S. v. Mamabolo: Post-Trial Speech in Post-Apartheid South Africa

The response to the Supreme Court's highly contentious 5-4 decision in *Bush v. Gore*[1] was extremely critical. Anthony Lewis warned that the Court's "unconvincing" decision "invites people to treat the court's aura of reason as an illusion."[2] Similarly, Jeffrey Rosen argued that the Court has "made it impossible for citizens of the United States to sustain any kind of faith in the rule of law as something larger than the self-interested political preferences of [Justices] William Rehnquist, Antonin Scalia, Clarence Thomas, Anthony Kennedy, and Sandra Day O'Connor."[3] Under the United States Constitution, speech is such a fundamental right that some have referred to it as the "most majestic guarantee."[4] Accordingly, it is not surprising that little attention was given to the right of Mr. Lewis or Mr. Rosen to speak openly about the judicial process. At the outset, Mr. Russell Mamabolo was not accorded the same freedoms. Part of the reason is that Mr. Mamabolo is a citizen of South Africa, and under South African law, courts may sanction disparaging remarks calculated to undermine the administration of justice.

Mr. Russell Mamabolo is an official of the Department of Correctional Services in South Africa.[5] He appealed directly to the

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1. 531 U.S. 98 (2000). In *Bush v. Gore*, Vice President and Democratic Presidential Candidate Al Gore filed a complaint contesting the Florida Secretary of State's certification of state results in the presidential election. The Circuit Court, Leon County, N. Sanders Sauls, J., entered judgment denying all relief. Gore v. Harris, No. 00-2808, 2000 WL 1770257, (Fla. Cir. Ct.), *rev'd*, 772 So. 2d 1243 (Fla.), *rev'd sub nom.* Bush v. Gore, 531 U.S. 98 (2000). Vice President Gore appealed this decision. Gore v. Harris, 772 So. 2d 1243, 1247 (Fla.), *rev'd sub nom.* Bush v. Gore, 531 U.S. 98 (2000). The First District Court of Appeal certified the matter to the Florida Supreme Court. *Id.* On review, the Florida Supreme Court ordered manual recounts of ballots on which machines had failed to detect a vote for President. *Id.* The Republican Presidential Candidate George W. Bush filed emergency application for stay of the Florida Supreme Court's mandate. *Bush*, 531 U.S. at 100.

The Supreme Court held that: (1) manual recounts ordered by the Florida Supreme Court, without specific standards to implement its order to discern "intent of the voter," did not satisfy the minimum requirement for nonarbitrary treatment of voters necessary, under the Equal Protection Clause, to secure a fundamental right to vote for President, and (2) remand of case to Florida Supreme Court for it to order that a constitutionally proper contest would not be appropriate remedy. *Id.* at 103, 105, 110.

2. Anthony Lewis, *A Failure of Reason: The Supreme Court's Ruling Isn't Convincing*, PITTSBURGH POST-GAZETTE, Dec. 18, 2000, at A13.
3. Jeffrey Rosen, *Disgrace*, NEW REPUBLIC, Dec. 25, 2000, at 18.
4. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-1 (2d ed. 1988).
5. S. v. Mamabolo, 2001 (5) BCLR 449, 454 (SA).

Constitutional Court of South Africa against his conviction for contempt of court resulting from a publication criticizing a judicial order.[6] At the time of publication, Mr. Mamabolo had been responsible for the issue of a departmental media release that criticized the Transvaal High Court for erroneously granting bail to a prisoner.[7] The judge who had granted bail, upon reading the newspaper report dealing with the departmental viewpoint, issued an order calling on the Director-General of Correctional Services, together with Mr. Mamabolo, to appear before the Court to explain whether what was written was true, the basis upon which the judge had erred, and whether it was the official viewpoint of the department.[8] Although there was no indication that the order would require the defendants to address the issue of contempt, both defendants brought the issue to the Court's attention.[9] At the hearing, the defendants denied any intention to have acted contemptuously against the Court and argued that a contempt order would infringe their right to freedom of speech.[10] After hearing arguments, the Judge concluded that the statements were scandalous comment, which "impugned on the integrity of [the] court" and that such comments had not been made in the exercise of free speech.[11] Mr. Mamabolo alone was convicted and appealed his case to the Constitutional Court of South Africa.[12] The Constitutional Court of South Africa *held* that the crime of scandalizing the court does not unjustifiably limit an individual's freedom of expression under the South African Constitution if that speech was not likely to damage the administration of justice.[13]

The crime of scandalizing the court has its origins in English common law and is a subspecies of the offense of contempt.[14] It is one of the many devices used by many common law jurisdictions to protect the authority of the courts.[15] The offense allows judges to summarily punish

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6. *Id.* at 458-59.
7. *Id.* at 454-55.
8. *Id.* at 456.
9. *Id.*
10. *Id.* at 457.
11. *Id.* at 458.
12. *Id.*
13. *See id.* at 471-72.
14. *See* The King v. Almon, 97 Eng. Rep. 94 (K.B. 1765) (Eng.); *see also* Douglas Hay, *Contempt by Scandalizing the Court: A Political History of the First Hundred Years*, 25 OSGOODE HALL L.J. 431, 433 (1987) ("The power to punish contempts of court by strangers—those not parties to the proceedings nor present in court—without jury trial was established in 1765 by the celebrated case of *R. v. Almon*.").
15. *See* Attorney-General for New South Wales v. Mundey, [1972] 2 N.S.W.L.R. 887, 905 (Austl.); R. v. Kopyto, [1987] 47 D.L.R. (4th) 213, 221 (Can.); Wong Yeung Ng v. Sec'y for Justice, [1999] 2 H.K.L.R.D. 293, 311-12 (CA); Narmada Bachao Andolan v. Union of India, 8

strangers, those not party to the proceedings or present in court, for contempt if they attack or impugn the decision of the bench by communicating malicious of scurrilous comment or questioning the honesty or impartiality of the bench.[16] Scandalizing the court involves communications committed after the fact and does not include spoken or written words that may occur during a pending proceeding.[17] In most cases, the offender has been a journalist, although sometimes it has been a lawyer or government official, as demonstrated in the noted case.[18]

Scandalizing the court is a form of contempt. There are two types of conduct that fall within the scope of contempt. The first type of conduct, known as contempt *in facie curiae*, "encompasses any word spoken or act done within the precinct of the court that obstructs or interferes with the due administration of justice, or is calculated to do so."[19] The other type of conduct occurs outside the court and is often referred to as contempt *ex facie curiae*.[20] This type of conduct is usually in the form of "words spoken or published or acts done [outside the court] which are intended to interfere with, or are likely to interfere with, the fair administration of justice."[21] Scandalizing the court falls under this latter form of contempt.[22]

The primary purpose of the crime is to protect the integrity of the judiciary.[23] For constitutional systems that ascribe to the doctrine of separation of powers, the maintenance of co-equal branches of government is an essential means to prevent the possibility of tyrannical rule.[24] Scandalizing the court serves a dual purpose. In the abstract, it is a mechanism to preserve the delicate balance between co-ordinate branches of government. On a more practical level, the crime is a mechanism employed to protect the administration of justice.[25] Normally, the judiciary cannot hope to compete with the legislative or executive branches of government in the areas of political, financial, or

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S.C.C. 308 (India 1999); Solicitor-General v. Radio Avon Ltd. [1978] 1 N.Z.L.R. 225, 230 (N.Z.); S. v. Harber, 1988 (3) SA 396, 400 (A); S. v. Kaakunga, 1978 (1) SA 1190, 1195 (SWA); Ahnee v. Dir. of Pub. Prosecutions, 2 A.C. 294, 301 (P.C. 1999) (Eng.); Attorney-General v. Times Newspaper Ltd., [1974] A.C. 273, 281 (H.L. 1973) (Eng.); R. v. Metro. Police Comm'r, *ex parte* Blackburn (No. 2), 2 All E.R. 319, 320 (C.A. 1968) (Eng.).

16. *See* Hay, *supra* note 14, at 434.
17. *Id.* at 433.
18. *See id.*
19. *In re* Chinamasa, 2000 (12) BCLR 1294, 1302 (ZS).
20. *Id.*
21. *Id.*
22. *Id.*
23. *See* The King v. Almon, 97 Eng. Rep. 94, 100 (K.B. 1765) (Eng.).
24. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1 (1997).
25. *See In re* Chinamasa, 2000 (12) BCLR at 1311.

military power and must rely solely on its moral authority as its power basis.[26] The court's "moral authority" comes from the public at large, and, not surprisingly, the court could not function properly without its support.[27] Malicious comments or statements questioning the judiciary's partiality undermine judicial decisions by negatively influencing the population.[28] The loss of public support results in the cessation of the judiciary as a coordinate branch of government and the breakdown of the administration of justice. If the court's legitimacy is compromised then it looses its ability to interpret the constitution and the laws of the jurisdiction. More importantly, legitimacy lost will have the undesirable result of striping the court of its ability to protect fundamental rights. Scandalizing the court addresses these fears by protecting the judicial process from criticism that may form the basis of disrepute.[29] The picture painted thus far is grim and it is important to note that many courts have justified the crime's continued legitimacy on similar, if not identical, policy grounds.[30]

The crime of scandalizing the court creates an inherent tension between two fundamental objectives. On the one hand, countries want to preserve the integrity of their judiciary. On the other hand, countries hope to protect an individual's right to free expression. Unlike the United States, most common law countries do not regard the freedom of speech as such a fundamental right.[31] Although countries protect and uphold the freedom, they have recognized that it is subject to limitation.[32] In *Narmada Bachao Andolan v. Union of India*, the Indian Supreme Court illustrated this point, stating:

> [U]nder the cover of freedom of speech and expression no party can be given a license to misrepresent the proceedings and orders of the court and deliberately paint an absolutely wrong and incomplete picture which has the tendency to scandalise the court and bring it into disrepute or ridicule. The right or criticizing, in good faith in private or public, a judgment of the court cannot be exercised, with malice or by attempting to impair the administration of justice. Indeed, freedom of speech and expression is the

26. *See* S. v. Mamabolo, 2001 (5) BCLR 449, 460-61 (CC).
27. *See Almon*, 97 Eng. Rep. at 100.
28. *See id.*
29. *See id.*
30. See sources cited *supra* note 15.
31. *See, e.g.*, S. v. Mamabolo, 2001 (5) BCLR 449, 469 (CC) (noting that freedom of speech is "not a preeminent freedom ranking above all others . . . it is not even an unqualified right").
32. *See In re* Chinamasa, 2000 (12) BCLR 1294, 1313 (ZS); Wong Yeung Ng v. Sec'y for Justice, [1999] 2 H.K.L.R.D. 293 (CA); Narmada Bachao Andolan v. Union of India, 8 S.C.C. 308 (India 1999).

> "lifeblood of democracy" but this freedom is subject to certain qualification. An offence of scandalising the court *per se* is one such qualification, since that offence exists to protect the administration of justice and is reasonably justified and necessary in a democratic society.[33]

As succinctly noted by the Indian Supreme Court, an individual's right to freedom of speech is subject to the qualification that the speech must not subvert the administration of justice.[34] Although speech is limited, countries have attempted to preserve it by clearly defining those situations where punishment is permissible. The easiest way to achieve this objective is to differentiate between scandalizing comment and fair and legitimate criticism. The distinction is not always clear-cut, but as a general rule "genuine criticism, even though it be somewhat emphatically or unhappily expressed, should . . . preferably be regarded as an exercise of the right of free speech rather than as 'scandalous comment' falling within the ambit of the crime of contempt of court."[35] Stated more clearly, "no criticism of a judgment, however vigorous, can amount to contempt of court, provided it keeps within the limits of reasonable courtesy and good faith."[36] Whether the statements of the speaker fall within or outside the limits of reasonable courtesy or whether the speech represents the expression of genuinely held views, it is clear that courts have recognized the need to protect certain speech. This "recognized need" is grounded in the general belief that certain public scrutiny promotes impartial, accessible and effective judicial processes, while at the same time constituting a democratic check on the judiciary. Courts have accomplished the goal of protecting "genuine" or "reasonable" public scrutiny by narrowing the scope of the crime. This is achieved by limiting the conduct for which the crime may encompass and by delineating the injuries the crime seeks to protect.

The inquiry is normally a two-step process. At the outset, the court must determine the substantive issue of whether the crime was committed. The second part of the inquiry concerns prudential considerations. At this point, courts have usually weighed the interest of protecting the scandalous speech against the interest of preserving the administration of justice.[37] The first part of the analysis is categorical and concerns the types of conduct sanctioned by the crime. Scandalizing the

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33. *See Narmada*, 8 S.C.C. at 313.

34. *Id.*

35. S. v. Van Niekerk, 1972 (3) SA 711, 720-21 (A).

36. R. v. Metro. Police Comm'r, *ex parte* Blackburn (No. 2), 2 All E.R. 319, 321 (C.A. 1968) (Eng.).

37. *See* R. v. Kopyto, [1987] 47 D.L.R. (4th) 213, 225 (Can.); Solicitor-General v. Radio Avon Ltd. [1978] 1 N.Z.L.R. 225, 237-33 (N.Z.).

court comprises two types of spoken or written communication. First, it covers communication imputing corrupt or dishonest motives or conduct to a judicial officer.[38] Second, it encompasses communication that "reflect[s] in an improper or scandalous manner on the administration of justice."[39] Thus, if statements made on a matter of public interest are not malicious or do not call into question the judiciary's impartiality, even if intemperately or offensively worded, they are outside the scope of the crime of scandalizing.[40] Not surprisingly, the inquiry must begin with whether the conduct is clearly that which comes within the ambit of contempt. *Solicitor-General v. Radio Avon Ltd.*[41] illustrates the approach that most courts have taken. In *Radio Avon*, the appellant radio station broadcast a news item in which it was stated that a judge of the Supreme Court was at the center of another closed court controversy.[42] The judge had dismissed an alleged arsonist in a hearing behind closed doors.[43] The closed-door controversy, referred to in the broadcast, stemmed from an incident involving the judge's son whose conviction for driving with an excessive blood alcohol level was similarly dismissed behind closed doors.[44] Although the judge had nothing to do with his son's judicial proceeding, the broadcast brought attention to this fact.[45] The court upheld the contempt charge against the broadcaster arguing that the news item was calculated to bring the judiciary into disrepute by implying that there were improper motives behind the judge's decision to hear the defendant's application behind closed doors.[46] In this respect, the broadcast represents the type of conduct that courts can punish summarily because it "plainly imputed impropriety and lack of judicial integrity on the part of the judge."[47] It is important to note that the Court of Appeals began its inquiry by characterizing the crime.

Another equally important limitation is the fact that the crime is not meant to protect the private interest of individual judges, but was created and has been kept extant in some common law countries to protect the

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38. *See Chinamasa*, 2000 (12) BCLR 1294, 1304 (ZS) (citing R. v. Torch Printing and Publ'g (Pty) Ltd., 1956 (1) SA 815, 819-20 (C); S. v. Oliver, 1964 (3) SA 660, 664 (N); S. v. Tobias, 1966 (1) SA 656, 660 (N)).
39. *Id.*
40. *Id.* at 1307.
41. [1978] 1 N.Z.L.R. 225.
42. *Id.* at 227.
43. *Id.*
44. *See id.*
45. *See id.* at 227-28.
46. *See id.* at 231.
47. *Id.*

public at large.[48] Therefore, the real crime "is the wrong done to the public by weakening the authority and influence of a tribunal which exists for their good alone."[49] The crime protects the administration of justice by protecting public confidence in it. Moreover, the remedy of contempt is not intended for the benefit of the individual judge concerned and should not be used to protect the tender and hurt feelings or grant him any additional protection against defamation other than that available to any person by way of a civil action for damages.[50] Unless public confidence in the administration of justice has been assailed, there can be no valid charge of scandalizing the court.

Even if a court has determined that the speech in question is scandalous and is calculated to undermine public confidence in the judiciary, courts must weigh the individual's interest of free speech against the government's interest of protecting the administration of justice. This is a prudential evaluation of fact and circumstance that has been conducted at varying degrees. At one end of the spectrum, courts in the United States have adopted a highly restrictive test that requires that the speech present a "clear and present" danger to the administration of justice.[51] The Canadian courts have adopted a similar test in *R. v. Kopyto*.[52] In that case, Judges Cory and Goodman were of the opinion that in order to accord the crime of contempt with the fundamental freedoms in the Canadian Charter of Rights and Freedoms of the Canadian Constitution, the contempt must be shown to involve a real, substantial and present or immediate danger to the administration of justice.[53] At the other end of the spectrum courts have adopted a less restrictive standard in balancing the interests. The New Zealand Court of Appeal, in *Solicitor-General v. Radio Avon Ltd.*, adopted a lower

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48. S. v. Mamabolo, 2001 (5) BCLR 449, 463 (CC).

49. The King v. Davies, 1 K.B. 32, 40 (1906) (Eng.).

50. *See* Argus Printing and Publ'g Co. v. Esselen's Estate, 1994 (2) SA 1, 29 (A); *In re* Chinamasa, 2000 (12) BCLR 1294, 1309 (ZS) (citation omitted); *see also* R. v. Kopyto, [1987] 47 D.L.R. (4th) 213, 227 (Can.) (stating that "the courts are not fragile flowers that will wither in the hot heat of controversy"); R. v. Metro. Police Comm'r, *ex parte* Blackburn (No. 2), 2 All E.R. 319, 321 (C.A. 1968) (Eng.) (holding that "no criticism of a judgment, however vigorous, can amount to contempt of court, providing it keeps within the limits of reasonably courtesy and good faith").

51. *See* Bridges v. California, 314 U.S. 252, 261 (1941) (citing Schenck v. United States, 249 U.S. 47, 52 (1919)).

52. [1987] 47 D.L.R. (4th) 213, 263 ("Unless, however, the fact that justice has been brought into disrepute results in a clear, significant and imminent or present danger to the fair and effective administration of justice, it does not justify the creation or maintenance of such an offence as a limitation on the rights of freedoms of opinion and expression.").

53. *Id.*

standard. In that case, the Court dismissed the relevance of the American standard.[54] Judge Richmond stated:

> The American courts appear to have directed their attention to the existence of a clear and present danger of a court being influenced, intimidated, impeded, embarrassed or obstructed in the administration of justice. English law, on the other hand, has also attached great importance to the need to preserve public confidence in the administration of justice generally. This court should not depart from that attitude subject, of course, in the type of contempt now under consideration, to the public right of fair comment and criticism, and to the possible defence of justification, earlier referred to in this judgment.[55]

Instead, the court held that there must be real risk beyond a reasonable doubt.[56]

New Zealand courts do not stand alone in their rejection of the clear and present danger standard adopted by American and Canadian courts. In Hong Kong, the Court of Appeal addressed a similar issue in *Wong Yeung Ng v. Secretary for Justice*.[57] The court was called upon to determine whether the appellant's conviction under the real risk standard was proper under the Basic Law and Bill of Rights of Hong Kong. The court concluded that the test adopted by New Zealand was more appropriate than that adopted by the Ontario Court of Appeal in *R. v. Kopyto*.[58] The court argued that each country adopted its own test according to the people's aspirations and the country's social circumstance.[59] Therefore, the Court surmised that the "real risk" approach was necessary for the particular circumstances in Hong Kong.[60] In this respect, the court held that the Hong Kong position on the legal restrictions on freedom of expression was not similar to that in Canada where the restrictions must be such as were "'reasonable and demonstrably justified in a free and democratic society.'"[61] Unlike the United States and Canada, the court noted that Hong Kong provides protection for the administration of justice as a continuing process.[62]

Many common law jurisdictions are split on whether a defendant can be held in contempt for out-of-court publications after a judicial

54. Solicitor-General v. Radio Avon Ltd. [1978] 1 N.Z.L.R. 225, 234 (N.Z.).
55. *Id.*
56. *Id.*
57. [1999] 2 H.K.L.R.D. 293 (CA).
58. *See id.* at 310-13, 320.
59. *See id.* at 309 (citing McLeod v. St. Aubyn, [1899] A.C. 549, 561 (P.C.) (Eng.).
60. *See id.* at 312.
61. *Id.* at 329 (Leong, J.) (citation omitted).
62. *See id.* at 312.

proceeding. In Canada and the United States the courts have concluded that contempt cannot occur after the conclusion of a judicial proceeding.[63] Chief Justice Taft summarized this view in his concurring opinion in *Craig v. Hecht* when he stated,

> If the publication criticizes the judge or court after the matter with which the criticism has to do has been finally adjudicated . . . the publication is not contempt . . . . If, however, the publication is intended and calculated to obstruct and embarrass the court in a pending proceeding in the matter of the rendition of an impartial verdict, or in the carrying out of its orders and judgment, the court may, and it is its duty to protect the administration of justice by punishment of the offender for contempt.[64]

Some state courts have adopted Taft's view. In *State* ex rel. *Pulitzer Publishing Co. v. Coleman*,[65] the Missouri Supreme Court held that a court did not have the power to punish contempt for criticism concerning a case made after its termination.[66] In that case, both the publisher and the editor of the *St. Louis Post-Dispatch* were found to be in contempt by a lower court for criticizing the judgment in a prior extortion trial.[67] The court's holding was partly based on the reasoning that the crime did not exist at common law and that the power to punish is not necessarily a safeguard to protect the proper functioning of a court as a judicial tribunal.[68] Similarly, in *Berlandi v. Commonwealth*,[69] the Massachusetts Supreme Judicial Court held that a court has no jurisdiction to convict for criminal contempt for acts performed with relation to a case after there has been a final adjudication of the case in that court and after that court has ceased to have jurisdiction to deal with the case.[70] *Berlandi* can be distinguished from the cases referenced above in that it involves acts committed in the presence of a municipal court judge after the termination of a judicial proceeding, and does not involve publication.[71] In U.S. jurisprudence, there is no distinction between the acts committed. If they occur after the termination of a judicial proceeding, they cannot

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63. *See, e.g.*, Craig v. Hecht, 263 U.S. 255, 278 (1923) (Taft, C.J., concurring); Lloyd v. Superior Court, 184 Cal. Rptr. 467, 470 (Cal. Ct. App. 1982); Justice v. State, 400 So. 2d 1037, 1038 (Fla. Dist. Ct. App. 1981); Berlandi v. Commonwealth, 50 N.E.2d 210, 215-16 (Mass. 1943); State *ex rel.* Pulitzer Publ'g Co. v. Coleman, 152 S.W.2d 640, 647 (Mo. 1941); R. v. Kopyto, [1987] 47 D.L.R. (4th) 213, 239-40 (Can.).

64. *Craig*, 263 U.S. at 278.

65. 152 S.W.2d at 640.

66. *Id.* at 647-48.

67. *See id.* at 642-44.

68. *See id.* at 647-48.

69. 50 N.E.2d 210 (Mass. 1943).

70. *Id.* at 215-16.

71. *See id.*

constitute contempt. Scandalizing the court does not concern interference with pending legal proceedings through prior publication, but rather attacks on the dignity or impartiality of the court after the fact.[72] In this respect, scandalizing the court is almost never recognized as a crime in the United States.

Jurisprudence in the United States concerning scandalizing post-trial publication is heavily influenced by the judiciary's concern for freedom of speech protected by the First Amendment. The judiciary's reverence for the First Amendment in trials concerning critical post-trial publication is first seen in the Supreme Court's decision in *Brides v. California*.[73] In that case two parties had been convicted of contempt of court.[74] The first parties to be convicted were the publisher and the managing editor of the *Los Angeles Times*, whose convictions were based on the publication of three editorials in that newspaper.[75] The other party convicted of contempt of court was Bridges, who at the relevant time was an officer of a union affiliated with the Congress of Industrial Organizations.[76] He had published, in several Californian newspapers, a telegram that he had sent to the Secretary of Labor.[77] The telegram was sharply critical of a judge's decision in a case involving a dispute between his union and one affiliated with the American Federation of Labor.[78] The telegram was published while a motion for a new trial was pending.[79] Following the Court's earlier decision in *Schenck v. United States*,[80] Justice Black stated that the state could place limitations upon freedom of speech only where "'the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils.'"[81] From Justice Black's analysis of the "clear and present danger" cases there emerges a working principle; namely, that the "substantive evil" must be extremely serious and the degree of imminence extremely high.[82] While Justice Black conceded that there might exist some situations where statements that posed a threat to the fair administration of justice would justify a conviction for contempt, he concluded that neither the editorials nor the

72. *See* Hay, *supra* note 14, at 433.
73. 314 U.S. 252 (1941).
74. *Id.* at 258.
75. *Id.* at 271.
76. *Id.* at 275-76.
77. *Id.* at 276.
78. *Id.* at 277.
79. *Id.* at 278.
80. 249 U.S. 47 (1919).
81. *Bridges*, 314 U.S. at 261 (quoting Schenck v. United States, 249 U.S. 47, 52 (1919)).
82. *Id.* at 263.

publication of the telegram actually posed such a threat.[83] The convictions for contempt were set aside.[84]

Similarly in *Pennekamp v. Florida*, the Court addressed the issue of whether the First Amendment protected post-trial speech criticizing the judgment of a state court.[85] In *Pennekamp*, the associate editor and the corporate publisher of the *Miami Herald* were convicted of contempt as a result of the publication of two editorials and a cartoon in the paper, which referred to several pending cases.[86] As in *Bridges*, the Court spoke of the necessity of demonstrating a clear and present danger before such comments should be punished.[87] The majority held that the editorials and cartoon lacked the "solidity of evidence" that would be required for a court to conclude that they created a clear and present danger to the administration of justice.[88] Under U.S. law, scandalizing the court is not only rejected as a criminal offense, but publication or speech criticizing a court is protected to the fullest extent.

Canadian courts have dealt with the crime in a similar fashion. In *R. v. Kopyto*, the Ontario Court of Appeal held that under the current Canadian Charter the offense of making a statement out of court does not constitute a reasonable limitation on the freedom of speech if it was merely calculated to bring the administration of justice into disrepute.[89] For the majority, the Crown must prove that the contempt amounted to a real, substantial and present or immediate threat to the administration of justice.[90] In many respects, the Canadian ruling is similar to the view adopted by U.S. courts. The result of the majority ruling is that there are very few limits placed on comments, unless those comments are made in the face of the court or would interfere with the fair trial of pending proceedings.[91] In his concurrence, Judge Houlden went even further by adopting a position analogous to that of American courts. Judge Houlden argued that no offense of scandalizing the court, however framed, would be consistent with the Canadian Charter.[92] However, Judges Dubin and Brooke, in dissent, considered the offense of scandalizing to be a necessary exception, provided that the statement

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83. *Id.* at 274-78.
84. *Id.*
85. 328 U.S. 331, 333-34 (1946).
86. *Id.* at 333.
87. *Id.* at 347.
88. *Id.*
89. *See* R. v. Kopyto, [1987] 47 D.L.R. (4th) 213, 260-61 (Can.).
90. *Id.* at 263.
91. *Id.* at 255.
92. *Id.* at 255-56 (Houlden, J.A., concurring).

complained of is calculated to bring the administration of justice into disrepute and shown to pose a serious risk of interfering with administration of justice.[93] For the dissenters, there was no reason to draw any distinction between publications tending to prejudice the fair trial of particular cases actually pending in the courts and publications tending to lower the authority of judges by imputations of impartiality.[94] It is important to note that the view adopted by the dissenters is the prevailing view among other courts in the Commonwealth.[95]

In the noted case, the South African Supreme Court followed the basic "Commonwealth" framework of analyzing the constitutionality of the crime and held that there was some degree of limitation on the untrammeled right to speak one's mind openly and fearlessly about public affairs.[96] The principal issue on appeal was whether the law relating to scandalizing the court unjustifiably limited the right to freedom of expression guaranteed by the South African constitution.[97] The argument advanced by the appellant was that the overriding constitutional protection given to freedom of speech was incompatible with the continued recognition of the crime of contempt of court.[98] The Court concluded that freedom of speech was not incompatible with the continued recognition of the crime of scandalizing the court.[99] The Court reasoned that the crime was a constitutional means of preserving the dignity of the courts, meant only to protect against public injury, and was circumscribed to those rare incidents where the offending conduct was likely to damage the administration of justice.[100]

The Court began its analysis by establishing the limits the law placed on the right to criticize a judge or judicial ruling.[101] Because section 36 of the South African Constitution permits limitations that are reasonable and justifiable, a principal issue that the Court had to address was whether scandalizing the court, as a limitation, met these requirements.[102] The Court argued that within any constitutional structure

93. *Id.* 265-67 (Dubin, J.A., dissenting).
94. *Id.* at 284-86 (Dubin, J.A., dissenting).
95. *See, e.g.*, *In re* Chinamasa, 2000 (12) BCLR 1294 (ZS); Wong Yeung Ng v. Sec'y for Justice, [1999] 2 H.K.L.R.D. 293 (CA).
96. S. v. Mamabolo, 2001 (5) BCLR 449, 471-72 (CC).
97. *Id.* at 467.
98. *Id.*
99. *Id.* at 472.
100. *Id.* at 472-73.
101. *Id.* at 459.
102. *See* S. AFR. CONST. ch. 2, § 36 (providing that rights conferred by the Bill of Rights "may be limited only in terms of law of general application to the extent that the limitation is

the judiciary is in a weaker position in relation to the executive and legislative branches of government and that its sole source of power is derived from its moral authority.[103] Since the judiciary's power was derived from moral authority, there was a special need to preserve its integrity.[104] The Court warned that if public confidence in the judiciary eroded, then the courts could not function properly and the rule of law would die.[105] The Court argued that the South African Constitution addresses both concerns of judicial vulnerability and integrity in chapter 8.[106] Chapter 8, section 165 of the South African Constitution deals principally with the role of the judiciary. Section 165 provides that the judicial authority of South Africa is vested in the courts and that the courts are independent and must be able to apply the law without fear, favor, or prejudice.[107] These two propositions are reinforced in the three succeeding subsections that provide that no person or subdivisions of the state may interfere with the functioning of the courts, that subdivisions of the state must assist and protect the courts to ensure their independence and impartiality, and that an order or a decision by a court is binding upon all persons to whom and subdivisions of the state to which it applies.[108] Although not explicitly stated in this part of the analysis, the Court implied that the South African Constitution forms the basis for adopting any mechanism that will ensure the independence, integrity, and impartiality of the judiciary as long as that mechanism is reasonable and justifiable.[109] One such mechanism is the crime of scandalizing the court whose sole purpose is to protect the judiciary against vilification and deter disparaging remarks calculated to bring the judicial process into disrepute. Based on the nature of the judiciary and the purpose of the crime, the Court concluded that scandalizing the court was a constitutional means of preserving the judiciary's role in South Africa that was both reasonable and justifiable.[110]

Having established the general nature and purpose of the crime, the Court then turned its focus to delineating its scope. The Court argued that the interest that was served by punishing scandalous comment was

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reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors").

103. *See Mamabolo*, 2001(5) BCLR at 460-61.
104. *Id.*
105. *Id.* at 462.
106. *Id.* at 461.
107. S. AFR. CONST. ch. 8, § 165(1)-(2).
108. *Id.* § 165(3)-(5).
109. *See Mamabolo*, 2001(5) BCLR at 461-62.
110. *Id.* at 472.

not the private interest of the member of the court concerned, but the interest of the public at large.[111] The Court stated, "it is important to keep in mind that it is not the self-esteem, feelings or dignity of any judicial officer, or even the reputation, status or standing of a particular court that is sought to be protected, but the moral authority of the judicial process as such."[112] The Court held that unless the integrity of the court is assailed, there could be no valid charge of scandalizing the court.[113]

The next part of the Court's analysis focused on determining what types of speech should be protected. The Court conceded that there was no universal way to determine "whether the mark of acceptable comment ha[d] been overstepped," arguing that no "litmus test" could be applied.[114] The determination of whether speech was unacceptable depended on the particular facts of each case. In determining the acceptable bounds of speech, the Court found it instructive to rely on generally accepted principles of the freedom of speech.[115] The Court first drew attention to a passage by Lord Atkin for the proposition that "'no wrong is committed by any member of the public who exercises the ordinary right of criticising in good faith in private or public the public act done in the seat of justice.'"[116] Therefore, if the offender exercised his ordinary right to criticizing the judiciary in good faith, then his comment should be protected by the constitution.

In determining whether the speech should be protected, the Court also pointed to the underlying purposes behind the right.[117] The Court argued that certain speech serves the fundamental purpose of promoting an impartial, accessible, and effective judiciary.[118] The Court also noted that public scrutiny also serves the constitutional function of checking the judiciary's power.[119] The Court found that the right also promotes stability by assuring "those who have been wronged that the legal process is preferable to vengeance . . . [and] that there exists a set of just norms and a trustworthy mechanism for their enforcement."[120] The Court has essentially established a working framework for determining whether

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111. *Id.* at 463.
112. *Id.*
113. *See id.* at 464.
114. *Id.*
115. *Id.*
116. *Id.* (quoting Ambard v. Attorney-General of Trinidad and Tobago, 1 All E.R. 704, 709 (P.C. 1936) (Eng.)).
117. *Id.* at 465.
118. *Id.*
119. *Id.*
120. *Id.* at 466 (citing Richmond Newspapers Inc. v. Virginia, 448 U.S. 555, 570-72 (1980)).

speech should be protected. Under the Court's analysis one should ask whether the comment in question is that which is normally afforded protection and whether the purposes for protecting speech in general have been advanced in the particular circumstance.

The final portion of the Court's analysis focused on striking a balance between the preserving an individual's freedom of expression and protecting the reputation of the judicial process.[121] The Court recognized that this exercise had been accomplished at varying degrees in other common law jurisdictions. It rejected the "clear and present danger standard" adopted by the United States and, to some extent, Canada.[122] The Court reasoned that the balance struck in those countries was fundamentally different than that achieved in South Africa because both Canada and the United States placed more weight in upholding the individual's right to free speech.[123] The Court noted that the United States "Constitution ranks the right to freedom of expression differently."[124] Unlike the South African Constitution, the United States Constitution envisions a preeminent right above all others that is unqualified.[125] The Court held that the South African Constitution was significantly different in content because it enumerates specific instances of the freedom and is immediately followed by a number of limitations in the succeeding subsection.[126] The proper test for the Court is one that places less significance on freedom of expression. Instead of adopting a "re-tooled" version of American and Canadian tests, the proper question for the South African Supreme Court was whether the offending comment, viewed contextually, was likely to damage the administration of justice.[127]

In regards to the appropriate test, the concurrence reached a different conclusion. Judge Sachs believed the majority had set the standard too low. He argued that the conduct must "pose a real and direct threat to the administration of justice" before it can be said to constitute scandalizing the court.[128] Judge Sachs noted that prosecutions should be based not simply on the expressions of words likely to bring the administration of justice into disrepute, but that an additional requirement exists that requires the words actually provoke real

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121. *Id.* at 469-70.
122. *Id.*
123. *Id.* at 469.
124. *Id.*
125. *Id.*
126. *Id.* at 469-70 (citing S. AFR. CONST. ch. 2, § 16(2)).
127. *Id.* at 470.
128. *Id.* at 482 (Sachs, J., concurring).

prejudice.[129] Judge Sachs reasoned that only then could the constitutional standards of reasonableness and justifiability be met. Although Judge Sachs adopted a different approach, he reached the same conclusion as the majority, that in certain tightly circumscribed circumstances the public interest in protecting the administration of justice and maintaining the rule of law justifies the survival of the offense of scandalizing the court.[130]

In many respects, the Court's decision is consistent with other jurisdictions addressing the constitutionality of scandalizing the court.[131] Almost all the major jurisdictions in the English common law tradition, apart from the United States, have recognized the continued necessity for retaining the offense.[132] Not only have these jurisdictions recognized a need for the offense of scandalizing, but they have also adopted similar approaches to determining whether the need still exists. The legal and policy rationales are all the same and, to a varying degree, all jurisdictions have concluded that the crime is meant to protect the integrity of the courts.[133]

The balancing standard adopted by the majority contemplates an altogether different judicial calculus. Prior to the Court's decision there were two standards adopted by courts in common law jurisdictions. On one end of the spectrum, Canada and the United States have adopted the clear and present danger standard. On the other end are courts that have adopted a standard of real risk. The South African decision creates a third alternative to those previously contemplated. Under the Court's newly adopted standard, any conduct that is likely to do damage to the administration of justice can be regulated. Similar to other commonwealth jurisdictions in South Africa, a court must balance the individual's right to free expression against the fundamental policy of protecting the judiciary. What complicates the South African situation is the very fact that South Africa is a newly developing democracy, which requires openness of debate and necessitates the existence of a judiciary with the capacity to defend itself.[134] These dual needs are indispensable, and courts should be extremely cautious in favoring one at the expense of the other. Striking this precarious balance between individual and state is

129. *Id.* (Sachs, J., concurring).
130. *Id.* at 479 (Sachs, J., concurring).
131. *Id.* at 462.
132. *Id.* at 462-63.
133. *Id.* at 462.
134. *Id.* at 479-80 (Sachs, J., concurring).

complex, but it is an essential endeavor that courts must undertake to preserve fundamental freedoms.

The problem with the majority's decision in the noted case is not its result, but its approach to that result. The Court's decision is troubling because it places more importance on protecting the judiciary's capacity to defend itself. But, as previously noted, any new democracy also requires openness and debate for it is the public's ability to freely debate, which contributes to the democratic process. As aptly noted by Justice Brennan in *Garrison v. Louisiana*, "speech concerning public affairs is more than self-expression; it is the essence of self-government."[135] There is social utility not only in protecting the right of expression but protecting speech that society condemns as wrong. John Stuart Mill illustrated this in his essay "On Liberty."[136] In that essay, Mill argued that it is the collision of truth and error that ultimately produces a clearer perception and livelier impression of truth.[137] Mill and Brennan support the proposition that democracies should be overly cautious before they commence with restricting an individual's right to comment. According to the Court's decision in *Mamabolo*, the ability to openly debate a court's decision is thwarted by a standard that is excessively broad. By capturing any speech that is *likely* to damage the administration of justice, the very dialogue that Mill contemplates is effectively silenced. There is an interest in preserving the administration of justice, but the protection of free public debate contributes to this preservation.

Although the South African Constitution makes it clear that speech is not an absolute, and the majority has clearly demonstrated that democratic societies permit restraints on speech, the Court is misguided in its characterization of the judiciary's vulnerability. There is a qualitative difference between a court's position during a pending trial and it's position after the termination of a judicial proceeding. During a judicial proceeding a court's position is more likely to be compromised by actions calculated to interfere with the administration of justice than after the proceeding has concluded. Here the Court's standard is proper because even minor infractions may subvert the authority of the court. The likelihood that comments will have a detrimental effect on the administration of justice subsequent to a judicial proceeding is probably less clear and, in many circumstances, less likely to have the same effect. Therefore, comments made after a proceeding should only attract

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135. Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964).

136. John Stuart Mill, *On Liberty*, *in* SOCIAL AND POLITICAL PHILOSOPHY 302 (John Somerville & Ronald E. Santoni eds., 1963).

137. *Id.* at 316.

criminal sanction if they present a real and direct threat to the administration of justice. Under the Court's analysis the prosecutorial standard is set significantly lower. All that is needed is proof that the utterances are likely to bring the judiciary into disrepute, whether for alleged ineffectiveness, incompetence, or lack of probity or impartiality. As noted by Judge Sachs in his concurring opinion, "One can give any number of examples of cases where criticisms are made which are likely to diminish the general confidence which the public has in the way justice is being administered."[138] In this respect, the Court's standard encompasses much more conduct than that contemplated under the real risk and clear and present danger test. There is a real danger in the approach adopted by the Court.

Although the Court ultimately condemns the trial court's contempt conviction as unconstitutional, it is troubling how the Court reached its conclusion. The effect of the Court's reasoning will make it harder to defend seemingly legitimate speech. South Africa has a legitimate interest in preserving the independence and integrity of its courts. This is without doubt. But the judiciary holds a special place within that constitutional system as the protector of individual rights. At its own expense, a court should be very cautious in exercising its power to proscribe individual freedoms. This is the type of limitation that leads to orthodoxy and tyranny, a result that is neither necessary nor desirable for the functioning of the judicial system.

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138. *Mamabolo*, 2001 (5) BCLR at 481 (Sachs, J., concurring).

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