The Judicial Protection of Anti-Judicial Speech

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Prepared for presentation at the Drexel University Thomas R. Kline School of Law, 1 September 2016.

Work in progress. Please do not cite without permission.

Abstract

The willingness of constitutional courts to extend free speech protection to speech that criticizes the performance and/or character of courts and judges could be a more widely used benchmark for assessing the commitment of various democratic jurisdictions to free expression. In a democracy, political institutions (and the leaders who occupy them) must tolerate criticism of their decisions (and their competence and character); this rule applies to courts no less than to legislatures and executives. Indeed, this rule is a key indicator of courts' democracy-reinforcing character. In this paper, we trace the emergence of this commitment in American contempt-of-court case law and then assess whether and to what degree constitutional courts in other jurisdictions have followed a similar path.

[1] This paper draws on research that has been supported by the US National Science Foundation (Award No. 1535250). Earlier drafts were presented at the 2016 Annual Meeting of the Law & Society Association and the 2016 Maryland Discussion Group on Constitutionalism. We would like to thank Jason Maloy, Dick Moon, Stephan Stohler, and Logan Strother for helpful comments and Sylvia Al-Mateen, Lisa Harms, Angela Rulffes, Susanne Prendergast, and Claire Sigsworth for outstanding research assistance.

Once upon a time, constitutional challenges to contempt of court holdings were a staple of US free expression jurisprudence. Judicial contempt powers had long been used by English common law courts to prevent disruptions of their proceedings, and over time, these powers had expanded to encompass judicial authority to punish out-of-court speech acts that might negatively impact public esteem for the judiciary. In the nineteenth and early-twentieth centuries, trial judges in both state and federal courts regularly imposed criminal sanctions on persons who had publicly commented on pending judicial proceedings in ways that (from the judges' perspectives) cast aspersions on the character of the judges or the legitimacy of their courts. These sanctions were often imposed on legal strangers (i.e., persons who were not parties to any pending cases at the court), and they were typically imposed by trial judges acting unilaterally, following summary procedures that lacked basic elements of due process. Those who were convicted under such procedures regularly objected on freedom of expression (FoE) grounds, and US appellate courts eventually imposed significant constitutional limits on the practice. By the second half of the twentieth century, mere public criticism of a judge or her court virtually never led to contempt sanctions. US appellate courts still receive free speech cases regarding judicial contempt orders, but these cases now consist of conflicts over gag orders, illegal contact with jurors, the publication of sealed materials, and the like, evincing a significant narrowing over time of the definition of interference with a pending case.

A wide range of courts outside the US now enforce constitutional free expression principles as well, but courts in many jurisdictions continue to suppress anti-judicial speech. For example, when Chilean journalist Alejandra Matus published a book-length expose on the Chilean judiciary in 1999, Supreme Court Justice Servando Jordan banned the book and issued a warrant for Matus's arrest. Justice Jordan's order held that Matus's *Black Book of Chilean Justice* was in violation of a 1957 State Security Law that prohibited defamation of the President, Ministers of State, members of the superior courts, and a number of other named office holders. The Chilean insult laws, known as "leyes de desacato," authorized the use of summary procedures to allow confiscation of insulting publications and punishment of their authors. As such, Matus's book was seized from the publisher, and Matus herself escaped arrest only by fleeing the country and seeking asylum in the US. Only after the relevant desacato law was repealed in 2001 was she able to return to Chile and was her book freely distributed (Matus 2002). In Singapore, when three protesters wore T-shirts with pictures of a kangaroo dressed as a judge, in and around the Supreme Court's building, while the Court itself was hearing a seditious libel case involving alleged defamation of Prime Minister Lee Hsien Loong and Minister Mentor Lee Kuan Yew, the Court held the protesters in contempt. In doing so, the Court emphasized that "there are limits to the right of fair criticism" and that the T-shirts at issue "amounted to a deliberate and provocative attack on the court, falling far outside the realm of fair and reasoned criticism."[2]

The judicial suppression of anti-judicial speech has a long history and has been defended on a number of grounds. Its most enduring justification has been that it is necessary to protect the rule of law—both in the narrow sense that public criticism of judges might sometimes represent an effort to sway judicial decisions in a particular case and in the broader sense that such criticism might undermine public confidence in the judiciary and hence negatively impact compliance with judicial orders. As the Chilean and Singaporean examples suggest, however, the actual use of such repressive powers by courts might reflect different motives. In Chile, Justice Jordan sought to prohibit distribution of a book alleging that the country's "judiciary has bent easily to political, economic, and military pressure," particularly during the Pinochet dictatorship, when Jordan himself had first been named to the Court (Matus 2002: 330). In Singapore, the Supreme Court used its contempt powers as an adjunct to its repressive powers to punish

[2] Attorney-General v. Tan Liang Joo John & Ors [2009] SGHC 41, excerpted in Chang, et al. (2014: 690-92). Note also Shadrake v. Attorney-General [2011] SGCA 26, in which the Supreme Court of Singapore upheld a contempt citation and six-week prison sentence issued against investigative journalist Alan Shadrake. Shadrake had been held in contempt on the basis of controversial passages in his book, *Once a Jolly Hangman: Singapore Justice in the Dock*, alleging that the country's courts issued criminal sentencing decisions on the basis of international trade and business interests, rather than neutral applications of the law.

seditious libel; the Court was in the process of sanctioning public criticism of the country's prime minister, and in the meantime it decided to sanction public criticism of its own role in that process.

In this paper, we review the origins of contempt of court in English law, survey its evolution in nineteenth- and twentieth-century US cases, where its most aggressive uses were eventually overridden by constitutional FoE principles, and then assess whether and to what degree constitutional courts in other jurisdictions have followed a similar path. Here, we have sought to identify as many jurisdictions as possible in which constitutional courts have explicitly grappled with the question of whether and how constitutional (or quasi-constitutional) FoE principles limit the suppression of anti-judicial speech. Where courts have tolerated the suppression of such speech, we assess the consistency of those holdings with the usually stated justification of protecting judicial authority and the rule of law. We focus this analysis principally on the decisions of the European Court of Human Rights (ECtHR), which has the richest body of jurisprudence on this question outside the US.

Contempt of Court in English Law

The phrase "contempt of court" has been used in English law since the twelfth century and was firmly established by the fourteenth (Fox 1972: 46). Its initial use was to describe defaults and other wrongful acts by parties before the court (or by officers of the court), but it was extended over time to cover acts by legal strangers (i.e., non-parties) out of court. With the arrival of the printing press in the fifteenth century, newspaper criticism of pending cases became the most common form of criminal contempt, on the theory that libeling a judge in his official capacity would undermine judicial authority and make the public less likely to submit to it.

In a definitive early-twentieth-century treatment, Sir John C. Fox argued that for contempts committed in the presence of the court, punishments had been imposed by summary procedures from time immemorial (i.e., as far back as English legal records were available). By the eighteenth century, English judges were using summary procedures to punish out-of-court contempts as well. Blackstone's *Commentaries* claimed that summary punishment for "speaking or writing contemptuously of the court, or judges, acting in their judicial capacity . . . must necessarily be as ancient as the laws themselves," but for contempts committed out of court by legal strangers, Fox finds no evidence to support the claim prior to 1721.[3] Blackstone referred to such out-of-court contempts as "consequential contempts"; today, they are more often known as "constructive contempts" or, in some jurisdictions, as the offence of "scandalizing the court."

Blackstone appears to have relied on the views of Mr. Justice Wilmot, whose undelivered judgment in *Almon's Case* (1765) likewise claimed that summary punishments had long been imposed even for contempts committed out of court (Fox 1972: 21). This case began when bookseller John Almon published a pamphlet accusing Lord Mansfield of arbitrary decision-making in a case against John Wilkes. The 1764 pamphlet was itself a protest against the use of summary procedures to prosecute seditious libel (Fox 1972: 34). It charged Lord Mansfield "with having introduced a method of proceeding to deprive the subject of the benefit of the Habeas Corpus Act" and with amending an information (i.e., a criminal charge brought without grand jury indictment) "officiously, arbitrarily, and illegally" (Fox 1972: 223). Wilmot's opinion was not delivered and remained unpublished until after his death, but then became a leading authority. The opinion held that libels on a judge in his official capacity could be summarily punished (i.e., by the judge alone, without a jury trial), on the grounds that such libels "excite[] in the minds of the people a general dissatisfaction with all judicial determination and indispose[] their minds to obey them" and might also be taken as "an impeachment of [the King's] . . . wisdom and goodness in the choice of his Judges" (Fox 1972: 105, 110, first quoting and then paraphrasing Wilmot).

[3] Blackstone's Commentaries, Book 4, chapter 20, available at http://avalon.law.yale.edu/subject_menus/blackstone.asp. See also Fox (1972: 18).

Regardless of when it emerged, this judicial practice developed into "a highly useful weapon for those in power because it provided an alternative prosecutorial remedy to criminal libel that was not dependent on a jury" (Blumberg 2010: 2). Not surprisingly, the practice proved controversial, with critics regularly observing that it allowed the judge who was libeled to serve simultaneously as party, prosecutor, judge, and jury. English judges, for their part, jealously guarded the powers once they had developed. For example, the 1792 Fox's Libel Act provided that the question of whether a publication was libelous was for the jury - not the judge - to decide, but in the contempt-of-court context, judges following Wilmot's doctrine thwarted this goal of the act (Fox 1972: 34-42). The late nineteenth and early twentieth centuries witnessed repeated efforts in Parliament to enact legislation directly targeting arbitrary judicial contempt powers, but none were successful (Frankfurter and Landis 1924: 1049-50). Perhaps most notable was the 1883 debate over Lord Selborne's Contempts of Court Bill, during which Lord Fitzgerald observed that the existing practice of summarily punishing out-of-court commentary on pending cases "did not exist in any other country" and had the effect of "enforc[ing] silence on the part of the press when the public interests required the fullest publicity and the closest criticism of what was going on" (quoted in Fox 1972: 42).

Heeding such sentiments, the Privy Council suggested in *McLeod v. St. Aubyn* (1899) that the offense of scandalizing the court had become "obsolete" in England, where "[c]ourts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them."[4] But this claim was not actually true at the time, as English courts continued to subject out-of-court criticisms of judges to contempt sanctions. For example, while presiding over an obscenity trial at the Birmingham Spring Assizes in March 1900, Mr. Justice Darling warned the assembled members of the press that while "a newspaper has the right to publish accounts of proceedings in a law court, . . . there is absolutely no protection to a newspaper for the publishing of objectionable, indecent, and obscene matter, and any newspaper which does so may be as easily prosecuted as anybody else, and if I find my advice disregarded I shall make it my business to see that the law is in that respect enforced." After the defendant was convicted and sentenced, Howard Alexander Gray published an article titled "A Defender of Decency," which observed that "[t]he terrors of Mr Justice DARLING will not trouble the Birmingham reporters very much. No newspaper can exist except upon its merits, a condition from which the Bench, happily for Mr Justice DARLING, is exempt. There is not a journalist in Birmingham who has anything to learn from the impudent little man in horse-hair, a microcosm of deceit and empty-headedness, who admonished the Press yesterday." Mr. Gray was held in contempt, with Lord Russell observing for the Queen's Bench that "[A]ny act done or writing published, calculated to bring the court or a judge of the court into contempt or to lessen his authority, is a contempt of court." Lord Russell admonished that this power should "be exercised with scrupulous care . . . [and] only where the case is clear beyond reasonable doubt"; it should not be used to suppress "reasonable argument . . . against any judicial act as contrary to law or the public good." These caveats did not apply here, as the Court considered Gray's criticisms unreasonable and hence levied a fine of £100 plus court costs.[5]

The Privy Council's claim that the crime of scandalizing the court was obsolete was not true in 1899, but it became true over the course of the twentieth century (Addo 2000b; Litaba 2003; Walker 1985: 377-78). In *Ambard v. Attorney-General of Trinidad and Tobago* (1936), Lord Atkin famously observed that "[j]ustice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men."[6] In *R v. Commissioner of Police, ex parte Blackburn* (1968), Lord Denning insisted that "[we judges] do not fear criticism, nor do we resent it. For there is something far more important at stake. . . . It is the right of every man, in parliament or out of it, in the Press or over the broadcast, to make fair comment, even outspoken comment on matters of public interest. Those who comment . . . can say that we are mistaken, and our decisions erroneous. . . . Mr Quintin Hogg

[4] McLeod v. St. Aubyn [1899] AC 549.
[5] R. v. Gray [1900-1903] All ER Rep 59 (Queen's Bench 1900).
[6] Ambard v. Attorney-General of Trinidad and Tobago [1936] 1 All ER 704.

has criticized the court, but in so doing he is exercising his undoubted right."[7] By 1985, Lord Diplock was able to note in passing that "the species of contempt of court which consists of 'scandalising the judges' . . . is virtually obsolescent in England,"[8] and by this point, the observation was indeed accurate (Addo 2000b: 38-41).

Contempt of Court in US Law

In the United States, the Judiciary Act of 1789 gave 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" them. With or without express statutory authority, state courts generally assumed that they had similar powers. As such, and from the beginning, US judges regularly censored public criticism of themselves by holding the critics in contempt of court, on the grounds that such criticism harmed the public's faith in the impartiality of the judicial system. In other words, of the two justifications offered by Mr. Justice Wilmot for the summary punishment of constructive contempts, US courts understandably omitted mention of the issue of impugning the King's wisdom in his selection of judges, but they retained Wilmot's concern that intemperate critiques might undermine public compliance with judicial orders.

As with English courts, disputes quickly arose regarding the legitimate scope of these contempt powers. Consider the 1780s conflict between Thomas McKean, Chief Justice of the Supreme Court of Pennsylvania, and Eleazer Oswald, the printer and publisher of the *Independent Gazetteer*, which nicely illustrates the state's use of contempt proceedings to evade limits on other modes of repression. The story starts in 1782, when Oswald's newspaper published criticism of Chief Justice McKean's conduct of a trial involving two Army officers. McKean ordered Oswald arrested for seditious libel and required him to post a £750 bond until trial, which would be forfeited if Oswald continued to publish seditious material in the interim. Oswald nonetheless continued to attack the Chief Justice in print, among other things for speculating in Continental Army certificates (i.e., getting rich off of distressed soldiers who were owed back wages), and on the day the grand jury met to consider his case, the *Gazetteer* published "A Hint to the Grand Jury," instructing the jurors on Oswald's understanding of libel law. The grand jury refused to indict, despite significant pressure from Chief Justice McKean, and the episode helped lead the Pennsylvania constitutional convention to provide that truth was a defense to libel claims and that the jury was entitled to judge both the law and the facts (Blumberg 2010: 248-50; Powe 1991: 34-40). The conflict continued in 1787-88, when Oswald was one of the first Pennsylvania printers to publish Anti-Federalist critiques of the newly proposed US Constitution, including sharp criticisms of Ben Franklin and George Washington for supporting it. In response, Andrew Browne, a local teacher who had allegedly been defamed in one of the articles, sued for libel. Oswald then published "An Address to the Public," which characterized Browne as a tool of Oswald's Federalist opponents, denounced libel law as inconsistent with liberty, and called into question the impartiality of the judges hearing the case against him (Beaumont 2014: 97-98; Blumberg 2010: 251-4; Maier 2010: 73-75). Browne's counsel then moved for an attachment for contempt, and in *Respublica v. Oswald* (Pa. 1788), Chief Justice McKean wrote for the state Supreme Court in imposing a fine and one month imprisonment on Oswald.[9] This holding appears to be the first American case imposing summary punishment for contempt by publication (Nelles and King 1928a: 409).

In 1802, the same court fined and imprisoned Thomas Passmore for publishing an article defaming two insurance underwriters who had been ordered to pay a claim that Passmore had filed. At the

[7] 2 All ER 319 (1968).
[8] Secretary of State for Defence v. Guardian Newspapers Limited [1985] AC 339.
[9] Respublica v. Oswald, 1 Dall. 319 (Pa. 1788). Note also Hollingsworth v. Duane, 12 F. Cas. 359 (C.C.D. Pa. 1801), in which the United States Circuit Court for Pennsylvania held that US courts had a common-law power to punish contempts without a jury trial.

time of publication, the underlying insurance dispute was pending in the state Supreme Court. The Court noted that libel claims would ordinarily be heard by a jury, but that contempts of court were an exception to this rule, and it held summarily that Passmore's publication amounted to a contempt in that it threatened to bias the public mind and hence prejudice the administration of justice.[10] Both the *Oswald* and *Passmore* decisions were followed by efforts to impeach the judges responsible for them, and they led the Pennsylvania legislature in 1809 to enact a statute that limited the contempt power to "misbehavior of any person in the presence of the court, thereby obstructing the administration of justice" and provided that publications out of court should not be the basis of summary punishment (Blumberg 2010: 252; Fox 1972: 225; Nelles and King 1928a: 412-15).

A similar sequence of events took place at the federal level in the 1820s and 30s. After issuing a decision in 1825, federal District Judge James H. Peck published his opinion in a St. Louis newspaper, a common practice where official reports were unavailable (Nelles and King 1928a: 428 n. 142). Attorney Luke Lawless, whose client had lost this case in Judge Peck's courtroom, responded with a letter to the editor rebutting Peck's arguments. Lawless's letter focused on the legal arguments at issue and did not impugn Judge Peck's motives, but Peck held him in contempt and barred him from practice in the federal courts for 18 months. For this abuse of the contempt power, Judge Peck was then impeached by the US House of Representatives. Judge Peck's subsequent acquittal by the US Senate might have had the effect of reinforcing the doctrine that summary punishments were permissible for contempts committed out of court, but Representative James Buchanan, who had served as Chief Manager of the impeachment, quickly set about to win a legislative correction of this doctrine (Fox 1972: 207). Within five weeks of Peck's acquittal, Buchanan had shepherded new restrictions on the contempt power into law. This 1831 statute, entitled "An Act declaratory of the law concerning contempts of court," provided that the power of federal courts "to issue attachments and inflict summary punishments for contempts of court shall not be construed to extend to any cases except the misbehaviour of any person or persons in the presence of the 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 of any officer . . ., party, juror, witness or any other person or persons, to any lawful . . . command of the said courts." At least five state legislatures followed up by enacting similar statutes (Frankfurter and Landis 1924: 1027). As far as these legislatures were concerned, contempts committed out of court—such as libels on judges—were to be prosecuted (if at all) by indictment and jury trial.

For the remainder of the nineteenth century, federal courts generally followed the 1831 Act in limiting contempt holdings to acts done in or near a court that disrupt its proceedings (Frankfurter and Landis 1924: 1027-30; Nelles and King 1928b). The reception of parallel state statutes by state courts, however, was more mixed. For more than one hundred years, most judges maintained that contempt powers were an inherent component of judicial authority and continued to use them to punish out-of-court libels regardless of legislative limits, which they construed narrowly or sometimes invalidated. These holdings either adopted a narrow, Blackstonian view of constitutional FoE principles or else ignored such principles altogether. Almost from the beginning, however, some judges articulated a dissenting tradition in which judicial contempt powers were significantly narrower than they had been at common law. These judges abided by state and federal statutory limits on the contempt power and/or articulated independent constitutional limits rooted in free expression principles. At the state level, this dissenting tradition long predates the Supreme Court position articulated by Justice Hugo Black in *Bridges v. California* (1941).

Using the Contempt Power to Curtail Free Expression

The first instance in which a US court held that judicial contempt powers were inherent, and hence immune from legislative limitation, appears to be *State v. Morrill* (Ark. 1855) (Fox 1972: 218). When the Arkansas Supreme Court responded to a habeas petition by freeing an accused murderer on bail, one Mr. Morrill published an article in the *Des Arc Citizen* intimating that the Court's judges had

[10] Respublica v. Passmore, 3 Yeates 441 (Pa. 1802). See Nelles and King (1928a: 413).

been bribed. Despite a state statute expressly limiting the application of judicial contempt powers to "[w]illful disobedience" of lawful judicial orders or "[d]isorderly, contemptuous, or insolent behavior, committed during [the court's] . . . sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority," the Court held Morrill in contempt.[11] Citing one of its own prior holdings, the Court held that "[t]he power of punishing summarily and upon its own motion, contempts offered to its dignity and lawful authority, is one inherent in every court of judicature."[12] The Court treated the statute's granting of judicial contempt powers as "declaratory of what the law was before its passage" and its purported limitation on those powers as "nothing more than the expression of a judicial opinion of the Legislature."[13] The Court acknowledged that it possessed common law contempt powers only to the extent that such powers were consistent with US constitutional principles, but it emphasized that the state constitutional free expression provision provided that "every citizen may freely speak, write and print on any subject--*being responsible for the abuse of that liberty*" (emphasis added by the Arkansas Court).[14] As such, the Court was firmly of the opinion that US courts "possessed the power to punish, as for contempt, libelous publications, . . . 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."[15] In reaching this judgment, the Court relied extensively on Blackstone, on Wilmot's opinion in Almon's case, and on the Pennsylvania Supreme Court's opinion in *Respublica v. Oswald*. For the remainder of the nineteenth century, *Morrill* was widely cited by the courts of sister states following Arkansas's lead (Nelles and King 1928b: 535).

In 1895, SCOTUS endorsed a broad reading of judicial contempt powers—which it characterized as inherent, summary, and unreviewable—in the Pullman Strike case.[16] The Pullman case involved a holding of contempt for failure to obey an injunction prohibiting a strike, but a decade later, SCOTUS endorsed a similar reading in a case involving anti-judicial speech. In *Patterson v. Colorado* (1907), the Supreme Court upheld a contempt citation against Thomas M. Patterson, a populist US Senator and newspaper owner who had published a series of articles and a cartoon that were critical of the Supreme Court of Colorado. Writing for the Court, Justice Oliver Wendell Holmes held that the First Amendment banned prior restraint of publication, but did not limit post-publication punishment for speech that undermined the legitimacy of the courts (or, presumably, that contributed to any of a host of other harms).[17]

From one angle, the logic of constructive contempts makes sense: protecting the orderly administration of justice from outside influence is a laudable goal in a democratic system, and intemperate criticism of judicial motives might have the effect of undermining public respect for the courts. In practice, however, the contempt power has often been aimed at protecting courts from what appears to be legitimate criticism. The facts behind *Patterson* make clear the potential for abuse. The case was rooted in a long-running series of political and legal disputes regarding labor unrest, the 8-hour day, home rule for the City of Denver, and regulation of corporate utility interests, culminating in a stolen gubernatorial election in 1904 (Powe 1991: 1-7). In that election, the people of Colorado appeared to vote out the incumbent Republican Governor James Peabody in favor of Democrat Alva Adams by a 9,000-vote margin and to give the Democratic Party narrow control of both legislative chambers as well. On the same day, the voters adopted an amendment increasing the size of the Colorado Supreme Court from

[11] Digest, chap. 36, sec. 1, approved February 28th, 1838, quoted in State v. Morrill, 16 Ark. 384, 388 (1855). The Arkansas statute included several additional items, not relevant here, on the list of lawful uses of the contempt power.
[12] 16 Ark. 384, 389 (1855).
[13] 16 Ark. 384, 391 (1855).
[14] 16 Ark. 384, 402 (1855).
[15] 16 Ark. 384, 399-400 (1855) (emphasis in original).
[16] In re Debs, 158 U.S. 564 (1895).
[17] 205 U.S. 454 (1907).

three to seven justices, with the governor to appoint two new members and the remaining members coming from a merger with the court of appeals (Snyder 1968, 21-22). Shortly after the election returns were published, Republicans brought an electoral challenge before the Republican-dominated Supreme Court, which invalidated the elections of enough Denver Democrats to switch control of the legislature back to Republicans. To ensure continued Republican dominance of the Court, lame-duck Governor Peabody then appointed, and the Republican Senate confirmed, justices to the new Supreme Court seats two months before those seats came into being. Meanwhile, Republican legislative leaders initiated an investigation of the gubernatorial vote and in March 1905 concluded that Peabody had actually won, thus ousting Governor Adams. Peabody, however, was secretly required to sign a resignation from office to take effect immediately upon his inauguration, leaving Republican Lt. Governor Jesse Fuller McDonald to take office. On 23 June 1905, the reconstituted court severely limited the reach of a 1902 constitutional amendment granting home rule to Denver, in effect declaring it an unconstitutional constitutional amendment.[18] This decision allowed corporate-friendly Republicans in the county government to extend a major utility franchise for another twenty years (Snyder 1968, 26).

The day after the home rule decision, Senator Patterson published a critical editorial in one of his newspapers, the *Denver Times*. Patterson complained that "[f]or the first time in the country's judicial history it is announced that the people may amend their state constitutions only just so far as a supreme court is willing that they should. . . . In other words, a part of the state constitution is unconstitutional—treating constitutional provisions as though they were state statutes and subject to be annulled by measuring them with the constitution of which they are a part."[19] The day after that, another of Patterson's papers, the *Rocky Mountain News*, published a cartoon depicting the five justices in the majority as executioners beheading the losing litigants in the home rule cases, alongside a shelf full of urns containing the "ashes of other slaughtered Democrats." The caption read, "IF THE REPUBLICAN PARTY HAS OVERLOOKED ANYTHING FROM THE SUPREME COURT, IT WILL NOW PROCEED TO ASK FOR IT."[20] Republican Attorney General Nathan C. Miller presented a complaint to the state high court alleging that these publications constituted contempt. In addition to the cartoon, Miller singled out the concluding paragraph of the 24 June editorial, which read, "What next? If somebody will let us know what next the utility corporations of Denver and the political machine they control will demand, the question will be answered." On Miller's reading, this passage suggested that the state Supreme Court "and the justices thereof are controlled by certain corporations and by partisan political influence, and were so controlled in rendering the decision in said causes."[21]

In response, Patterson claimed that his writings were truthful and legitimate commentary on an already concluded case. Rejecting this claim, the state high court acknowledged that it had already decided the home rule cases at issue, but noted that it had not yet remitted them to the lower courts; as such, they remained technically pending. In this light, Patterson's newspapers had "charged this court, and certain of its judges, with having been influenced by corrupt motives in their rulings in pending cases, and [had suggested] that they would be so influenced in the final disposition of the same."[22] Comparing constructive contempts with publication of immoral materials, the court held that "[t]he offense consists in the publication of such matter, and it is entirely immaterial whether the matter published is true or false."[23] On appeal, SCOTUS also rejected Patterson's claims, with Holmes noting for the majority that "the main purpose of" the freedom of speech and of the press is to prevent prior restraints; this

[18] People ex Rel. Miller v. Johnson, 86 P. 233 (Colo. 1905). See also People ex rel. Stidger v. Alexander, 86 P. 249 (Colo. 1905); People ex rel. Stidger v. Horan, 86 P. 252 (Colo. 1905).
[19] People ex rel. Attorney General v. The News-Times Publishing Company, 84 P. 912, 913 (Colo. 1906).
[20] News-Times Publishing, 84 P. at 914.
[21] News-Times Publishing, 84 P. at 914.
[22] News-Times Publishing, 84 P. at 955.
[23] News-Times Publishing, 84 P. at 956.

"preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false."[24]

The facts of *Patterson* may be extreme, but the use of constructive contempt often paralleled the Colorado Supreme Court's tactics. Court critics, especially those using sharp language, regularly faced summary convictions from judges jealously protecting their power. With only a few exceptions, nineteenth- and early-twentieth-century state supreme courts adopted standards of free speech and press that allowed these summary prosecutions, even for statements that today would be widely seen as legitimate commentary on public affairs.

State high courts routinely invoked considerations of judicial legitimacy and the administration of justice to justify contempt citations. When an Idaho newspaper complained that a recent decision of the Idaho Supreme Court "aids the Republican organization to perpetrate another steal from the people, which is in pursuance of the conspiracy to steal the presidency of the United States,"[25] the court held the paper in contempt, fining the owners and editors $500 each and sentencing them to 10 days in jail. While true coverage of public institutions is crucial to a modern democracy, the Idaho court treated these statements as obviously false and unworthy of protection, complaining that the "liberty of the press is often claimed as a cover by character assassins to gratify ill will and passion, or to pander to the passion and prejudice of others."[26] Likewise, when a journalist published criticism of the Florida Supreme Court, the court justified the use of contempt as a necessary measure to "protect[] and preserve[] [judicial legitimacy] against the attempts of designing persons to undermine its authority and destroy its efficiency."[27] When a newspaper issued a stinging set of charges against the Missouri Supreme Court for a recent workers' compensation case—complaining that "the Supreme Court has at the whipcrack of the Missouri Pacific railroad, sold its soul to the corporations," that "the corruption of the Supreme Court has been thorough," and that the "corporations have long owned the Legislature, now they own the Supreme Court"—the Court invoked the same legitimacy-protecting function as its Florida counterpart.[28] After an extensive discussion of the history of free speech and the recognized distinction between liberty and abuse, the Missouri Court stressed that "the press has no greater liberty [of speech] in this regard than any citizen. . . . Neither has any right to scandalize any one or any institution."[29] Adopting a position as arbiter of proper journalistic ethics, the Court complained that "there are newspapers that have so far misconceived their proper functions, or been misguided by other considerations, as to indulge in such practices" that appeal to "moral perverts and degenerates." The Court went on to warn that since newspapers regularly come to courts for assistance, "[s]elf-interest should … induce them not to impair the power or authority of the courts, and not to inculcate a feeling of disrespect or want of confidence in the courts."[30]

One recurring argument in these cases was that critical commentary on pending cases might be thought to impair the independence of the courts, but that critical commentary on past decisions should be as free as critical commentary on the performance of any other government institution in a democracy. Indeed, this distinction is sometimes described as the American rule, marking a break from English law, but Phillip Blumberg finds the practice in nineteenth and early-twentieth century state courts so

[24] Patterson, 205 U.S. at 462.
[25] McDougall v. Sheridan, 128 P. 954, 957 (Ida. 1913).
[26] McDougall v. Sheridan, 128 P. at 962. The Idaho Supreme Court also suggested that this trend was part of the unethical yellow journalism of the day, see ibid at 964 ("If there be a sentiment among the people demanding the publication of falsehood and calumny, and charging courts with selling their decisions, it must have been formed very recently from the utterances and publications of yellow journals and muck-raking magazines.")
[27] The court did not quote or reproduce the objectionable piece, describing it only as "a libelous article impugning the integrity, dignity and authority of this court." In re Hayes, 73 So. 362, 363-4 (Fla. 1916).
[28] State ex inf. Crow v. Shepherd, 76 S.W. 79, 80 (Mo. 1903).
[29] 76 S.W. 79, 91 (Mo. 1903).
[30] 76 S.W. 79, 95 (Mo. 1903).

inconsistent that the label is inapposite (2010: 281-2).[31] And even when state courts purported to endorse the distinction, they often adopted such a broad reading of what counts as a pending case that the distinction had very little bite. In addition to the Colorado Supreme Court's decision in *Patterson*, state high courts in Washington and Montana rejected critics' defenses that their commentary concerned past cases by noting that the relevant cases had not yet been remitted and thus technically remained pending.[32] This tack was particularly egregious in Washington, where the state Supreme Court had issued the final merits decision eight months before the publication of criticisms, but nonetheless held that the case was still pending in its own court. In Colorado, moreover, as Patterson's lawyers had pointed out, state law allowed a petition for rehearing any time, which left the contempt power temporally unbounded (Rabban 1999: 134).

As in *Morrill*, when legislatures attempted to narrow the contempt power, they continued to face judicial resistance. This resistance sometimes took the form of narrow readings of the relevant statutory restrictions. For example, in *Toledo Newspaper Co. v. U.S.* (1918), SCOTUS held that the 1831 contempt of court act drafted by then-Representative James Buchanan "conferred no power not already granted and imposed no limitations not already existing."[33] Recall that this statute provided that federal judicial contempt powers "shall not be construed to extend to 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." Chief Justice White's opinion did not dwell on this text, but the Court appeared to be relying on a broad reading of the phrase, "or so near thereto as to obstruct the administration of justice," in order to render the statutory limitations ineffective (Frankfurter and Landis 1924: 1031). In a brief passage, White followed *Patterson* in dismissing the relevance of constitutional free expression principles. On White's account, the First Amendment argument "involves in its very statement the contention that the freedom of the press is the freedom to do wrong with impunity and implies the right to frustrate and defeat the discharge of those governmental duties upon the performance of which the freedom of all, including that of the press, depends. The safeguarding and fructification of free and constitutional institutions is the very basis and mainstay upon which the freedom of the press rests and that freedom therefore does not and cannot be held to include the right virtually to destroy such institutions. It suffices to say that however complete is the right of the press to state public things and discuss them, that right as every other right enjoyed in human society is subject to the restraints which separate right from wrongdoing."[34]

In other cases, as in *Morrill* itself, this resistance took the form of judicial invalidation of the relevant statutory restrictions. For example, the Colorado Supreme Court preemptively announced that the legislature could not alter the Court's contempt powers—this announcement came seventeen years before the *Patterson* case—and the Missouri Supreme Court invalidated a statute purporting to limit contempt to actions "in the immediate view and presence" of the court.[35] In both cases, the state high courts viewed such legislative limitations as invasions of the inherent powers of the judiciary. Several decades later, the California Supreme Court likewise invalidated a state statutory provision that "no speech or publication reflecting upon or concerning any court or any officer thereof shall be treated or punished as a contempt of such court unless made in the immediate presence of such court while in session and in such a manner as to actually interfere with its proceedings." The state court reached this judgment "on the ground that the courts have inherent power to punish for contempts, whether of a direct or constructive nature, and that the legislature cannot constitutionally infringe on that power."[36] This holding cited several prior

[31] Note, for example, Burdett v. Commonwealth, 48 S.E. 878 (Va. 1904), in which the Virginia Supreme Court held that the past/pending distinction was irrelevant where the publication tended to degrade the institutional legitimacy of the courts.
[32] State v. Tugwell, 52 P. 1056 (Wash. 1898); State v. Faulds, 42 P. 285 (Mont. 1895); In re Nelson, 60 P.2d 365 (Mont. 1936).
[33] 247 U.S. 402, 418 (1918).
[34] Toledo Newspaper Co. v. United States, 247 U.S. 402, 419-20 (1918).
[35] Cooper v. People, 22 P. 790 (Colo. 1889); State ex inf. Crow v. Shepherd, 76 S.W. 79, 88 (Mo. 1903).
[36] In re The San Francisco Chronicle, 36 P.2d 369, 370 (Cal. 1934).

holdings along the same lines, and the state court subsequently reiterated the point in *Bridges v. Superior Court of Los Angeles County* (Cal. 1939).[37] The latter holding, however, was reversed by SCOTUS on First Amendment grounds.

Using Free Expression to Curtail the Contempt Power

In *Patterson* and its ilk, both state and federal judges engaged in profoundly arbitrary and anti-democratic behavior. After surveying many of these cases, Blumberg concluded that "the judicial contempt power in the states, as in the federal courts, flourished unrestrained by federal or state constitutional or statutory guaranties for 150 years. During this lengthy period before federal constitutional intervention [in *Bridges*] . . . , there does not appear to be a single state decision that imposed constitutional limitations based on its state Constitution on the exercise of the judicial contempt power" (2010: 279). On our reading, this conclusion is overstated, as some courts followed a different path as early as the 1840s. In other words, some courts relied on constitutional free expression principles to limit the contempt power. As early as 1835, the Pennsylvania Supreme Court held that "[t]he conduct of a judge, like that of every other functionary, is a legitimate subject of scrutiny," at least "where the public good is the aim"; as such, a lawyer could not constitutionally be disbarred for criticizing judges in a public letter to the court.[38] The Pennsylvania case involved not the contempt power, but rather the courts' independent power to discipline attorneys who practice before them. Still, the parallels are clear.

The earliest and best-known precedent finding constitutional limitations on the contempt power itself is *Stuart v. People* (Ill. 1842), in which the Illinois Supreme Court construed inherent contempt powers narrowly so as to comport with fundamental free expression principles. This case emerged out of an inter-newspaper dispute between William Stuart, editor of the *Chicago Daily American*, and John Wentworth, editor of the *Chicago Morning Democrat*. On 7 May 1840, Wentworth published an article alerting readers to the fact that he was currently empaneled as a member of the jury in the murder trial of *People v. Stone*, then pending in the Cook County Circuit Court, with Judge John Pearson presiding. Later that same day, Stuart published an article objecting to Judge Pearson's decision to close the trial, observing that perhaps "the weakness of his honor's head would not admit of the noise and confusion incident to a crowd of hearers, and a proper attention to the cause, all at the same time."[39] Stuart also commented on the odd spectacle of a member of a sequestered jury furnishing articles about the trial for daily publication. Judge Pearson ordered Stuart to show cause for the publication and, following Stuart's answers to the court's questions, imposed a fine of $100 plus court costs.

On a writ of error, a divided state Supreme Court reversed. Writing for the Court's majority, Justice Breese noted that the state constitution "has provided that the printing presses shall be free to every person who may undertake to examine the proceedings of any and every department of the government, and he may publish the truth, if the matter published is proper for public information, and the free communication of thoughts and opinions is encouraged."[40] Breese further noted that while Stuart's article was clearly meant to "irritate" the presiding judge of the Stone murder trial, it was in no way "reflecting upon his integrity, or in any way impeaching his conduct. The paragraphs and communication published had no tendency to obstruct the administration of justice, nor were they thrust upon the notice of the court, by any act of [Stuart]."[41] Emphasizing that the Illinois courts retained common law powers only to the extent that such powers were consistent with state and federal constitutional principles, Breese cautioned that if punishment for contempt is a safeguard to preserve the integrity of judicial institutions, it should be used sparingly:

[37] Bridges v. Superior Court of Los Angeles, 94 P.2d 983 (Cal. 1939).
[38] In re Austin, 1835 WL 2736 (Pa. 1835).
[39] 4 Ill. 395, 404-5 (Ill. 1842).
[40] 4 Ill. 395, 404 (Ill. 1842).
[41] 4 Ill. 395, 405 (Ill. 1842).

> 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.
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> It does not seem to me necessary, for the protection of courts in the exercise of their legitimate powers, that this one, so liable to abuse, should also be conceded to them. It may be so frequently exercised, as to destroy that moral influence which is their best possession, until finally, the administration of justice is brought into disrepute. Respect to courts cannot be compelled; it is the voluntary tribute of the public to worth, virtue and intelligence, and whilst they are found upon the judgment seat, so long, and no longer, will they retain the public confidence.[42]

The 1842 *Stuart* holding stands for the proposition that constitutional free expression principles limit the powers of courts to punish for contempt. In addition, the court's opinion suggests that contempt powers are positive institutional authorities conferred by legislative bodies, as opposed to inherent powers belonging to courts regardless of popular will.

Similarly, the Mississippi Supreme Court's 1840 opinion in *Ex Parte Hickey* read state constitutional protections as a limitation on contempt powers "of immemorial usage and practice," citing Blackstone as an authority while also noting that "the doctrine of consequential contempts, in its present broad understanding, was unknown to and not confirmed by the earliest constitutional law of England – magna charta."[43] The case facts here were similar to those in most other anti-judicial speech cases heard during the nineteenth century, with one variation. As editor of the *Vicksburg Sentinel*, Hickey published an article accusing Judge Coalter of the Circuit Court of Warren County of releasing a murderer in an ongoing trial. He was imprisoned for contempt of court, pardoned by the governor, and then imprisoned again. (The intervening gubernatorial pardon is the novel aspect of the case. In the proceedings attached to the opinion, the Circuit Court drolly observed that, following the pardon, "the said Walter Hickey has by some means escaped from [Warren County] jail, and is now going at large in contempt of said order of said court."[44] Ignoring the pardon, the court ordered him rearrested and detained.) The relevant Mississippi statute provided that "[t]he courts shall have power to fine and imprison any person who may be guilty of a contempt of the court, while sitting, either in the presence or hearing of such court: provided, that such fine shall not exceed one hundred dollars, and no person, for such contempt, shall be imprisoned for a longer period than the term of the court at which the contempt shall have been committed."[45] On the Court's reading, the legislature's enactment of these carefully limited statutory contempt powers implied the non-existence of an overlapping set of inherent, and unlimited, common law contempt powers. Citing similar statutory limitations from Pennsylvania and Ohio, Justice Thacher observed that in states "established upon the same republican principles as our own, having courts of justice of similar jurisdiction and like authority, needing the same inherent capacity for self-preservation, and the same influence over the public mind to render them efficacious for the ends of their creation, . . . the common law power of the judges over contempts is found to be unnecessary and useless."[46] Meeting the question of the role of constitutional free press protections head-on, Thacher declared such rights "the most dearly prized offspring of our national liberty." Free speech and press were of course subject to

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[42] 4 Ill. 395, 405 (Ill. 1842).

[43] Justice Thacher's opinion notes that broad powers of contempt in relation to newspaper libels could not have existed since time immemorial: "For so far as the newspaper publication of a libel upon a court is concerned, a case of the kind could not have occurred until the time of Queen Elizabeth, when newspapers were first established, which was three hundred and forty-three years after the date of magna charta." 12 Miss. 751, 772-773 (Miss. 1840).

[44] 12 Miss. 751, 755 (Miss. 1840).

[45] 12 Miss. 751, 780 (1840).

[46] Ibid, 779-780.

potential abuse, "[b]ut who would argue, because disease may float in the atmosphere, that that atmosphere should be destroyed?"[47]

A number of state courts noted that these free expression considerations were particularly weighty in the context of judicial elections, which might reasonably be thought to require open and honest discussion of judges' performance in office. In an 1875 holding, for example, the Illinois Supreme Court noted that the "judiciary is [now] elective. . . . There is, therefore, the same responsibility, in theory, in the judicial department, that exists in the legislative and executive departments to the people, for the diligent and faithful discharge of all duties enjoined on it; and the same necessity exists, for public information, with regard to the conduct and character of those intrusted [sic] to discharge those duties, in order that the elective franchise shall be intelligibly exercised, as obtains in regard to the other departments of the government."[48] Similarly, when the Pennsylvania Supreme Court reversed a contempt holding that had disbarred two attorneys for publishing an article suggesting improper political motives in the handling of a recent case, it emphasized that the published commentary was on a past case and thus fell outside the contempt rule, but it also noted that the shift from appointed to elected courts may have changed the weighing of factors in contempt proceedings. Where once the Court had been critical of appeals to the people that might diminish confidence in the judiciary, now it emphasized the "duty of a lawyer to bring to the notice of the people who elect the judges every instance of what he believes to be corruption or partisanship."[49] This duty appertained to lawyers in particular because they have greater knowledge of court performance than do ordinary citizens. In a later case that began not with a contempt proceeding but with a libel suit filed by a judge seeking reelection, the same court warned of the potential chilling effect of a liberal use of the contempt power: "If the voters may not speak, write, or print anything but such facts as they can establish with judicial certainty, the right does not exist, unless in such form that a prudent man would hesitate to exercise it."[50]

In a notable Wisconsin dispute in 1897, an attorney and newspaper editor published stories critical of a trial judge just a few weeks before he was up for reelection. The judge initiated constructive contempt proceedings, summoned the attorney and editor to court, and compelled them to admit publication and repeat the allegations. He then stayed the constructive contempt proceedings and immediately held them in direct contempt for statements made in open court. This sequence of events suggests that the trial judge knew the constructive contempt charges were tenuous and thus orchestrated a more easily punishable direct contempt. On appeal, the Wisconsin Supreme Court acknowledged that the contempt power is inherent in the very nature of a court, has been so recognized "from time immemorial," and cannot legitimately be eliminated (or severely impaired) by statute, but it held that when extended to commentary on already concluded cases, the power unduly trenches on constitutional FoE values. The Court held further that such deprivations of liberty are particularly dangerous in the context of judicial elections: "Had [the judge] 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 law. . . . 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."[51]

Our focus here is on constitutional free expression holdings, but state supreme courts sometimes reached similar results via purely statutory reasoning. For example, the Nebraska Supreme Court held that "when the language used in an article is not *per se* libelous, and only becomes so and made to apply to the court by the use of innuendoes, and if fairly susceptible of an innocent meaning so far as any reflection upon the court is concerned," judges must accept the innocent meaning wherever the speaker plead an

[47] Ibid, 782.
[48] Storey v. People, 79 Ill. 45, 52-53 (Ill. 1875).
[49] Ex parte Steinman and Hensel, 95 Pa. 220, 238-39 (Pa. 1880).
[50] Briggs v. Garret, 2 A. 513, 523 (Pa. 1886).
[51] State ex rel. Atty. Gen. v. Circuit Court of Eau Claire County, 72 N.W. 193, 196 (Wis. 1897).

innocent intent. The court also noted that the commentary at issue appeared to be on past rather than pending cases.[52] The New Mexico and Missouri Supreme Courts likewise limited the application of contempt powers where the offending language was ambiguous.[53]

At the federal level, SCOTUS sometimes also reversed contempt holdings on statutory grounds, and it did so long before coming around on the constitutional issue in *Bridges*. In *Ex parte Robinson* (1873), for example, Justice Stephen Field held that federal courts have inherent contempt powers, but that Congress is free to limit those powers (at least for the inferior courts), and he reversed a contempt holding as inconsistent with the 1831 Act.[54] But the most notable development on this front was a dissenting opinion from Justice Holmes in the *Toledo Newspaper* case. Writing more than a year before his celebrated dissent in *Abrams v. United States* (1919), Holmes raised statutory objections to the scope of contempt powers being exercised in federal court, and the opinion suggests that he had begun to reconsider the narrow vision of the First Amendment that he endorsed in *Patterson*.

The *Toledo* case involved newspaper coverage of legal disputes between a railway company and the local government. When the company's franchise expired and the parties were unable to reach a new agreement, the city unilaterally imposed low fares. This decision led to multiple legal challenges filed by the company and its creditors. In this context, the *Toledo News-Bee* "began publications adverse to the rights asserted against the city by the creditors and the railway company and in no uncertain terms avouched the right of the city to have enacted the ordinance which the suits assailed." The newspaper's articles grew more vociferous over time, and in the view of the Supreme Court, at least indirectly called into question "the duty and power of the [trial] court and its right to afford any relief in the matters before it." On the basis of these publications, the trial judge held the newspaper company and its editor in contempt, imposing a "nominal" fine on the editor and a "very substantial" one on the company.[55] SCOTUS affirmed.

In dissent, Holmes began by observing that it is fundamentally "contrary . . . to our practice and ways of thinking for the same person to be accuser and sole judge in a matter which, if he be sensitive, may involve strong personal feeling." As such, judicial contempt powers may legitimately be directed "only to the present protection of the Court from actual interference, and not to postponed retribution for lack of respect for its dignity." In Holmes's view, "a judge of the United States is expected to be a man of ordinary firmness of character, and I find it impossible to believe that such a judge could have found in anything that was printed even a tendency to prevent his performing his sworn duty. I am not considering whether there was a technical contempt at common law but whether what was done falls within the words of an act intended and admitted to limit the power of the Courts [i.e., the 1831 contempt statute]."[56]

In a subsequent treatment in the *Harvard Law Review*, Felix Frankfurter and James M. Landis likewise argued that the *Toledo Newspaper* majority had misread the 1831 Act, and they noted that several lower federal courts had followed SCOTUS's lead in effectively erasing the Act from the statute books (1924: 1037-38). On the statutory issue, Professor Frankfurter's view was that the courts should abide by legitimate statutory limitations on their contempt powers. On the constitutional issue, Frankfurter's view took shape only once he joined the Court, and here, he argued that judicial punishment of constructive contempts did not raise constitutional free expression concerns. But he made this argument in dissent, as Justice Black wrote for a bare majority in reversing the contempt holdings in *Bridges v. California*.

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[52] Percival v. State, 64 N.W. 221, 222 (Neb. 1895).
[53] State v. New Mexican Printing Co., 177 P. 751 (N.M. 1918), State ex rel. Pulitzer Pub. Co. v. Coleman, 152 S.W.2d 640 (Mo. 1941); cf. Boorde v. Commonwealth, 114 S.E. 731 (Va., 1922) (admitting that the language was open to interpretation and deferring to the lower court's judgment).
[54] Ex parte Robinson, 86 U.S. 505 (1873).
[55] Toledo Newspaper Co. v. United States, 237 F. 986, 988 (6th Cir. 1916).
[56] 247 U.S. 402, 423-4 (1918).

In *Bridges*, the Court vacated contempt citations that a trial judge had issued against both radical union leader Harry Bridges and the anti-union *Los Angeles Times*.[57] While a major union decision was pending, Bridges sent a telegram to the Secretary of Labor implying that his union would call a strike in the event of an adverse decision.[58] The *L.A. Times* published editorials calling for conviction of union activists in a variety of cases.[59] Overriding the state statutory limitations on the contempt power, the California Supreme Court treated both sets of statements as commentary on pending cases with the intent to affect the administration of justice. Drawing on his strongly held view that the First Amendment had marked a break with English common law regarding speech and press, Black argued that the common law history of the contempt power in England was irrelevant in the US. Following Justice Louis Brandeis's opinion in *Whitney v. California* (1927), Black significantly tightened the existing clear-and-present-danger test, holding that "the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."[60] He acknowledged that ensuring fair trials was an important government interest, but was not persuaded that any of the anti-judicial speech acts here had threatened that interest. With regard to the *L.A. Times* contempt, Black noted that the paper's anti-union "militancy" was well-known and could hardly have surprised an experienced L.A. judge; even reading the editorial in the harshest light, it "did no more than threaten future adverse criticism which was reasonably to be expected anyway in the event of a lenient disposition of the pending case."[61] As for the Bridges telegram, at most it threatened to call a legal strike, something the trial judge likely anticipated anyway, and "[i]f he was not intimidated by the facts themselves, we do not believe that the most explicit statement of them could have sidetracked the court of justice."[62]

In Black's view, if the contempt citations here were allowed to stand, "it would follow as a practical result . . . that anyone who might wish to give public expression to his views on a pending case involving no matter what problem of public interest, just at the time his audience would be most receptive, would be as effectively discouraged as if a deliberate statutory scheme of censorship had been adopted."[63] After all, cases often remained technically pending in US courts for "months or even years rather than days or weeks," in which case blanket prohibitions on discussion of pending cases could impose severe limits on free expression.[64] In sum, and echoing the Illinois Supreme Court's holding in *Stuart* almost 100 years earlier, Black observed that "[t]he assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak 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."[65]

Black's opinion in *Bridges* radically altered the ability of US courts to punish critics, though not without some initial resistance. Some state courts responded by criticizing the decision even while adhering to it.[66] Others sought to resist the new rule more directly. In a 1945 holding, for example, the Florida Supreme Court complained that "it was not until 1925 that anyone dreamed that the Federal

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[57] Bridges v. California, 314 U.S. 252 (1941).
[58] Bridges v. Superior Court of Los Angeles, 94 P.2d 983 (Cal. 1939).
[59] Times-Mirror Co. v. Superior Court, 98 P.2d 1029 (Cal. 1940).
[60] 314 U.S. 252, 263 (1941).
[61] 314 U.S. 252, 273 (1941).
[62] 314 U.S. 252, 278 (1941).
[63] 314 U.S. 252, 269 (1941).
[64] 314 U.S. 252, 269 (1941).
[65] 314 U.S. 252, 270 (1941).
[66] Note, for example, Graham v. Jones, 7 So.2d 688, 694 (La. 1942), in which the Louisiana Supreme Court noted that the newspaper editorials at issue went "far beyond fair and reasonable criticism" of a recent judicial decision and that they clearly amounted to constructive contempts at the time they were published, but that the *Bridges* decision had changed the constitutional rule while the action was pending. Under this new rule, the state court reversed the contempt holding, but its sympathy for the old rule was clear.

Constitution had anything to do with the punishment for contempt under state law. . . . The States had been exercising the power to punish for contempt for more than a hundred years and we find nothing in the *Bridges* case indicating a purpose to supersede state law and decisions on the question or to require state courts to conform to Federal pattern."[67] The case involved a contempt holding against the associate editor and publisher of the *Miami Herald*, which had published two editorials and a cartoon critical of the state circuit court. The first editorial, entitled "Courts Are Established -- FOR THE PEOPLE," alleged that judges were impeding the State Attorney (the instrument of the people) from prosecuting alleged bookmakers operating out of the local Tepee Club. The editorial was accompanied by a cartoon later described by SCOTUS as follows: "It caricatured a court by a robed compliant figure as a judge on the bench tossing aside formal charges to hand a document, marked 'Defendant dismissed,' to a powerful figure close at his left arm and of an intentionally drawn criminal type. At the right of the bench, a futile individual, labeled 'Public Interest' vainly protests."[68] In upholding the contempt judgment, the Florida Court attempted to limit *Bridges* to its facts—either because the California legislature had not affirmatively granted judicial contempt powers or because nothing in the California publications amounted to an attack on the integrity of the courts—but SCOTUS reversed in *Pennekamp v. Florida* (1946).

The Texas Court of Criminal Appeals likewise tried to narrow the reach of the *Bridges* holding, reading it as protecting only publications "which do[] nothing more than threaten adverse criticism of a judge."[69] The Texas case involved contempt convictions of a publisher, an editorial writer, and a reporter associated with two newspapers in Corpus Christi, Texas that had reported critically on an ongoing civil trial. The civil trial centered on whether one Mr. Mayes (who at the time was serving active duty in the military) had forfeited a leased property for not paying rent. The jury initially returned a verdict for Mayes, but the trial judge repeatedly refused to accept it. The jury eventually complied by returning a verdict against Mayes, but indicated that it did so under compulsion. Following this judgment, and while Mayes's motion for a new trial was pending, the local press criticized the trial judge's behavior as "arbitrary action" and a "travesty on justice."[70] The state Court of Criminal Appeals read these articles as not just adverse criticism but an effort "to force, compel, and coerce [the trial judge] . . . to grant Mayes a new trial."[71] The state court upheld the contempt, but SCOTUS reversed in *Craig v. Harney* (1947), with Justice Frank Murphy stating the issue most plainly in a brief concurring opinion: "the Constitution forbids a judge from summarily punishing a newspaper editor for printing an unjust attack upon him or his method of dispensing justice. The only possible exception is in the rare instance where the attack might reasonably cause a real impediment to the administration of justice."[72]

Collectively, *Bridges*, *Pennekamp*, and *Craig* made clear that public commentary on courts was now constitutionally protected so long as it did not tend immediately to interfere with the administration of justice. Put another way, maintaining respect for the judiciary was no longer a legitimate justification for infringing on free expression. Protecting the administration of justice still was such a justification, but SCOTUS indicated that strong proof of interference would be required before allowing suppression of anti-judicial speech. Still, some state courts tried to exploit whatever opening remained. In *Weston v. Commonwealth of Virginia* (Va. 1953), the Virginia Supreme Court ruled in favor of a speech claim brought by a pastor whose sermon had criticized a local judge for a decision disqualifying certain federal employees from holding county office. Though the state court endorsed the free expression claim here, it nonetheless indicated less-than-enthusiastic support for *Bridges*: "We are not impressed with the

[67] Pennekamp v. State, 22 So.2d 875, 883 (Fla. 1945)
[68] Pennekamp v. Florida, 328 U.S. 331, 337-9 (1946). The second editorial, entitled "WHY PEOPLE WONDER," concerned "gumming up" of the prosecution of a "padlock case" at the Brook Club ("a road house of local note"). 22 So.2d 875, 879, 882 (Fla. 1945).
[69] Ex parte Craig, 193 S.W.2d 178, 187 (Tex. Crim. 1946).
[70] Craig v. Harney, 331 U.S. 367, 369 (1947).
[71] Ex parte Craig, 193 S.W.2d 178, 188 (Tex. Crim. 1946).
[72] 331 U.S. 367, 383 (1947).

argument that because of the constitutional guaranty of freedom of speech and press the State is without power to punish in a contempt proceeding unwarranted and improper criticism of judicial conduct in litigation which has been terminated, but must resort to a criminal libel proceeding for that purpose. We are of opinion that false and libelous utterances as to a judge's conduct of an ended case may or may not be punishable contempt, depending upon whether such utterances present a clear and present danger to the administration of justice."[73] Similarly (but this time ruling against the free expression claimant), in *Sarner v. Sarner*, a unanimous Supreme Court of New Jersey held that "[t]he right of free speech is always subject to subsequently applicable sanctions for abuse of the right, and one of these is a contempt citation for contemptuous remarks to a judge in a courtroom."[74] In support, the opinion cited a prior state court holding emphasizing that *Bridges, Pennekamp,* and *Craig* were concerned with constructive contempts by the press rather than comments within the courtroom itself.[75]

Even on SCOTUS, judges remained attentive to protecting the administration of justice against undue interference. When the civil rights movement led to repeated conflicts between African American demonstrators and southern law enforcement officials, the Court repeatedly intervened on the side of free expression for the protestors, but even in this context, the Court drew the line at picketing of courthouses.[76] In sum, all judges are likely to be aware of the potential threat to the administration of justice posed by unbridled free expression—even those who serve on the most speech-protective constitutional court in the world, during one of its most speech-protective periods, acting in a political context in which it had repeatedly demonstrated its commitment to free speech. But only some judges, acting in some places, times, and contexts, are likely to recognize that subjecting their own institutions to free and open debate is an imperative of democratic governance that may outweigh these concerns for judicial order. Our focus in the remainder of this paper is on when and where non-US judges have followed their US counterparts in reaching this conclusion.

Anti-Judicial Speech in Other Jurisdictions

The lesson of the English and American cases is that contempt powers, when understood to extend well beyond a judge's authority to control her own courtroom, are potentially serious threats to free expression. They may sometimes be used against relatively powerful actors (like government ministers) who systematically seek to undermine judicial authority, in which cases the damage to free expression may be outweighed by the threat to the rule of law. But as with other legal authorizations for

[73] Weston v. Commonwealth of Virginia, 77 S.E.2d 405, 409-410 (Va. 1953).

[74] The quoted text is from the judgment of the Superior Court, Appellate Division, whose opinion was fully adopted by the state Supreme Court. Sarner v. Sarner, 147 A.2d 244 (NJ 1959).

[75] State v. Gussman, 34 N.J. Super. 408, 411-12 (App. Div. 1955).

[76] When civil rights demonstrators in Baton Rouge, Louisiana protested the arrest of 23 fellow demonstrators by marching to and then picketing the local courthouse where those demonstrators were jailed, they were convicted of disturbing the peace, obstructing public passages, and violating a state statute prohibiting "pickets or parades in or near" a state courthouse, "with the intent of interfering with, obstructing, or impeding the administration of justice." In Cox v. Louisiana, 379 U.S. 536 (1965), the Supreme Court reversed the first two convictions. In a companion case decided the same day, the Court held that the courthouse picketing statute did not violate the First Amendment; the Court reversed these convictions as well, on due process grounds, but it did so by a 5-4 vote. Cox v. Louisiana, 379 U.S. 559 (1965). As Harry Kalven noted at the time, the *Cox* opinions indicated that "[a]t one extreme, it is clear that this kind of use of public streets and places cannot be summarily suppressed as a breach of the peace . . . [but a]t the other extreme is the unequivocal clarity of the point that no matter who you are or what your grievance, you cannot picket the courthouse" (1965: 182). For instances in which the Court intervened in favor of free expression for civil rights advocates, see *New York Times v. Sullivan* (1964), *Bell v. Maryland* (1964), and *Wood v. Georgia* (1962), the latter of which reversed a contempt holding against an elected sheriff who had criticized a local judge's efforts to intimidate African American voters.

speech suppression, it appears more likely that these powers will be deployed against journalists, scholars, and dissidents who question existing political arrangements; in these cases, the supposed threat to the rule of law may be no more than a fig leaf for political repression. In the remainder of this paper, we assess whether and to what degree courts outside England and the US have drawn a defensible line in this regard.

Put another way, the transformation from *Patterson* to *Bridges* marks a historically important step in the development of constitutional free speech law, one that could be a more widely used benchmark for assessing the commitment of various democratic jurisdictions to free expression. In a democracy, political institutions (and the leaders who occupy them) must tolerate criticism of their decisions (and their competence and character); this rule applies to courts no less than to legislatures and executives (Addo 1998; 2000). Indeed, this rule is a key indicator of courts' democracy-reinforcing character.

Freedom of expression is expressly guaranteed by 184 national constitutions that are currently in force, but 34 of these documents provide explicit exceptions for speech that amounts to contempt of court or otherwise harms judicial authority.[77] For example, Art. 19 of the Indian Constitution guarantees "freedom of speech and expression," but authorizes "reasonable restrictions on the exercise of the right . . . in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with Foreign States, public order, decency or morality, or *in relation to contempt of court*, defamation or incitement to an offence" (emphasis added). Some international legal guarantees of free expression include similar exceptions, most notably Art. 10 of the European Convention on Human Rights (ECHR).[78] Other constitutional (or constitution-like) documents include so-called limitations clauses that have been read to authorize certain restrictions on free speech, sometimes including restrictions necessary to guard the integrity of the judiciary. For example, Sec. 1 of the Canadian Charter of Rights and Freedoms provides that constitutional rights are "subject . . . to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Still other constitutional documents include explicit prohibitions on interferences with judicial authority that might be read in similar ways. For example, Sec. 165 of the South African Constitution provides that "[n]o person or organ of state may interfere with the functioning of the courts" and obligates the state to "assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts." Even where express constitutional authorizations are lacking, common law courts might well follow their English and American counterparts in holding that contempt powers are inherent to judicial institutions. And in civil law jurisdictions, courts might entertain statutory defamation suits filed by judges themselves. In any of the foregoing instances, constitutional courts will sometimes confront the same conflict between free expression and judicial authority that US courts faced from *Respublica v. Oswald* to *Bridges v. California*.

Using the Contempt Power to Curtail Free Expression

Judicial contempt powers are a creature of the common law world, and it is in such jurisdictions that the jurisprudential balancing of judicial legitimacy and free expression is most fully developed. Even while British courts were moving toward a more speech-protective stance in England, however, they repeatedly made clear that this stance might not apply in other territories to which their jurisdiction extended. In *McLeod*, the 1899 case in which the Privy Council observed (prematurely) that the crime of

[77] These numbers are drawn from the national constitutions available at https://www.constituteproject.org/, last accessed 22 July 2016.

[78] Art. 10 provides that "[e]veryone has the right to freedom of expression," but that this right "may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or *for maintaining the authority and impartiality of the judiciary*" (emphasis added).

scandalizing the court was "obsolete" in England, Lord Morris indicated that the rule might be different for courts "in small colonies, consisting principally of coloured populations, [where] the enforcement in proper cases of committal for contempt of Court for attacks on the Court may be absolutely necessary to preserve in such a community the dignity of and respect for the Court."[79] The Privy Council referenced this less-freedom-for-non-white-colonies argument as late as 1936, and even sixty years later, it was still suggesting that courts in some former colonies needed greater protection from scandalous comments than did English courts, though the explicit racism had by this point been scrubbed from the argument.[80] In the 1936 case, the Council simply quoted the above-noted passage from *McLeod*; in 1999, the Council found it "permissible to take into account that on a small island such as Mauritius the administration of justice is more vulnerable than in the United Kingdom. The need for the offence of scandalising the court on a small island is greater."[81] Despite the colonialist overtones, other common-law courts have likewise noted that contempt powers might be more necessary for less-secure judiciaries.[82]

Common law courts in multiple jurisdictions continued to punish constructive contempts throughout the twentieth century, and those in repressive jurisdictions used these powers repressively. In apartheid South Africa, law professor Barend van Niekerk was charged with contempt for publishing a scholarly article in 1969 suggesting that the country's courts applied capital punishment in a racially discriminatory manner. He was acquitted on *mens rea* grounds, but the presiding judge described the article at issue as a contempt: "if the reader accepted the views set out he could possibly hold the judges and the administration of justice in low esteem. . . . If the interpretation suggested be correct then the judges could no longer be treated with due respect for they could no longer be universally thought of as being impartial" (quoted in Dugard 1978: 292-3; see also Dugard 1987: xii-xv). In a November 1971 protest meeting, van Niekerk denounced Section 6 of the Terrorism Act, which authorized indefinite solitary confinement, along with the lawyer and judges who were enforcing it. He was again charged with contempt, both re scandalizing in general and re prejudicing the judgment in a pending case. He was acquitted on the former count but convicted on the later, and this conviction was upheld on appeal (Dugard 1978: 293-301; Dugard 1987: xii-xv).

A 2000 decision from Zimbabwe presented the issue in a more difficult context. In apartheid South Africa, an authoritarian regime relied on courts to repress political dissent, and the courts relied on their contempt powers to repress public discussion of their role even by respected scholars, let alone dissidents. The case from Zimbabwe, however, presents an instance of anti-judicial speech by an agent of the authoritarian state itself—in this case, Attorney General Patrick Chinamasa. In 1999, three American citizens claiming to be Pentecostal Church missionaries were convicted by a Zimbabwe court for smuggling weapons and munitions from the Congo to Zimbabwe.[83] Following the convictions, the trial judge effectively reduced the sentence to six months for each defendant. Attorney General Chinamasa then gave a statement to the *Herald* newspaper, accusing the trial judge of having "trivialised the crimes" and opining that "the leniency of the sentences constitutes a betrayal of all civilised and acceptable notions of justice and of Zimbabwe's sovereign interests." The *Herald* article concluded with the Attorney General's observation that "[a]ll these developments erode the office's confidence in the administration of criminal justice."[84] The trial judge responded by initiating contempt proceedings, and

[79] McLeod v. St. Aubyn [1899] AC 549.
[80] Ambard v. Attorney-General of Trinidad and Tobago [1936] 1 All ER 704; Ahnee, Sydney Selvon and Le Mauricien Ltd v. Director of Public Prosecutions (Mauritius) [1999] UKPC 11. See Litaba (2003).
[81] Ahnee, Sydney Selvon and Le Mauricien Ltd v. Director of Public Prosecutions (Mauritius) [1999] UKPC 11, para. 21.
[82] Note for example the Supreme Court of Malaysia's decision in Attorney-General v. Arthur Lee Meng Kuang [1987] 1 MLJ 207. Note also the concurring opinion from Justice Albie Sachs in State v Mamabolo, 2001 (3) SA 409 (South Africa 2001), para. 71 ("What further complicates the matter in South Africa is that the very context of a newly developing democracy that requires the greatest openness of debate, necessitates the existence of a judiciary with the strongest capacity to defend that openness.")
[83] Associated Press, "3 Americans Convicted in Zimbabwe Released," *The Los Angeles Times*, Nov. 7, 1999.
[84] In re Chinamasa, 2000 (12) BCLR 1294 (ZS), 19.

Chinamasa's counsel responded in turn by requesting that the question whether common law contempt powers were compatible with Zimbabwe's constitutional guarantee of free expression be referred to the Supreme Court.

In a unanimous decision, the Zimbabwe Supreme Court allowed the contempt proceedings to proceed. Justice Gubbay's opinion surveyed the state of contempt law in other common-law jurisdictions, finding it to be alive and well rather than a dead letter. He expressly disavowed the colonialist argument that "in small islands the need to retain the offence of scandalising the court is greater."[85] On the other end of the legal spectrum, he also rejected the US standard that anti-judicial speech acts should be punished only if they pose a clear and present danger of harming the administration of justice. Justice Gubbay indicated strong support for free expression, but noted that Art. 20 of the 1980 Constitution authorized limitations on this freedom to "maintain[] the authority and independence of the courts," so long as those limitations were "reasonably justifiable in a democratic society."[86] Here, he found that standard to have been met.

It is of course no surprise that judges in repressive states have used their available powers of speech suppression in repressive ways. More notable is that similar decisions have continued to issue even in well-established democracies like Australia and India.[87] Australia does not have an express constitutional guarantee of free expression, but in 1992, its High Court held that "the representative form of government established by the Australian Constitution implies a freedom of communication on political matters, where none is actually stated" (Gelber 2012: 203; see also Chesterman 2000:3). This holding has developed into a fully enforceable constitutional guarantee of freedom for political speech, but the High Court has nonetheless allowed summary prosecution of contempts committed out of court. In *Re Colina; Ex parte Torney* (1999), for example, the Court upheld a contempt holding against one Mr. Torney, who had repeatedly demonstrated outside the Family Court building in Melbourne, distributing written materials and making abusive remarks about that court's judges. Among other things, Torney "blam[ed] the court and its judges for the deaths of people and for instances of child abuse, describe[ed] the judges as being 'terrorised' by women's organizations, . . . claim[ed] that 'decisions are being made on a daily basis destroying the lives of innocent children' . . . [and] asserted that if people knew the nature of orders made by judges, the likely consequence would be violent action towards the judges."[88] In a joint opinion, Chief Justice Murray Gleeson and Justice William Gummow cited to a 1935 High Court holding in adopting a broad definition of contempt as anything that "has a tendency to deflect the Court from a strict and unhesitating application of the letter of the law or, in questions of fact, from determining them exclusively by reference to the evidence. But such interferences may also arise from publications which tend to detract from the authority and influence of judicial determinations, publications calculated to impair the confidence of the people in the Court's judgments because the matter published aims at lowering the authority of the Court as a whole or that of its Judges and excites misgivings as to the integrity, propriety and impartiality brought to the exercise of the judicial office."[89] Citing to another early-twentieth century Australian case, Gleeson and Gummow held that the power to deal summarily with contempts is an "inherent . . . power of self-protection or a power incidental to the function of superintending the administration of justice."[90] Writing separately, Justice Michael Kirby remarked that "undue attention has been paid in the cases (and in argument before this Court) to the law and practice of

[85] 2000 (12) BCLR 1294 (ZS), 48-51.
[86] 2000 (12) BCLR 1294 (ZS), 44-47.
[87] Note also Wong Yeung Ng v. Secretary for Justice [1999] 3 HKC 143, in which the Hong Kong Court of Final Appeal upheld a contempt conviction and four-month sentence for a newspaper editor who had published a series of scurrilous articles attacking Hong Kong judges who had ruled against his newspaper in several obscenity and copyright disputes.
[88] Re Colina; Ex parte Torney [1999] HCA 57, para. 7.
[89] Re Colina; Ex parte Torney [1999] HCA 57, para. 2, quoting R v. Dunbabin; Ex parte Williams (1935) 53 CLR 434 at 442.
[90] Re Colina; Ex parte Torney [1999] HCA 57, para. 16, quoting Porter v The King; Ex parte Yee (1926) 37 CLR 432 at 443.

summary prosecutions for contempt in England and in the Australian colonies and States which developed without concern for the need to consider the application of" subsequently adopted constitutional provisions.[91] Justice Kirby did not refer here to a free expression provision (which, again, the Australian Constitution lacks), but to the constitutional guarantee of trial by jury. Relying on this provision (Sec. 80), he would have held that trials for contempt must now be by jury, regardless of the pre-constitutional common law practice.

In India, the Supreme Court has repeatedly, across multiple decades, rejected constitutional challenges to contempt convictions in circumstances in which important FoE values appear to be in play. In 1970, the Court affirmed a contempt holding against the Chief Minister of Kerala, a member of the Communist Party of India who had voiced a Marxist critique of the courts as tools of the ruling class during a press conference.[92] In 2002, the Court itself convicted novelist Arundhati Roy of contempt and sentenced her to one day in prison because she had accused the Court of muzzling dissent. As with Eleazer Oswald and the Pennsylvania Supreme Court 220 years earlier, the contempt holding here represented just one step in a long-running conflict between the Court and a vocal critic (Stone, et al. 2014). Several years earlier, Roy had published an article entitled "The Greater Common Good," which objected to the displacement of thousands of people from their ancestral homes by the construction of the Sarovar Reservoir Dam. The article included passages criticizing a ruling of the Court that had permitted the height of the dam to be increased. In October 1999, the Court ruled against the movement challenging the construction of the dam. In its opinion, the Court also expressed disapproval of Roy's article—with two judges characterizing it as "a misrepresentation of the proceedings of the court"—but did not initiate contempt proceedings. One year later, opponents of the dam staged a protest outside the Court, yelling "abusive slogans against the court including slogans ascribing lack of integrity and dishonesty to [the] institution," as the Court later characterized it.[93] J.R. Parashar, an advocate before the Court who objected to the anti-Court protests, filed a contempt petition against the protesters. In response, Roy filed an affidavit with local police officials complaining of the Court's "disquieting inclination . . . to silence criticism and muzzle dissent, to harass and intimidate those who disagree with it."[94]

On the basis of this affidavit, the Court held Roy in violation of the national Contempt of Courts Act, as she "had imputed motives to specific courts for entertaining litigation and passing orders against her. She had accused courts of harassing her as if the judiciary were carrying out a personal vendetta against her. She had brought in matters which were not only not pertinent to the issues to be decided but has drawn uninformed comparisons to make statements about this Court which do not appear to be protected by law relating to fair criticism." Echoing eighteenth-century English and nineteenth-century American courts, the Indian Court objected to Roy's "persistent and consistent attempt to malign the institution of the judiciary," observed that "[f]or the judiciary to perform its duties and functions effectively and true to the spirit with which it is sacredly entrusted, the dignity and authority of the courts have to be respected and protected at all costs," noted that the courts' "only weapon [for doing so] . . . is the long hand of contempt of court left in the armoury of judicial repository which, when needed, can reach any neck howsoever high or far away it may be," and insisted that it "is no defence to say that as no actual damage has been done to the judiciary, the proceedings be dropped. The well-known proposition of law is that it punishes the archer as soon as the arrow is shot no matter if it misses . . . the target. The respondent is proved to have shot the arrow, intended to damage the institution of the judiciary and thereby weaken the faith of the public in general and if such an attempt is not prevented, disastrous consequences are likely to follow resulting in the destruction of rule of law." In support, the Court quoted at length from one of its own holdings from 1978, including a passage which had appealed to Justice

[91] Re Colina; Ex parte Torney [1999] HCA 57, para. 101.
[92] E.M. Sankaran Namboodiripad v. T. Narayanan Nambiar, 1970 AIR 2015, 1971 SCR (1) 697 (1970).
[93] In Re: Arundhati Roy v. Unknown, 3 SCC 343 (India 2002), para. 8.
[94] In Re: Arundhati Roy v. Unknown, 3 SCC 343 (India 2002), para. 11.

Frankfurter's and Jackson's dissents in *Bridges* and *Craig v. Harney*, respectively.[95] The Court acknowledged that freedom of expression was constitutionally guaranteed, but noted that the Indian Constitution included express textual exceptions, allowing "reasonable restrictions on the exercise of the right . . . in relation to contempt of court, defamation or incitement to an offense."[96] In the years since, the Court has continued to rely on this textual exception as warrant for punishing speech that questions judicial impartiality.[97]

Using Free Expression to Curtail the Contempt Power (and Judicial Defamation Suits)

While constitutional courts in some common law systems have continued to allow repressive uses of judicial contempt powers, others have begun to recognize that such powers are limited by constitutional FoE principles. For example, the leading Canadian case is *R. v. Kopyto* (Ont. C.A. 1987), in which the Ontario Court of Appeals relied on Sec. 2(b) of the Charter of Rights and Freedoms in quashing the contempt conviction of a lawyer who had publicly criticized a judge for dismissing a case that the lawyer had filed. Representing a long-time leader of the League for Socialist Action who had lodged repeated legal complaints regarding R.C.M.P. investigations, Harry Kopyto was quoted in the press as follows: "This decision is a mockery of justice. It stinks to high hell. It says it is okay to break the law and you are immune so long as someone above you said to do it." He also noted that he and his client were "wondering what is the point of appealing and continuing this charade of the courts in this country which are warped in favour of protecting the police."[98] The Ontario court held that Kopyto's statements were constitutionally protected speech, with two members of the three-judge majority adopting a standard closely modeled on the US clear-and-present-danger test (holding that scandalous comments could be punished only if the state demonstrates an "imminent" danger to the fair administration of justice) and the third holding that the common law offense of scandalizing the court is inconsistent with Sec. 2(b) whether or not the comments at issue pose an imminent danger.

The *Kopyto* holding is widely cited internationally, though it remains unclear whether the Supreme Court of Canada endorses the full scope of the freedom to criticize judges that it recognized. Just one year after *Kopyto*, the Supreme Court rejected a constitutional FoE challenge to an injunction imposed summarily on the picketing of courthouses, with Chief Justice Dickson's opinion making clear that judicial contempt powers can sometimes override Sec. 2(b) rights.[99] In 2012, the Supreme Court again issued a decision suggesting a somewhat less speech-protective standard than that which prevailed in *Kopyto*. *Doré v. Barreau du Québec* (2012) involved not a contempt holding but rather a three-week suspension of a lawyer's license in a disciplinary proceeding, but like the *Kopyto* case, it began with a lawyer harshly criticizing a judge, so the Court's rejection of the free expression claim here left the scope of Canadian freedom to criticize judges somewhat unclear. Writing for a unanimous Court in *Doré*, Justice Rosalie Abella acknowledged that even "robust" criticism of judges by lawyers "can be constructive," but held that "in the context of disciplinary hearings, such criticism will be measured against the public's reasonable expectations of a lawyer's professionalism." In the case at hand, the lawyer's "displeasure with [the judge] . . . was justifiable, but the extent of the response was not." As such, the temporary suspension from the bar was a reasonable and proportionate restriction on Sec. 2(b).[100] Taken together, these holdings

[95] In Re: Arundhati Roy v. Unknown, 3 SCC 343 (India 2002), para. 22-24, citing In Re: S. Mulgaokar vs Unknown, 3 SCC 339 (India 1978).
[96] In Re: Arundhati Roy v. Unknown, 3 SCC 343 (India 2002), paras. 1, 9, 40.
[97] Note, for example, Bal Kishan Giri v. State of Uttar Pradesh, 7 SCC 280 (India 2014), in which the Indian Supreme Court affirmed a contempt conviction of a lawyer who had publicly expressed concern that a sitting justice of the Allahabad High Court would not be impartial in a pending bail hearing in a high-profile murder case.
[98] R. v. Kopyto, 62 O.R. (2d) 449 (Ont. C.A. 1987).
[99] B.C.G.E.U. v. British Columbia (Attorney General) (aka Vancouver Courthouse case) [1988], 2 S.C.R. 214.
[100] Doré v. Barreau du Québec, 2012 SCC 12, [2012] 1 S.C.R.

demonstrate the Canadian Supreme Court's continued concern for protecting judges and judicial institutions from undue criticism and protest.

Outside the US, no national high courts operating in common-law jurisdictions have protected anti-judicial speech as fully as did the Ontario court in *Kopyto*, but at least one has taken a step in this direction. In 2001, the South African Constitutional Court acknowledged the importance of protecting judicial authority in new democracies, but nonetheless ruled in favor of a claimant who had been jailed for anti-judicial speech. This case involved a spokesperson for the Department of Correctional Services who had issued a press release contending that a High Court judge had wrongly granted bail to a prisoner. The spokesperson, Mr. Russell Mamabolo, was summarily tried, convicted, and jailed for scandalizing the court. On appeal, and with support from the Freedom of Expression Institute, Mamabolo argued that the offence of scandalizing the court by way of statements not made in court or related to pending proceedings could no longer be recognized in light of the 1996 Constitution's express guarantee of freedom of expression. As this question was one of first impression, the Constitutional Court noted the long common law history of the contempt power (including an extended quotation from Mr. Justice Wilmot in *Almon's Case*), asked whether the continued existence of such a power was compatible with free expression in a democratic state, and concluded that it remained an essential means for preserving judicial authority. As such, the Court held that punishments for contempt limited freedom of expression in ways that were "reasonable and justifiable in an open and democratic society" and hence were authorized under the Constitution's Sec. 36 limitations clause. But the Court went on to hold that, in light of constitutional FoE principles, the scope of the crime of scandalizing the court must be carefully defined, preserved only for a "narrow category of egregious cases."[101] (The Court also held that in light of constitutional fair trial principles, contempt charges could no longer be tried by the sort of summary procedures used at common law.) In a separate opinion concurring in the judgment, Justice Albie Sachs called for tightening the crime of scandalizing the court still further, limiting it to statements that "pose a real and direct threat to the administration of justice."[102] Under either standard, the justices were unanimous that Mamabolo's statements at issue in this case "did not in any way impair the dignity, integrity or standing of the judiciary or of the particular judge" and hence that his conviction and sentence should be set aside.[103] In sum, the Court expressly rejected a call to import strict, US-style FoE limits on contempt powers, but it read those powers down and required more-than-summary procedures when using them.

In some civil law jurisdictions, constitutional courts have proven willing to defend the freedom to criticize judges as broadly (or nearly so) as have US courts. Lacking the summary contempt powers traditionally exercised by common-law courts, courts in these jurisdictions have sometimes sanctioned anti-judicial speech acts under generic defamation laws (in suits filed by or on behalf of the impugned judges) or under statutory prohibitions on abusing judges in particular. In response, some constitutional courts have joined SCOTUS in emphasizing the value of robust democratic debate about judicial performance and on this basis have thrown out convictions of anti-judicial speakers. In 2007, for example, the Constitutional Court of the Czech Republic held that the producers of a television report accusing a named judge of "carry[ing] out political trials" could not constitutionally be ordered to apologize to the judge in question.[104]

Perhaps most notably, the German Federal Constitutional Court has repeatedly and consistently held that the freedom of expression extends to critical commentary about courts. Its first significant reference to this principle came in the course of declaring that judges have free expression rights of their own to respond to published criticism. In a November 1953 public appearance in Stuttgart, Judge Schmid

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[101] State v Mamabolo, 2001 (3) SA 409 (South Africa 2001), para. 45-47.
[102] State v Mamabolo, 2001 (3) SA 409 (South Africa 2001), para. 75.
[103] State v Mamabolo, 2001 (3) SA 409 (South Africa 2001), para. 61.
[104] Our account of this case is drawn from the English-language summary (case number CZE-2007-2-009) in the Venice Commission's CODICES database, available at http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm.

delivered a speech in favor of political strikes; in the process, he criticized the mainstream press for being economically dependent on anti-union employers. The speech was subsequently published in a trade union journal, and the weekly magazine *Der Spiegel* responded with an article accusing the judge of Communist sympathies. Judge Schmid responded in turn, writing in a daily newspaper that *Der Spiegel* was lying about him and comparing the magazine's reporting to pornography. *Der Spiegel*'s editor and publisher won a criminal libel judgment against Judge Schmid, but he filed a constitutional complaint, and the Constitutional Court ruled in his favor, holding that *Der Spiegel* had a constitutional right to publish the articles at issue, even if they were not well motivated, but that the subject of the articles likewise had a constitutional right to publish a response.[105] Fifteen years later, the Constitutional Court built on the first half of this holding in the *Prison Privacy Case* (BVerfG 1976). Here, a criminal defendant who was jailed pending trial had written a letter to his wife describing the presiding judges as "prodigious clowns" who if they had any conscience would be unable "to sleep peacefully at night." One of the judges in question ordered the letter confiscated on insult-to-judiciary and prison-discipline grounds, but the Constitutional Court subsequently ruled that the defendant's Art. 5 free expression rights had been violated.[106] The Constitutional Court reaffirmed this principle most recently in 2014, in a case involving a disciplinary complaint filed by a litigant against a judge who had ruled against him in a recent case. The written complaint characterized the judgment as "fraudulent," "malicious," and "shabby," accused the judge of a "perfidious lie," and argued that the judge might herself commit a crime in the future. On the basis of such language, the complainant was found guilty of defamation, but the Constitutional Court then held that this judgment had violated Art. 5.[107]

Anti-Judicial Speech at the ECtHR

Outside the US, the only constitutional or quasi-constitutional court that has addressed the limits of anti-judicial speech regularly enough to enable systematic analysis of the cases is the European Court of Human Rights (ECtHR). The ECtHR has repeatedly held that anti-judicial speech acts are protected expression under ECHR Art. 10, even though that article expressly authorizes restrictions on expression that "are prescribed by law and are necessary in a democratic society, in the interests of . . . maintaining the authority and impartiality of the judiciary." In this section, we review all Art. 10 holdings involving anti-judicial speech acts issued by the ECtHR from its inception through 2015, and we assess the degree to which the Court has developed (and adhered to) a standard that distinguishes between speech acts that pose a genuine threat to the administration of justice and those that merely offend judicial sensibilities. This standard is drawn from the strict clear-and-present-danger test endorsed by Justice Black in *Bridges*, but it has been recognized by influential jurists in a variety of other jurisdictions as well. As Justice Sachs wrote, concurring in the *Mamabolo* case from South Africa:

> [T]he words 'scandalising' and 'disrepute' . . . belong to an archaic vocabulary which fits most uncomfortably into contemporary constitutional analysis. They evoke another age with other values, when a strong measure of awe and respect for the status of the sovereign and his or her judges was considered essential to the maintenance of the public peace. Constitutionalism arose in combat with mystique, and does not easily become its bride. The problem is not simply that the nomenclature is quaint - something not uncommon in legal discourse - but that it can be misleading. . . . [T]he heart of the offence lies not in the outrage to the sensibilities of the judicial

[105] Schmid-Spiegel Case (1961), 12 BVerfGE 113, excerpted in English in Kommers and Miller (2012: 450-53).
[106] Prison Privacy Case (1976), 42 BVerfGE 234. See Kommers and Miller (2012: 476). Note also Case 2 BvR 701/72 (1973), in which one of the Court's chambers had also ruled in favor of an Art. 5 claim from a prisoner who had criticized a judge in a private letter.
[107] Case 1 BvR 482/13 (2014).

> officers concerned, but in the impact the utterance is likely to have on the administration of justice. The purpose of invoking the criminal law is not essentially to provide a prophylaxis for the good name of the judiciary, as the term scandalising suggests. It is to ensure that the rule of law in an open and democratic society envisaged by the Constitution is not imperilled [sic]. There might be a link between the repute of the judiciary and the maintenance of the rule of law. But it would be a mistake to regard them as synonymous. Indeed, bruising criticism could in many circumstances lead to improvement in the administration of justice. Conversely, the chilling effect of fear of prosecution for criticising the courts might be conducive to its deterioration.[108]

If Justice Black and Justice Sachs have it right, then a constitutional court committed to democracy-reinforcing principles of free expression must distinguish between hurt judicial feelings and actual dangers to the rule of law, and must err on the side of protecting the freedom to criticize courts.

At the ECtHR, the impulse to protect anti-judicial speech did not emerge right away. In *Barfod v. Denmark* (ECtHR 1989) and *Prager and Oberschlick v. Austria* (ECtHR 1995), the Court upheld defamation judgments against the authors of magazine articles that criticized recent judicial decisions and that clearly represented commentary on matters of public concern.[109] The latter case began with publication of an article referencing nine members of the Vienna Regional Criminal Court. Entitled "Danger! Harsh Judges!," the article included the following passage: "They treat each accused at the outset as if he had already been convicted. They have persons who have travelled from abroad arrested in court on the ground that there is a danger that they will abscond. They ask people who are unconscious after fainting whether they accept their sentence. Protestations of innocence are greeted on their part with a mere shrug of the shoulders and attract for their authors the heaviest sentence because they have not confessed. - Some Austrian criminal court judges are capable of anything; all of them are capable of a lot: there is a pattern to all this." The article also included passages regarding several individual judges—in one instance, noting disciplinary proceedings regarding the judge's involvement with a prostitute and complaining about his dismissive treatments of probation officers and unnecessarily harsh sentencing practices. The judge at issue in these passages filed a defamation claim under Art. 111 of the Austrian Criminal Code, and the author of the offending article was convicted and fined. The author then alleged a violation of Art. 10, but the ECtHR sided with the Austrian state in rejecting this claim. Echoing the early English and American treatment of such issues, the Court noted that "[r]egard must . . . be had to the special role of the judiciary in society. As the guarantor of justice, a fundamental value in a law-governed State, it must enjoy public confidence if it is to be successful in carrying out its duties. It may therefore prove necessary to protect such confidence against destructive attacks that are essentially unfounded, especially in view of the fact that judges who have been criticised are subject to a duty of discretion that precludes them from replying."[110]

Judges in most Council of Europe (CoE) member states lack common law contempt powers, but as the Austrian case makes clear, their reputations are often well-protected by generic defamation laws, and they are sometimes protected by explicit statutory or constitutional guarantees of judicial authority as well.[111] Many judges have eagerly taken up these defenses when faced with attacks on their authority, and the ECtHR's early treatment of such cases would fit comfortably within the repressive line of holdings in nineteenth-century US courts. Indeed, the *Barfod* and *Prager* decisions led at least one observer to note that the ECtHR was less protective of anti-judicial speech than other categories of expression under Art. 10 (Addo 1998). But the Court's view has been shifting since then, with ECtHR judges becoming

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[108] State v Mamabolo, 2001 (3) SA 409 (South Africa 2001), para. 70.

[109] Barfod v. Denmark, Application no. 11508/85 (ECtHR 1989); Prager and Oberschlick v. Austria, Application no. 15974/90 (ECtHR 1995). Note also Schöpfer v. Switzerland, Application no. 25405/94 (ECtHR 1998), in which the Court rejected an Art. 10 claim from a lawyer who had been disciplined for calling a press conference to criticize the judicial handling of a pending case.

[110] Prager and Oberschlick v. Austria, Application no. 15974/90 (ECtHR 1995), para. 34.

[111] Note, for example, Art. 434-24 and 434-25 of the French Penal Code 1994 (Lambert 2000).

increasingly sensitive to the need to balance the protection of judicial reputation with a strong commitment to robust public debate on judicial performance.

Indeed, this recognition was present even on the chambers that heard *Barfod* and *Prager*, neither of which was unanimous. In *Barfod*, Judge Gölcüklü emphasized in dissent that the controversial magazine article "involved criticism of a specific judicial system, namely the Greenland judiciary and its composition, which, in the applicant's view, did not inspire public confidence."[112] Surely a democratic society must be willing to tolerate such discussion? Likewise in *Prager*, Judge Martens pointed out that "[q]uite apart from the one-sided interpretation of [the] . . . passages on which the impugned conclusion is based, it simply cannot be accepted that the mere wording of a critical comment on a subject of general public interest suffices for that comment to be classified as being made with malicious intent to defame. That would mean that the courts would totally disregard the author's purpose of initiating a public discussion; that would mean that, de facto, only the interests of the plaintiff would be taken into consideration and would curb freedom of expression to an intolerable degree. I recall that 'Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed.' For these reasons I think that at least where a critical comment on a subject of general interest is involved, even very exaggerated terms and caustic descriptions do not per se justify the conclusion that there was malicious intent to defame."[113] Judge Gölcüklü dissented alone in *Barfod*, but *Prager* was issued by a 5-4 vote.

Just two years after the *Prager* holding, a similar case from Belgium came out the other way. Here, a weekly magazine had published a series of articles "criticis[ing] judges of the Antwerp Court of Appeal at length and in virulent terms for having, in a divorce suit, awarded custody of the children to the father," who had been accused by the mother of sexually abusing their children and of requiring the family "to live according to Hitler's principles."[114] The impugned judges filed a defamation claim against the journalists, and the Belgian courts ruled in the judges' favor, but the ECtHR then held that this judgment had violated Art. 10. The Court noted its disapproval of "the journalists' polemical and even aggressive tone" and reiterated that "in a State based on the rule of law [the courts] must enjoy public confidence [and hence] must . . . be protected from destructive attacks that are unfounded." But it nonetheless concluded that the articles in question represented a legitimate contribution to an ongoing debate on matters of public concern.[115]

The ECtHR subsequently elaborated on this holding in a series of cases indicating that member states were entitled to protect judicial reputations from abuse, but that excessive punishments imposed on anti-judicial speech would amount to Art. 10 violations. In *Skalka v. Poland* (ECtHR 2003), for example, the Court held that an eight-month prison sentence imposed on a prisoner who had written a letter characterizing a judge as an "irresponsible clown", a "little cretin", a "fool", a "bully", and "a limited individual" was so disproportionate as to violate Art 10.[116] The Court indicated explicitly that a lesser sentence would have been upheld, but it made clear that Art. 10 imposed some limitation on defamation prosecutions for anti-judicial speech. In a series of cases from various Russian regional courts during the late 2000s, the Court likewise ruled that fines and imprisonment imposed for defamation went further than necessary in maintaining judicial authority in a democratic society. In *Kuznetsov v. Russia* (ECtHR 2008), the organizer of a demonstration in front of the Sverdlovsk Regional Court was fined 1000 Rubles under the Code on Administrative Offences for distributing leaflets with "slanderous and insulting" characterizations of the president of the court and for impeding access to the courthouse.[117] A unanimous

[112] Barfod v. Denmark, Application no. 11508/85 (ECtHR 1989) (dissenting opinion of Judge Gölcüklü), para. 3.
[113] Prager and Oberschlick v. Austria, Application no. 15974/90 (ECtHR 1995) (dissenting opinion of Judge Martens), para. 15, quoting Jersild v. Denmark, Application no. 15890/89, (ECtHR 1994). Note also Weber v. Switzerland, Application no. 11034/84 (ECtHR 1990).
[114] De Haes and Gijsels v. Belgium, Application no. 19983/92 (ECtHR 1997), para. 7, 19.
[115] De Haes and Gijsels v. Belgium, Application no. 19983/92 (ECtHR 1997), para. 37, 48.
[116] Skalka v. Poland, Application no. 43425/98 (ECtHR 2003), para. 10.
[117] Kuznetsov v. Russia, Application no. 10877/04 (ECtHR 2008), para. 9.

ECtHR chamber found a violation of ECHR Art. 11 (freedom of assembly), interpreted in light of Art. 10. The chamber's opinion noted that "the purpose of the picket was to attract public attention to the alleged dysfunction of the judicial system in the Sverdlovsk Region. This serious matter was undeniably part of a political debate on a matter of general and public concern," and the Russian authorities had not produced sufficient reasons for restricting this debate. In language reminiscent of the standard articulated by Justice Black in *Bridges*, the Court noted further that "any measures interfering with the freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles – however shocking and unacceptable certain views or words used may appear to the authorities – do a disservice to democracy and often even endanger it."[118]

In *Obukhova v. Russia* (ECtHR 2009), the ECtHR heard an Art. 10 challenge to a judicial injunction preventing newspaper reporting of any material related to ongoing proceedings concerning a traffic altercation in which a judge had been involved. A unanimous ECtHR chamber held that the prior restraint was "excessively broad and disproportionate," even while acknowledging that articles critical of the judge "could indeed be damaging to Judge Baskova's reputation and to the authority of the judicial system."[119] Similar reasoning was employed by a closely divided chamber in *Kudeshkina v. Russia* (ECtHR 2009), a controversy arising from a Moscow City Court judge's criticism of the President of the Moscow Judicial Council and Prosecutor General's Office in connection with a high profile corruption case. Judge Kudeshkina's critical statements, made during the course of her own election campaign to the State Duma of the Russian Federation, led to her dismissal under Russia's judicial Code of Honour. Finding a violation of Art. 10, the ECtHR majority noted that while Judge Kudeshkina "made the public criticism with regard to a highly sensitive matter, notably the conduct of various officials dealing with a large-scale corruption case in which she was sitting as a judge," her dismissal was nevertheless not necessary in a democratic society because her comments drew attention to the importance of judicial independence and the need for public confidence in the judicial branch.[120] Unanimous chambers in *Romanenko v. Russia* (ECtHR 2009) and *Bezymyannyy v. Russia* (ECtHR 2010) continued this trend, with the *Bezymyannyy* Court emphasizing that "[t]he important role . . . the judiciary plays in a democratic society cannot . . . immunise judges from being targets of citizens' complaints."[121] As these cases proceeded, even when the Court was emphasizing the excessive punishment issue, its opinions increasingly included language suggesting that judges should not be so insulated from, or sensitive to, public criticism.

The Court reiterated this point in the context of academic speech in *Ungváry and Irodalom Kft. v. Hungary* (ECtHR 2013), a case arising from the May 2007 publication of a magazine article by a historian entitled "*The Genesis of a Procedure – Dialógus in Pécs."* The article focused on the role of the Hungarian security service and its network of informants in quelling a 1980s student peace movement, referencing the role of a current Constitutional Court judge in that affair. The judge in question had not served as a state security agent, but he had served "as an official contact" with the security agencies, and in that capacity, "he was busy as an informant and demanding hard-line policies."[122] Following publication of the article and a Hungarian court-ordered rectification at the Constitutional Court judge's request, Ungváry co-authored a book-length treatment of the Communist State security apparatus and included the original magazine article in the book. The Constitutional Court judge then initiated defamation proceedings against Ungváry and his publisher, resulting in convictions and fines for both parties. A closely divided ECtHR chamber ruled four to three that Ungváry's conviction violated Art. 10. The majority opinion acknowledged that "courts . . . must enjoy public confidence; and it may therefore prove necessary to protect judges from offensive and abusive verbal attacks," but emphasized that the

[118] Kuznetsov v. Russia, Application no. 10877/04 (ECtHR 2008), para. 47, 45.
[119] Obukhova v. Russia, Application no. 34736/03 (ECtHR 2009), para. 27.
[120] Kudeshkina v. Russia, Application no. 29492/05 (ECtHR 2009), para. 94.
[121] Romanenko v. Russia, Application no. 11751/03 (ECtHR 2009); Bezymyannyy v. Russia, Application no. 10941/03 (ECtHR 2010), para. 40.
[122] Ungváry and Irodalom Kft. v. Hungary, Application no. 64520/10 (ECtHR 2013), paras. 6-8.

statements at issue were part of a broader scholarly discussion of public interest: "The highest office holders, who are elected in the political process, must accept that their past public and political conduct remains open to constant public scrutiny. [The judge at issue] . . . was a public figure in that he was member of the Constitutional Court at the time when the impugned statements were made. . . . [As such,] he should have had a higher degree of tolerance to criticism."[123]

From 2004-2015, similar speech-protective decisions issued in anti-judicial speech cases arising in Cyprus, France, Moldova, Poland, Slovakia, and Turkey.[124] During this same period, speech-repressive decisions issued in cases from Croatia, Greece, Hungary, Italy, and Poland.[125] Taken collectively, as indicated in table one, two patterns are apparent in these holdings. First, in cases involving anti-judicial speech acts by scholars or journalists, the ECtHR has become consistently speech-protective; after the initial holdings in *Barfod* and *Prager*, the ECtHR issued eight such decisions, and it found Art. 10 violations in all of them.

Table 1. ECtHR Holdings on Art. 10 Claims Involving Anti-Judicial Speech Acts (N=27)

Speech Claimant	Speech Context				
	Comments in open court	Written court filings	Journalistic or academic writing	Private letter	Public demonstration
Dissident					**Kuznetsov v. Russia (2008)**
Scholar			**Ungváry and Irodalom Kft. v. Hungary (2013)** **Mustafa Erdoğan and Others v. Turkey (2015)**		
Journalist			Barfod v. Denmark (1989) Prager and Oberschlick v. Austria (1995) **De Haes and Gijsels v. Belgium (1997)** **Hrico v. Slovakia (2004)**		

[123] Ungváry and Irodalom Kft. v. Hungary, Application no. 64520/10 (ECtHR 2013), paras. 44, 64.
[124] Kyprianou v. Cyprus, Application no. 73797/01 (ECtHR 2005); July and Sarl Libération v. France, Application no. 20893/03 (ECtHR 2008); Roland Dumas v. France, Application no. 34875/07 (ECtHR 2010); Morice v. France, ECtHR 29369/10 (2015); Bono v. France, Application no. 29024/11 (ECtHR 2015); Amihalachioaie v. Moldova, Application no. 60115/00 (ECtHR 2004); Marian Maciejewski v. Poland, Application no. 34447/05 (ECtHR 2015); Hrico v. Slovakia, Application no. 49418/99 (ECtHR 2004); Saday v. Turkey, Application no. 32458/96 (ECtHR 2006); Mustafa Erdoğan and Others v. Turkey, Application nos. 346/04 and 39779/04 (ECtHR 2014).
[125] Žugić v. Croatia, Application no. 3699/08 (ECtHR 2011); Karpetas v. Greece, Application no. 6086/10 (ECtHR 2012); Kincses v. Hungary, Application no. 66232/10 (ECtHR 2015); Peruzzi v. Italy, Application no. 39294/09 (ECtHR 2015); Łopuch v. Poland, Application no. 43587/09 (ECtHR 2012). Note also A. v. Finland, Application no. 44998/98 (ECtHR 2004), an anti-judicial speech case in which the ECtHR found the Art. 10 claim inadmissible.

			July and Sarl Libération v. France (2008) **Obukhova v. Russia (2009)** **Romanenko v. Russia (2009)** **Marian Maciejewski v. Poland (2015)**		
Judge			**Kudeshkina v. Russia (2009)**		
Lawyer	**Kyprianou v. Cyprus (2005)**	**Bono v. France (2015)** Kincses v. Hungary (2015)	Schöpfer v. Switzerland (1998) **Amihalachioaie v. Moldova (2004)** **Morice v. France (2015)**	Peruzzi v. Italy (2015)	
Party to recent or ongoing judicial proceedings	**Saday v. Turkey (2006)**	Žugić v. Croatia (2011) Lopuch v. Poland (2012)	**Weber v. Switzerland (1990)** **Dumas v. France (2010)** Karpetas v. Greece (2012)	**Skalka v. Poland (2003)** **Bezymyannyy v. Russia (2010)**	

Note: Boldface indicates pro-FoE decision; regular type indicates anti-FoE decision.

Second, in cases involving anti-judicial speech acts by litigators or litigants involved in recent or ongoing judicial proceedings, results in Strasbourg have been more mixed; the ECtHR has issued fifteen decisions on the merits of such cases, and it found Art. 10 violations in nine of them. This differential treatment is potentially justifiable on the grounds of protecting the fair administration of justice, particularly as regards commentary on pending cases. In this context, recall the so-called "American rule" in nineteenth-century US courts. But it is not clear that the ECtHR has yet developed a clear and consistent rule for distinguishing comments by lawyers and their clients that pose a genuine threat to the rule of law from those that do not.

Consider a series of related holdings emerging from a single legal dispute in France. In October 1995, French Judge Bernard Borrel, who had been working as technical adviser to the Djiboutian Minister of Justice, was found dead in a remote area outside the city of Djibouti. Local investigators concluded that he had committed suicide, but his widow, also a judge, contested this finding, alleged that her husband had been murdered, and persuaded French authorities to investigate further. Mrs. Borrel hired Olivier Morice to represent her in these further proceedings, and Morice arranged for a potential witness to meet with the investigating judges and with French media outlets. Borrell and Morice were dissatisfied with the quality of the French investigation, and in March 2000, *Libération* published an article entitled, "Death of a judge: widow attacks judges and police," which quoted the Chair of the Professional Association of Judges and Prosecutors describing the investigation as "rocambolesque" ("farcical").[126] At this point, the investigating judges sued for defamation, and the French courts ruled in their favor. The publication director of the newspaper then petitioned to the ECtHR, which found the French judgment to have

[126] July and Sarl Libération v. France, Application no. 20893/03 (ECtHR 2008), 14.

violated Art. 10. In reaching this conclusion, the ECtHR noted that as members of the judiciary, "[t]he offended individuals . . . [may not have laid] themselves open to close scrutiny of their every word and deed to the extent to which politicians do [but] . . . may nevertheless be subject to wider limits of acceptable criticism than ordinary citizens."[127] Meanwhile, Morice uncovered additional irregularities in the investigation, and was quoted by *Le Monde* in September 2000 criticizing the investigating judges for engaging in "conduct which is completely at odds with the principles of impartiality and fairness."[128] The investigating judges again brought a defamation suit, which was again successful in the French courts. Morice objected on Art. 10 grounds, but in July 2013, a divided ECtHR chamber rejected his claims, emphasizing the distinct rules that pertain to public speech by lawyers.[129] These conflicting results in virtually identical cases seemed to suggest divergent approaches from the Strasbourg Court to anti-judicial speech by journalists as compared to lawyers, but the case was subsequently referred to a Grand Chamber, and in April 2015, the chamber holding was unanimously reversed.[130]

This eventual result in the *Morice* case might be taken to suggest that the Court has become increasingly protective of the freedom to criticize judicial performance for all categories of speech claimants, but this impression does not fit the data. For criticisms advanced by litigants and litigators, the Court sometimes finds that they have gone too far, and hence that their subsequent punishment has been adequately justified. But it sometimes holds the reverse, and the Court has not developed a clear line for distinguishing one set of cases from the other.

In *Žugić v. Croatia* (ECtHR 2011) and *Łopuch v. Poland* (ECtHR 2012), the ECtHR found no Art. 10 violations when parties in pending civil proceedings (one of whom was also representing himself) were held in contempt and convicted of criminal defamation, respectively, for submitting written filings that insulted the trial judges presiding over their cases. Observing that "the work of the courts, which are the guarantors of justice and which have a fundamental role in a State governed by the rule of law, needs to enjoy public confidence," the *Łopuch* court held that such work "should . . . be protected against unfounded attacks" (para. 61).[131] In *Kincses v. Hungary* (ECtHR 2015), the Court similarly found no Art. 10 violation when a lawyer was disciplined for criticizing the trial judge in a written appellate filing, and in *A. v. Finland* (ECtHR 2004), it found a similar Art. 10 claim inadmissible. It seems clear that critical comments about named judges in a written court filing might embarrass the targets in front of their colleagues, but it is hard to see how they could pose any threat (let alone an imminent one) to the administration of justice, as their primary audience is other judges. To the contrary, punishing litigants and their advocates for alleging in court that certain judges are biased against them (or otherwise acting improperly) might itself pose a threat to the fair administration of justice by leaving actual instances of judicial impropriety unaddressed. As such, when French lawyer Sébastien Bono was disciplined for claiming, in written pleadings before the Court of Appeal, that French investigating judges had been complicit in the torture of his client by Syrian intelligence agents, the ECtHR found an Art. 10 violation, noting that Mr. Bono was acting on "the lawyer's duty to defend his clients' interests" and that his "criticisms, which had a factual basis, did not leave the courtroom because they were contained in his written submissions. They were not therefore capable of damaging the reputation of the judiciary in the minds of the general public."[132] The Court's conclusion here is readily defensible on conventional free expression grounds, and it lies in significant tension with the Court's holdings rejecting Art. 10 claims in similar circumstances.

In sum, after some early missteps, the ECtHR routinely and consistently defends free expression rights for journalists (and, less often, scholars or dissidents) who allege that courts are biased and/or

[127] July and Sarl Libération v. France, Application no. 20893/03 (ECtHR 2008), 74.
[128] Morice v. France, Application no. 29369/10 (ECtHR 2013), 17.
[129] Morice v. France, Application no. 29369/10 (ECtHR 2013).
[130] Morice v. France, Application no. 29369/10 (ECtHR 2015).
[131] Łopuch v. Poland, Application no. 43587/09 (ECtHR 2012), para. 61.
[132] Bono v. France, Application no. 29024/11 (ECtHR 2015). The quoted language is from the ECtHR's English-language press release announcing the judgment; the opinion itself is not published in English.

corrupt. Since this description is undoubtedly true of at least some courts operating in CoE member states, journalists, scholars, and dissidents should certainly be free to say so, whether or not the allegation has been proven (to the courts' satisfaction!) in a particular case. In some of these cases, the anti-judicial speech act undoubtedly advanced rather than harmed rule-of-law interests, as Justice Sachs suggested in *Mamabolo*. Note, for example, *Hrico v. Slovakia* (ECtHR 2004), in which a weekly magazine published an interview with a former president of the Constitutional Court who criticized the country's Supreme Court for a recent speech-suppressive decision in a seditious libel case. In cases involving litigants or litigators rather than journalists, the ECtHR is sometimes speech-protective, but less consistently so and with no clear trend emerging over time.

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The idea that free and open debate about courts might sometimes pose a threat to the rule of law is long-standing and well-established, dating to Blackstone's and Wilmot's eighteenth-century accounts of common law contempt powers. Throughout this time, judges have sometimes exploited these doctrines to justify repressive and unnecessary silencing of public commentary on judicial performance. As the Illinois Supreme Court recognized as early as 1842, these repressive actions by judges are more likely to undermine than to buttress public confidence in the courts. Put another way, if it is an empirical fact that judges sometimes abuse their power, then the threat to judicial authority lies not with public discussion of these abuses, but with the abuses themselves.

On the one hand, many of the cases reviewed in this paper are a reminder that the empowerment of independent courts is risky. Once empowered, after all, courts will be enabled to thwart important democratic values. On the other hand, if those courts develop into institutional sites of commitment to such values, then the risks may sometimes be outweighed by countervailing benefits. A wide range of constitutional (and quasi-constitutional) courts, operating in all regions of the constitutional world, have sometimes defended free expression against state efforts to silence public criticism of government policy and performance. To date, only a handful of these courts have consistently done so with regard to public criticism of courts themselves.

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