of arbitrary restriction of free expression will be avoided and greater respect will be gained by being content with the respect of well-bred fellow citizens while being indifferent to the abuse of the ill-bred. Much can be gained from treating abuse

[97] Pennekamp v Florida, supra, at 357.
[98] Bridges v California, supra, at 292.
[99] U.S. v Bustos, supra, at 741.
[100] In Re Parazo 82 Phil. 230, 268 (1948).

not "as contempt" but "with contempt."[101] After all, individual justices, like other citizens, are protected by libel laws; and the court, as an institution, will always find champions in a responsible press, in a responsible Bar Association, and in a responsible citizenry. If the Supreme Court must assert majesty, it were far nobler to express it in words not like the regalian tone of Wilmot but approximating the tenor of an imperial decree found in the Code of Justinian:

> Their Majesties, the Emperors Theodosius, Arcadius and Honorius to the praetorian prefect Rufinus: If anyone who knows no restraint and is a stranger to propriety, thinks he must attack our names with scurrilous abuse and in his intemperance become a noisy berater of our era, we desire that he be not subjected to punishment nor suffer any harsh or severe treatment, since if what he does proceeds from irresponsibility, it should be despised, if from irrationality, it deserves pity, and if from ill-will, it should be pardoned. Done at Constantinople, Aug. 7, in the third consulship of His majesty Theodosius, and, the first of Abundantius. (393 A.D.)[102]

[101] See Radin "Freedom of Speech and Contempt of Court" 36 ILLINOIS L.R. 599, 620 (1942).

[102] Cited ibid. at 619-20.

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