IN RE TURNER: A STUDY IN ABUSE OF THE POWER OF CONTEMPT TO STIFLE EXPOSURE OF WRONGDOING BY BENCH AND BAR

Thesis for the Degree of M. A.

MICHIGAN STATE UNIVERSITY
ROGER FRANCIS LANE

1970

JUL 11 2000
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ABSTRACT

IN RE TURNER: A STUDY IN ABUSE OF THE POWER OF CONTEMPT TO STIFLE EXPOSURE OF WRONGDOING BY BENCH AND BAR

By

Roger Francis Lane

This study analyzes a contempt of court charge brought against a small town news-magazine publisher for out-of-court spoken and written criticism of the local court system. It considers the setting and nature of the alleged offenses, the constitutional theory and case law of contempt of court, the editor's trial and conviction, coverage and reaction within the Michigan news community and the reversal of the conviction on appeal. The purpose is to evaluate whether the citation was a reasonable and plausible act by the judge, consistent with proper historic use of the contempt power, or was clearly an abuse of judicial authority to stifle criticism. The author concludes that it was a gross abuse of judicial power.

The charges against James C. Turner, a novice in publishing, arose from stories in his magazine, Today, describing the plundering of some estates by attorneys and other questionable conduct by lawyers and judges.

First, the editor appealed for State authorities--the Attorney General, the Michigan Supreme Court and the State Bar--to intervene. Later, Turner decided editorially that the long dominant attorney in the county, a crony of the circuit judge, "had almost totally corrupted" the county judicial system. Mainly for this, he was cited for contempt. A visiting judge tried the case.

Inquiry led to these principal conclusions: (1) the federal courts since 1941 repeatedly have ruled that judges may punish out-of-court criticism under extremely limited conditions clearly lacking here; (2) that the trial judge employed harassing tactics; (3) that the news community--temporarily weakened by a shutdown of Detroit dailies--little heeded abuse of Turner until he was convicted but rallied to his defense on appeal; (4) printing of facts which malefactors seek to suppress still exerts great power, even in a rural setting; (5) that Turner's probing stories eventually brought punishment to seven lawyers--four of them judges and former judges--and spurred substantial reform of the state bar organization; and (6) that a courageous editor sometimes must pay a high price for public service.

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By

Roger Francis Lane

A THESIS

Submitted to
Michigan State University
in partial fulfillment of the requirements
for the degree of

MASTER OF ARTS

Department of Journalism

1970

To my wife, Millicent

ACKNOWLEDGMENTS

The writer gratefully recognizes the encouragement of Associate Professor John Murray to resume work begun at New York University and gain at age fifty-two a Masters Degree nine years after pursuit started. Thanks for sympathetic help also are given to Department Chairman Frank Senger and to Professors George A. Hough and W. Cameron Meyers.

R.F.L.

Lansing, Michigan

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PREFACE

At this writing, activities of James C. Turner have projected to the public in two separate episodes that should be distinguished sharply, for purposes of this study, although they are related sequentially. This paper deals with the first only.

Events considered here arose directly from Turner's experiences as a novice publisher of a monthly news magazine written strictly for Livingston County readers, circulated in Livingston County and devoted chiefly to stimulating civic betterment in Livingston County. Meticulously documented stories of mischief by lawyers and judges in handling of some estate cases stirred attempted reprisals against Turner, chief among them a contempt of court citation issued by the supervising judge of the county court system. The legal action was a threat not only to Turner but to all courageous editors daring to offend the law establishment. The first phase of the Turner saga ended when the State Court of Appeals erased the threat by reversing Turner's lower court conviction.

Frustrated, under emotional pressure and nearly bankrupted by his lonely two-year struggle, Turner in

December 1969 suddenly found himself legally vindicated but in a highly unstable situation otherwise. Thus the second episode began. Dropping his editor's scalpel, Turner launched forth as a political crusader, concentrating on rallies, reform committees, a petition drive and finally a candidacy for governor, all with the avowed goal of routing rascals from the law. The magazine was converted into an instrument for sustaining the statewide crusade. Its character changed greatly, in the author's opinion, for the worse.

INTRODUCTION

A major test of the guarantee of a free press, as specified in the First Amendment of the Constitution of the United States, arose in 1968 in the unlikely setting of Livingston County, Michigan. A shoe sales executive turned news magazine publisher exposed the fleecing of some estates by attorneys and attacked the county lawyers' organization and the courts for condoning the misconduct. The ranking judge in the county responded with a contempt of court citation. The publisher was tried, convicted of contempt, and sentenced to jail. Eighteen months later and $70,000 in debt, the publisher was vindicated when a three-judge panel of the State Court of Appeals unanimously reversed the convication. Further review was not sought.

Long predominately rural, Livingston County during the post-World War II period sprouted three colonies of burgeoning and prosperous light industry strung along I-96, a federal highway on the interstate system reaching diagonally from Detroit northwest toward Lansing, Grand Rapids, and Muskegon. The largest of the clusters centered

on the county seat, Howell, a town of 5,500 population.[1] The others formed around Brighton, nine miles closer to Detroit, and Fowlerville, eleven miles northwest toward Lansing.

Howell, besides being a farm trading center and a growing magnet for auto industry supplier plants, boasts thriving banking, insurance, and government institutions, and stands atop an underground gas storage dome where excess natural gas deliveries from the Southwest were impounded in the summer to meet swollen wintertime demand in the Detroit area. Its economic vitality supports a bustling airport. Nearby lakes and state parks provide variety and a recreational flavor to the community, enhancing its residential attractiveness to strife- and congestion-ridden city dwellers. A sprinkling of state government agency heads and lobbyists commute to Lansing, a thirty-seven-mile forty-minute drive by expressway. Real estate prices are climbing. The Citizens Mutual Insurance Group, one of the state's largest and most successful casualty insurers, is based in Howell. Brighton, although smaller, enjoys many of Howell's advantages and stands athwart the main highway between Ann Arbor and Flint, which also is on a principal Sault Ste. Marie-to-Tampa, Florida

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[1] U.S., Department of Commerce, Bureau of the Census, United States Census of Population: 1960, Vol. I, Part A, 24-18; revised estimate, Michigan, Department of Public Health, 1968.

artery, Interstate-75. A large ski resort and good fishing lakes are close by. The General Motors Corporation Proving Ground, north of Brighton, is the county's largest industry. For a time, in 1966, it appeared that the federal government might choose a site ten miles south of Brighton for development of a $100-million atomic research facility, a project later awarded to Illinois. The county's $335-million property valuation in 1967 was 12 per cent industrial.[2] Population was estimated at 48,300 in 1968, a one-year growth of 8 per cent.[3] A sense of prosperity and fast-expanding commercial promise pervaded the atmosphere.

Pertinent to this study, opportunities in the practice of law and in newspapering were manifestly on the upswing, along with those in many other fields. In early 1968, the rolls of licensed attorneys in Livingston County listed twenty-nine names. Of the twenty in Howell, five were shown as employees of the Citizens' Mutual insurance complex, and two were retired. Six held city, county or state government offices, including the posts of probate and municipal judge. Three of the other government lawyers, the prosecutor, his deputy who doubled as city attorney, and the circuit court commissioner, also engaged

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[2]Michigan, Department of Treasury, State Tax Commission, Final Report of Equalization, May 29, 1967.

[3]Michigan, Department of Public Health, Center for Health Statistics, Michigan Population by Counties, July 1, 1968 estimate.

in private practice, putting twelve of twenty in this broad category. Seven attorneys were listed for Brighton, two for Fowlerville.[4] Livingston County has three long-established, conventional weekly newspapers but no dailies. The weeklies are the Livingston County Press at Howell, the Livingston County Argus-Dispatch at Brighton, and the Fowlerville Review. Prospective buyers approached owners of each newspaper in the mid-1960s and two, the Livingston County Press and the Argus-Dispatch, changed hands in a five-month period of 1968-69.[5] The Lansing State Journal and the Ann Arbor News reached into portions of Livingston County but neither was heavily distributed throughout county territory. The Detroit News and Detroit Free Press also had important circulation in the county. However,

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[4]State Bar of Michigan, Journal, Geographical Roster, Vol. 48, March 1969, p. 23, and Vol. 47, June 1968, pp. 93, 173, 187-188.

[5]Michigan Newspaper Directory (Lansing: Michigan Press Association, 1969). For many years, the weekly in Howell was under absentee ownership as one of a half dozen properties owned by Associated Newspapers, Inc., operating chiefly in western Wayne County at Belleville, Inkster, Wayne, Garden City and Westland. It was sold in December, 1968, to another pair of chain-building outside enterprisers, Richard L. Milliman, of Lansing, and Richard A. Jones of Bloomfield Hills, incorporated as Livingston County Press, Inc. Milliman, a director of Panax Corporation, a newspaper-broadcast chain, with various associates operated weeklies in Grayling, Clare, Reed City and Grand Ledge. Five months later, in April, 1969, the Argus-Advance of Brighton, owned principally by Dr. Thomas Barton, was sold to Bill Fliger of Northville, whose string included papers at Northville, South Lyon and Novi.

they were shut down during the vital early phase of events here chronicled.[6]

This was the situation when James C. Turner, an ex-shoe sales executive turned advertising man, launched a new and unusual publishing venture. Turner introduced a monthly magazine, Today, markedly similar in appearance and format to Time magazine. Today made its debut in a December, 1967, issue of 6,000 copies that appeared in the last days of November. This was roughly ten days after the two Detroit papers shut down November 16-17 in a strike-lockout that was to last nine months. Turner said the timing was pure coincidence. He had been on the verge of bringing out the magazine in the early spring of 1965 when a serious back injury hospitalized him for a protracted period and forced postponement of his enterprise.[7]

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[6]"The Howell area is a kind of 'no man's land' for daily newspaper coverage," as it was aptly put by Arthur Gallagher, editor of the Ann Arbor News. "Our paper is fairly well established in the Hamburg-Pinckney area to the south. We put a couple of boys in Howell a while back for a time but had to pull them out. We couldn't make enough headway to justify them." Interview with Gallagher, Dec. 29, 1969. See Chapter V for a more detailed analysis of news reporting operations during the period under study.

[7]Turner, then forty-five, a curly-haired, typically extroverted salesman and promoter, said he drifted toward publishing after wearying of the travel and tensional demands of his earlier business career. The bridge was a successful advertising agency--and a period of pinch-hitting for a friend who ran a radio station during the latter's illness. That his schooling ended with twelfth grade proved little if any handicap except for an occasional spelling or punctuation lapse. Although limited

Turner said he attempted to pursue neutrality in and at times tumultuous political environment.[8] Historically, the county is heavily Republican. In 1966, Republicans George Romney and U.S. Senator Robert P. Griffin, running for governor and the senate, respectively, carried the county better than two to one, and the two Republican candidates for regents of the University of Michigan outdistanced Democratic adversaries by roughly that margin.[9] The Democratic party, although in a minority, was strategically important in filling some offices.[10] Its ranks were continually and bitterly divided between factions generally loyal to the regular state party leadership and a renegade, teamsters union-oriented group

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to capital of $20,000, Turner undoubtedly was buoyed in an almost swashbuckling readiness to tilt swords with the entrenched powers by an inheritance promising financial independence for his wife and children. His second wife, Nona Muir, and her two sisters stand to share in a living trust provided for his widow by the late James G. Muir, an executive and large stockholder in Wolverine Shoe Company, of Rockford, and Turner's one-time employer. Two years after lauching his publishing venture, Turner, severely buffeted by rigors of the business and by reprisals from those he attacked, had plunged $70,000 in debt. Unpublished manuscript by author, September 30, 1969, and interviews with Turner.

[8]Detroit News, May 28, 1965.

[9]Michigan, Secretary of State, Michigan Manual, 1967-68, pp. 450, 460, 469.

[10]In the landslide of 1932, Livingston County went Democratic for President by a mere 150 votes. Franklin D. Roosevelt outpolled Herbert Hoover 4,684 to 4,534. Michigan, Secretary of State, Michigan Manual, 1933, p. 421.

led by Martin J. Lavan, a Brighton attorney. One harsh battle, in 1964, was settled, in court.[11] A brash, brassy-voiced one-time Irish revolutionary, Lavan was a shrewd tactician and sometimes swung political weight more than commensurate with the numbers of his followers.[12] He was able to maintain control of the county Democratic machinery during much of the 1950s and the first half of the 1960s. His election support in Livingston County was strategically valuable to Circuit Judge Michael Carland, a resident of Owosso in adjacent Shiawassee County, the more populous portion by far of the two-county Thirty Fifth Judicial Circuit. A close relationship developed between Carland and Lavan, and more than once they were companions on journeys to Ireland.[13] Carland, when sitting in Howell, frequently lunched with Lavan at the Canopy, an outstanding bar and restaurant in Brighton, where Lavan and his son, Brian, maintained their law offices. On this account, the Canopy became known to some as "the courthouse annex."[14]

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[11] Detroit News, Oct. 6, 1965.

[12] Descriptive matter relating to Lavan and assessment of his political skills are the result of personal observation and evaluation of the author who encountered Lavan several times at Democratic party conventions and political meetings while Associated Press correspondent and political reporter in Lansing, 1956-60.

[13] Detroit Free Press, Dec. 7, 1968.

[14] Ibid.

The judge often spent the night at the Woodland Lake Motel, near Brighton. Carland's courtoom and Livingston County offices were in Howell. The close relationship was well known among attorneys and presumably was a factor in Lavan's considerable influence. At any rate, Lavan and his son had a busy practice. They were counsel in 20 per cent of pending circuit court cases in the March and May terms of 1968.[15] Colorful and crafty, Lavan was known at times to browbeat others to gain his ends.[16] Lavan's big stock of red hair, now turned gray, lent distinction to his appearance. This was the man, then, that the novice news editor-publisher, Turner, in full recognition of his

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[15] In Re Turner, Michigan Court of Appeals, Docket #5846, Transcript of Record, Hearing May 17, 1968 in Livingston County Circuit Court, Plaintiff's Attorney Richard Ryan speaking.

[16] A news reporter in the community who asked anonymity said Lavan told her unfriendly stories might cause him to use his influence at the McPherson Bank in Howell to deprive one of the reporter's close relatives of a business loan then under consideration. The same reporter related Lavan's tactic of leaving two or three $100 bills carelessly but conspicuously on his office desk, presumably to tease a caller into a cooperative frame of mind. Personal interview in Howell, April 19, 1968.

adversary's power, labeled publicly as the corrupter of Livingston County courts.[17]

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[17] Today, Vol. 1 No. 5, April 1968, p. 4. "Martin J. Lavan, who did this to Orpha Bowe has almost totally corrupted the entire judicial system of Livingston County." For full text of Turner's "A letter from the Publisher," which was seized upon by Judge Carland as the principal basis for his contempt of court charge, see Appendix A. The letter also supplies a sample of Turner's somewhat unpolished and occasionally ungrammatical, but blunt and punchy journalistic style.

CHAPTER I

TURNER'S CHALLENGE--AND THE RESPONSE

The third issue of Turner's new publication, Today, the February number, hit Livingston County newstands on February 3, 1968, a Saturday. A red question mark 4 $\frac{1}{2}$ inches high stood in the center of the cover, flanked by two smaller ones. Beneath were the words, "Our Judicial System," and at the bottom, in a box, "Good, Bad and Very Bad." Ringed around the questions marks were the words "circuit," "municipal," "justice" and "probate," signifying the various echelons of the system. About one half the forty-four-page issue was devoted to mostly critical articles dealing with the courts. The severest criticism dealt with the probate court. It focused on alleged neglect and mishandling of juvenile problems, and on seemingly extravagant fees totaling $83,500 collected from the estate of Rosa Miller, a spinster, who died in 1959 leaving an estate appraised at $425,000. The Rosa Miller case, as it turned out, was a first prime stepping stone in a series of discoveries by Turner that brought him into point blank confrontation with the county bar. Like many good news stories, the Miller story was a combination of

a good tip, resourceful exploitation, energetic pursuit and thoroughness. Among other things, it demonstrated Turner's knack for reporting, despite his limitations in experience and in writing skill. It also showed a keen news sense and an adroit management of a tricky news situation, all qualities that in subsequent stories were to stand Turner in good stead.[1]

Briefly, these were the facts, as eventually assembled, published by Turner and forwarded to authorities for investigation.[2] Except for $1,000 set aside for relatives, Miss Miller left all she possessed to lifelong friends, Lyman and Dorothy Vandercook of Howell. The Vandercooks retired and moved to Florida while the estate was being probated. Attorney Stanley Berriman, destined by 1967 to be serving as Howell Municipal Judge, drew Miss Miller's will and became executor.[3] Berriman hired Martin

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[1]Turner received help--freely acknowledged--from the Detroit News, including the News' able investigative reporter, John F. Nehman, and court reporter Bob Kirk. The News was not then publishing. "He did his own investigative work and his own follow up. He may have received advice from time to time but he did 90 per cent of the spadework. It was he who went to California on the Bowe case, and brought back the documentation. It was he who went to Florida on the Miller case, and showed enough respect for detail to want to get Mrs. Vandercook's affidavit in the presence of her attorney." Interview with John Nehman, Jan. 2, 1970.

[2]Today, February 1968, pp. 10-11, and March 1968, pp. 9-13.

[3]Livingston County, Official Canvass of Votes 1964, Office of County Clerk. Voters elected Berriman

Lavan as attorney for the executor. In due course, Berriman claimed $15,000 for his services as executor and "special administrator," Lavan $20,000 for his claimed services. Payment was approved by then Probate Judge Hiram R. Smith, now retired. Subsequently, apparently unknown to Judge Smith, Lavan, and Francis Barron, as attorney for the Vandercooks (Barron was serving as probate judge in 1967), visited the Vandercooks in Florida in January, 1960.[4] They had in their possession for the Vandercooks a check for $92,500, seemingly a partial payment of what was due the Vandercooks from the estate. "In exchange for this check, Lavan demanded and received three certified checks totaling $47,500 from the Vandercooks for alleged expenses connected with the estate."[5] One check for $25,000 was drawn in the favor of Lavan, a second for $20,000 was for Barron, a third for $2,500 was brought back to Berriman. A fourth check, its propriety unchallenged by Turner, was for $25,000 and was made out to Dr. Thomas G. Barton, who attended Miss Miller in her last illness, to establish trusts for the five Barton children. By coincidence, a medical doctor, Barton was owner of the

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notwithstanding an earlier perhaps forgotten run-in with the bar that resulted in a two year suspension from the practice of law in 1938. Circuit Court of Wayne County, No. Misc. 64273, In the Matter of Stanley Berriman, Order of Suspension, Nov. 26, 1938 (filed in Michigan Supreme Court Jan. 12, 1939).

[4] Ibid.

[5] Today, March 1968, p. 9.

Argus-Dispatch in Brighton. The checks were all dated January 18, 1960 and drawn on the First National Bank of Dunedin, Florida. No reflection of the transactions appeared in the probate files of Livingston County. Also an object of the comment were what were described as excessive estate taxes of $124,244. Turner contended that much of the tax could have been avoided if Berriman, in arranging Miss Miller's affairs, had provided for a proper trust.

Turner, encountering full cooperation from Dorothy Vandercook (Lyman had died in 1962) and the Dunedin, Florida, bank, made two trips to Florida and documented his story with certified copies of the cancelled check; an affidavit, executed by Dorothy Vandercook and witnessed by her attorney, describing the events of January 18, 1960; and other materials. Along the way, Turner also discovered that Barron and Berriman, through Mrs. Barron, had purchased property from the Rosa Miller estate in questionable transactions and that a final accounting never was filed. Before publishing his story, Turner engaged in lengthy soul-searching, and counseled with disinterested parties well versed in banking, probate, newspaper, and legal practice. He was advised by an intermediary that Judge Barron wished to see him. At the time, Barron was ill. Turner, after considering the matter, set strict terms for an interview, including two witnesses--one of his selection--and a recording of all that transpired. The

conditions were rejected. "It was obvious that Barron wanted to make a deal," Turner explained. "We're all human. Maybe I would have been tempted. Anyway, he was a sick man and whatever a man said in his condition couldn't be relied on."[6] The intermediary then wanted to know if Turner would suppress what he had found out if Barron resigned his position on the bench. "I told him [the intermediary] 'you know I can't do that. There may be twenty-five other cases like this, twenty-five heirs or groups of heirs that have been taken in this manner.'"[7] Thereupon, with the help of a newspaperman he trusted, Frank Hand of the Lansing State Journal, Turner, before publishing his story, arranged to deliver the file to the office of the Michigan Court Administrator, an agent of the Michigan Supreme Court in overseeing inferior court operations. This was done on Janury 16, 1968. In the same day, he turned over copies of the same material to Frank J. Kelley, Attorney General, and to officials of the State Bar of Michigan. This was eighteen days before the February issue of Today, summarizing his findings, was first distributed in Livingston County. Reflecting later, Turner called the Rosa Miller exposé "the pebble that started the landslide."[8]

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[6]Interview with Turner in Howell, Michigan, April 18, 1969.

[7]Ibid.

[8]Ibid.

The other story which lay prominently behind Turner's citation for contempt was just beginning to filter through to the publisher. This was the case of Orpha Bowe that was to be discussed in the April issue of Today. In an editorial, Turner put it this way:

> Orpha Bowe . . . died a poor, frightened, destitute and bewildered seventy-one-year-old woman (on March 4, 1965). . . . While Orpha Bowe was forced to live her last few years in near poverty, existing mainly on public assistance, her attorney, Martin J. Lavan, thought so little of the profits from this stolen property (filched from her estate) that he casually deeded it over to his two sons. Martin Lavan, who did this to Orpha Bowe, has almost totally corrupted the entire judicial system of Livingston County. We believe the judges and most of the attorneys either live in fear of this man, or, for some reason, are afraid, or won't speak out against the system.[9]

By Turner's account, as related to Attorney General Kelley, the State Bar of Michigan and the Michigan Supreme Court, Mrs. Bowe, a widow living near Brighton, inherited property in Santa Cruz, California, from her brother, in August 1958.[10] A few months later, she went to Lavan seeking help in getting her money out of the property. Lavan had her sign a blank deed which she never saw again. Three and one half years later, on June 18, 1962, Lavan,

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[9] Today, April 1968, p. 4. See also Appendix A for fulltext.

[10] Today, April 1968, pp. 6-7. Photocopies of the published correspondence between Mrs. Bowe and various attorneys whose aid she solicited, together with some other letters not published, are on file in the offices of the State Bar of Michigan, the Attorney General of Michigan, and with the state editor of the State Journal, all in Lansing, where Turner delivered them.

after extensive prodding by Mrs. Bowe, gave her a check for $3,000, representing the entire sum due her. There was reason to believe that she was entitled to a far greater sum, perhaps five times this amount. In this period of more than three years, the frustrated woman repeatedly appealed to other lawyers for help in her predicament but for various reasons received none. In a typical instance, a Detroit attorney, in an exchange of correspondence with Mrs. Bowe, demanded in advance a $250 retainer, which the ill, befuddled and pleading widow was unable or unwilling to pay, possibly influenced by her unsatisfactory experience with Lavan.

Lavan, it developed, wasted little time after Mrs. Bowe put herself and her property in his hands in March 1959. An obviously dummy sale of the Santa Cruz property to Margaret I. Timmons, Lavan's long-time secretary and confidante, for $10,000, was recorded on May 19, 1959. In January, 1962, the property was transfered in a bona fide sale by Lavan to a Santa Cruz couple for $20,000--after rents had been collected for three years from the five living units it contained. Turner, after a trip to California, produced copies of cancelled checks--one dated September 21, 1961, for $765.34--attesting payments by M. C. Hall & Sons Realty Co. of Santa Cruz, manager of the property, to Lavan. Two years later in 1964, after investing $5,000 in improvements, the California buyers resold the property for $44,000, suggesting

that Lavan accepted far less than its actual worth. This was four and one half times the amount of the purported transfer recorded to Margaret Timmons in 1959. During the period Lavan was in the picture, there were mortgage notes and rent assignments involved in the rather complicated transaction. One series of documents Turner brought back from California supported his contention that a note for $8,247.01 given in the 1962 purchase by the California buyers was assigned by Martin Lavan, to his sons, Brian and Sean, and paid in full to the Lavans, with 6 $\frac{1}{2}$ per cent interest.

Mrs. Bowe died March 4, 1965. The case was probated and closed before Judge Barron. At this point, there had been no detailed written disclosure of what Turner learned about Lavan's apparent manipulations, only a partial oral report to Barron by Wilfred Erwin, attorney for the executor. About a week before Turner published his account of the Orpha Bowe case, Barron resigned from the bench, giving ill health as the cause. Dated March 27, 1968, the resignation was to take effect May 1. At the time, Barron was a patient in Mercywood, a sanitarium near Ann Arbor specializing in emotional disorders.[11] Also, by this time, Turner had learned in his investigation of the Orpha Bowe case that word of Erwin's oral report to Barron relecting on Lavan's conduct passed quickly among certain

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[11] Livingston County Press, April 3, 1968, p. 1.

attorneys. It was relayed by Attorney Michael Merritt to Circuit Judge Michael J. Carland, and, Turner learned, Carland, later the same day, personally visited Lavan's home to inform him (Lavan). At this point, Carland, while in Lavan's residence, telephoned Erwin to remonstrate with him for not telling him earlier of Turner's inquiries about the case. Erwin was attorney for the executor of Mrs. Bowe's estate. Merritt served briefly as an investigator for a relative of Mrs. Bowe who expected an inheritance.[12]

Turner related that the "almost totally corrupted" editorial was written longhand en route back to Michigan from Santa Cruz where he had nailed down evidences available there of Lavan's behavior. From Detroit Metropolitan Airport, Turner headed to the editorial offices of the Detroit News where he spread out his material before Boyd Simmons, Assistant Managing Editor, Bob Kirk, News Court Reporter, and John F. Nehman, crack investigative Reporter. He believed the News would be interested because of sleuthing Nehman previously had done in Livingston County, and a story Nehman had written in 1967 depicting slipshod work in the office of Prosecutor Charles Gatesman, who had launched his legal career as a member of the Lavan firm. "What a story, and to think we're on strike," Turner quoted Simmons."[13] It was on this occasion that Simmons

[12]Today, April 1968, pp. 5-8.

[13]Turner interview, April 18, 1969.

authorized the dispatch of four reporters to Howell to monitor Turner's operation so the News would be prepared to wade in on the resumption of publication, then believed to be imminent.[14]

By now, the stage had been set--once Turner's April issue went into distribution--for retaliatory steps that the publisher regarded as inevitable. The blow fell, from an unexpected quarter, on April 9, 1968. Fully recognizing the seriousness of the allegations he was publishing, Turner had been wary of exposing himself to a libel suit from Martin Lavan or other attorneys who could be expected instantly to fight back with familiar legal weapons. After counseling with Frank Hand, state editor of the Lansing State Journal, he even made a second trip to Florida to obtain the February 8, 1968, affidavit from Dorothy Vandercook that seemed to make his story not only airtight but also suit-proof. So what happened was a complete surprise, something so remote that it never had occurred to him or to others who advised him. At about 8:30 a.m., the then sheriff, Lawrence Gehringer, cousin of Charlie, the immortal Detroit Tiger second baseman, walked through the rear door of Turner's one-story cinderblock office. As Turner recalled later,

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[14] Detroit News actually resumed publication August 8, 1968.

> I could not imagine why the sheriff was coming to see me. I knew him quite well, but he wasn't in the habit of stopping by my office. After the familiar 'Hi, Larry' and 'Hi, Jim,' the sheriff said he was serving papers on me by order of the circuit court. Larry handed me the papers and walked out of the office. It had taken all of one minute.[15]

Essentially, Judge Carland's order against Turner to show cause why he should not be cited for contempt, presented two counts. The first was the "almost totally corrupted" language printed in the April issue of Today. The second accused Turner for what was said at a luncheon panel discussion put on by the industrial committee of the Howell Chamber of Commerce on February 13, 1968, An affidavit signed by City Attorney Robert E. Kleeb, who said he was present, swore that on this occasion Turner had said, "The control which Martin J. Lavan exercises over the courts of Livingston County is more vicious than the control exercises by the mafia in New York and Chicago."[16] A second affidavit, relating to what appeared in April's Today, was signed by Wilfred H. Erwin, president of the Livingston County Bar. Ironically, Erwin was the first man to congratulate Turner on his Rosa Miller issue, calling at Turner's residence to do so, and leaving the message with Turner's wife. In another peculiar circumstance, the

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[15]Turner, Lawyers: Licensed to Steal (unpublished book manuscript, 1969), p. 77.

[16]In Re Turner, Michigan Court of Appeals, Docket #5846, Transcript of Record, Order to Show Cause, dated April 9, 1968.

language cited at the Chamber of Commerce meeting was not Turner's at all; he was repeating a passage in a letter he had received from a respected and retired probate judge, Hirman R. Smith whom Barron had succeeded in 1960. Also remarkable, State Representative Thomas G. Sharpe, Republican of Howell, had without challenge all but repeated Turner's "almost totally corrupted" language in a widely publicized letter dated April 4, 1968, to Attorney General Kelley, urging aggressive investigation. Said Sharpe: "A strong case has been made, at least on the surface, that corruption long has existed in certain legal circles of Livingston County, corruption that may have spread to the very public offices from which justice is dispensed."[17] Having cited Turner, Judge Carland disqualified himself to hear the petition. It was arranged, through Court Administrator William R. Hart in Lansing, that Judge James R. Breakey, Jr., of the twenty-second (Washtenaw County) Circuit at Ann Arbor would sit in Howell to hear the case on April 19.

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[17]Sharpe To Kelley, April 4, 1968, files of Attorney General Frank J. Kelley, Lansing.

CHAPTER II

HISTORIC AND PRESENT USE OF CONTEMPT

The power Judge Michael Carland sought to invoke against James C. Turner--the power to punish for contempt of court--is an inheritance from English common law. Conceptually, contempt is the "inherent" power of the court to protect itself from interference in the administration of justice or from the mockery of justice that would flow from disregard of judicial orders. Its history is murky but contempt is traceable back at least to the latter part of the 18th century. Not only its origins but its varieties are fuzzy. For example, an issue arose before Judge James R. Breakey whether Turner was confronted with the civil variety of contempt or the criminal variety. Important procedural considerations hinged on the answer, possibly including the right of a jury to sit--which Turner was denied.

In general, civil contempt refers to the power of the court to punish for disobedience to one of its orders--for example, non-payment of alimony order by the court, or disobedience of an anti-picketing injunction in an illegal strike situation. The power of civil contempt authorizes

the court to summarily jail an offender, and for an indefinite period. Compliance with the order usually "purges" the contempt, relieving the accused of further punishment.

Criminal contempt subdivides into three kinds--direct contempt, constructive contempt and a fuzzy concept sometimes called contempt by publication. Direct contempt refers to disturbance in or near the courtroom, or in the presence of the judge, such as shouting, obscene gesturing, or other infringement of decorum The judge may control the corridors nearby or even the entire courthouse premises by applying this power. Constructive contempt refers to events outside the courtroom or the presence of the judge which interfere with the processes of justice, such as an attempt to bribe or intimidate a juror. A judge can find or imprison the offender. The third category, contempt by publication, is an offshoot of the theory underlying the second, and applies particularly to newspaper and television conduct regarded as an attempt to meddle into or influence the disposition of a pending case.[1] Consider, for example, a newspaper story, editorial or cartoon, published in mid trial, that would threaten the judge with defeat for reelection unless he dismissed the case. This might be taken by the judge as intimidation worthy of invoking the power of contempt. Some judges have tried to invoke penalties against post-verdict criticism which

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[1]Ronald L. Goldfarb, The Contempt Power (New York: Columbia University Press, 1963), pp. 17-18.

could not be deemed interference with a pending case. While in the view of some this variety of contempt power has virtually ceased to exist, there have been recurrent attempts to revive--and more particularly--to abuse it by punishing legitimate criticism. There was a period in U.S. history from just before the end of World War I until 1941 when the U.S. Supreme Court recognized at least a limited power to punish newspaper criticism that tended to bring the judiciary into disrepute, and many state courts apparently still subscribe to the doctrine. However, starting with Bridges v. California[2] in 1941, amplified by a succession of subsequent cases, the U.S. Supreme Court has rigidly restricted authority to invoke contempt to instances where the questioned publication raised a clear and present danger to a fair trail then in progress or about to begin, or to continued public confidence in the judiciary.

The power of contempt is unrecognized in the United States Constitution, owing its introduction into the American system to common law. In fact, the Constitution makers, primarily through the Bill of Rights, sought to curb abuse of judicial and royal power by affirming liberties that assigned transcendent values to individual rights. The right to public trial by jury, to be secure

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[2]314 U.S. 252 (1941).

against unreasonable search--these were denials of judicial abuses under the English system.

Many legal scholars agree that common law origins of the constructive contempt power are at least questionable and subsequent usage erratic.[3] The power generally is credited to date from an unpublished, unissued and unrecorded decision in 1764 by Judge Wilmot in a moot case, Rex v. Almon. Almon was a bookseller charged with an alleged libel of Lord Mansfield, who had been influential in elevating Wilmot to his judicial post. Procedural mix-ups intervened and the case was abandoned. However, in 1802 what would have been Judge Wilmot's condemnation of Almon appeared in a son's publication of Wilmot's Notes. Wilmot ascribed to the judiciary a power of contempt not unlike the divine right of a ruling monarch:

> The power which the courts . . . have of vindicating their own authority is coeval with their first foundation and institution; it is a necessary incident to every court of justice . . . to find and imprison for contempt to the court, acted in the face of it . . . and issuing attachments . . . for contempts out of court stands upon the same immemorial usage as supports the whole fabric of the common law; it is as much the lex terrae and within the exception of the Magna Charta as the issuing of any other legal process whatsoever. . . . It is as ancient as any other part of the common law.[4]

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[3] In Re Turner, Michigan Court of Appeals, Docket #5846, Amicus Curiae Brief, Central Michigan Chapter of Sigma Delta Chi, by Fred S. Siebert, p. 4.

[4] Alfred Friendly and Ronald L. Goldfarb, Crime and Publicity (New York: Vintage Books, 1968), p. 277.

Before Wilmot's Notes appeared, his theory came to the American colonies, and later the United States, through the Commentaries of Blackstone, who as it happened was a friend of Wilmot. Blackstone consulted Wilmot about the law of contempt and propagated his view. By this strange sequence, the influence of the moot Almon cases was spread quickly and widely in the New World before its substance was known in England, except through Blackstone.

The Federal Judiciary Act of 1789 granted newly constituted federal courts the discretionary power to punish by fine or imprisonment "all contempts of authority in any cause or hearing before the same."[5] Although the power to cite for constructive contempt was asserted as well by some state courts, twenty-three states in the early decades of the 19th century, including New York and Pennsylvania, expressly repudiated it by statute--as indeed Congress did for the federal judiciary in 1831.[6] It has been observed that New York and Pennsylvania preserved the dignity of their courts against scandalization since the early days of the republic.[7] Congress acted in the wake of the Judge Peck case which evolved in the late 1820's in the Missouri territory. Peck undertook an unpopular line of

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[5] 1 Stat. 83.

[6] See footnote 3 supra, p. 25.

[7] Ibid.

rulings in a large number of cases involving land grants that were affected by events under Spanish rule of the Louisana Territory. Evictions and other inconveniences followed, prompting newspaper publication by attorney Luke Lawless of comment critical of Peck's holding. Peck held Lawless in contempt. Lawless, being a man of political influence, stimulated a move in the Congress for Peck's impeachment. At some length, the senate judiciary committee got to the matter. Finally, after long debate, the senate acquitted Peck, twenty-two to twenty-one.[8] The struggle led to adoption of a law enunciating principles in the contempt field that were to prevail into the 20th century, and after an interlude of reversion to something resembling Wilmot's, to the present time in their fundamentals. Contempt of court was defined as "any misbehavior in the court or so near thereto as to obstruct the administration of justice."[9] The words, "or so near thereto," became crucial in the interpretation of out-of-court contempt. The new federal statute was an adaptation of the New York and Pennsylvania laws and was viewed in this light. The state laws limited a court's power to punish summarily to contempt committed in the court's actual physical presence. Accordingly, "so near thereto"

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[8]Friendly and Goldfarb, Crime and Publicity, p. 278.

[9]Act of March 2, 1831, 4 Stat. 487, 28 U.S.C. sec. 385.

in juxtaposition to the concept of "presence" was taken to mean near in the obvious spatial sense as a chair is near an adjacent table, applying to the maintenance of order and decorum. The word "near" was not understood to have a causal connotation or reference to elapse of time. This view was somewhat spelled out nine years after the enactment by Justice Baldwin in U.S. v. Holmes.[10] If there was any doubt of the meaning of the words, Justice Baldwin said "the occasion and circumstances of its enactment must effectively remove them." He held that the only acts punishable under this language were those giving rise to noise or disorder that actually disturbs the court while sitting or impedes exercise of its functions. Nearly all the states came to follow the federal rule as enunciated by Baldwin.

Eighty-seven years after the Congress definitively fixed a course for American judicial practice, the U.S. Supreme Court in 1918 gave a new reading to the "so near thereto" clause that for a time greatly enhanced the power of courts to punish contempt by publication--outside their presence. This was in Toledo Newspaper Co. v. U.S.,[11] a case involving a dispute over a transit franchise and fares. The Toledo News Bee criticized rulings by the court in a

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[10]Fed. case No. 15,383 (1842).

[11]247 U.S. 402 (1918).

suit to block a level of fares fixed by the city. On this occasion, the U.S. Supreme Court, Justice Oliver Wendell Holmes dissenting, held that test in interpreting the crucial words of the 1831 statue was the character of the act done to obstruct justice rather than the physical location. Thus was introduced what has been called the "tend to obstruct" or "reasonable tendency" rule. This abruptly changed approach was eagerly accepted by the federal judiciary and spread, as well, through most state court jurisdictions. The Toledo case rule controlled for nearly three decades and then departed as suddenly as it came.

In 1941, the "inherent tendency" rule was superseded in Nye v. U.S.[12] this one having no relation to newspaper practice, and Bridges v. California,[13] founded squarely on the concept of freedom of the press. The federal high court in Bridges reversed state court contempt convictions against the publisher and managing editor of the Los Angeles Times. In this case, which involved Longshoreman Union Leader Harry Bridges, the Times commented after the conviction--but before the sentencing of some labor toughs who had assaulted non-union truck drivers. A tartly worded Times editorial entitled "Probation for Gorillas?" said Superior court Judge A. A. Scott "will make

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[12]313 U.S. 33 (1941). [13]314 U.S. 352 (1941).

a serious mistake if he grants probation" to the convicted parties. It held forth in this philosophical vein:

> Sluggers for pay, like murderers for profit, are in a slightly different category from ordinary criminals. Men who commit mayhem for wages are not merely violators of the peace and dignity of the state; they are also conspirators against it. The man who burgles because his children are hungry may have some claim to public sympathy. He whose crime is one of impulse may be entitled to lenity. But he who hires out his muscles for the creation of disorder and in aid of a racket is a deliberate foe of organized society and should be penalized accordingly. . . . This community needs the example of their assignment to the jute mill. [San Quentin Prison.][14]

Meantime, Bridges in an earlier but closely related episode had wired the Secretary of Labor branding a conviction of twenty-two striking union followers "outrageous" and threatening to tie up West Coast ports if the convicted ones were punished. In this landmark case, Justice Black, writing for a five to four majority, made these principal points: (1) restriction of the First Amendment right to free speech and free press could be justified only by a "clear and present danger"[15] of infringing the constitution's fair trial guarantee; the editorials (the state court held three were punishable) were insufficiently influential to sway the sentencing decision of the judge who was well acquainted with the views of the Times in such matters, and as for the Bridges telegram its publication was only confirmatory of what Bridges' attitude was known

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[14] Ibid.

[15] Schenk v. U.S., 249 U.S. 47 (1918).

to be; (2) inasmuch as most controversial subjects tend to attract the strongest comment--and thus to give free speech its most meaningful exercise, the court must guard against muffling discussion on the weightiest public affairs; (3) the First Amendment, in the context of ratification, repudiated British judges in the practice of punishing derogatory publication by contempt just as the Bill of Rights also repudiated British standards on restriction of religion, assembly and petition in favor of liberties of the broadest scope consistent with an orderly society; (4) neither the previously accepted criteria of "inherent tendency" nor "reasonable tendency" to bring the judiciary into disrespect measure up to the "clear and present danger" test and thereby justify restricting a free press; (5) it is not enough to show "likelihood" that publication will cause substantive evil but there must be a showing the evil also will be "substantial"--that is, "extremely serious"; and that the degree of imminence is "extremely high." Writing for the minority, Justice Felix Frankfurter recognized that the contempt power was deeply rooted in the English practice and sometimes had been abused. But he condemned "trial by newspaper," which he said the majority condoned, and exalted the ideal of a calm, rational, dispassionate judiciary unswayed by emotion, pressure and "intimidating influences." Frankfurter saw the "gorilla" editorial as an "explicit demand" levied against the judge

just a year before he would be seeking reelection, hopefully with the newspaper's backing or at least without its enmity. While criticism and discussion of the judiciary is desirable, he said, publications that interfere with impartial and calm disposition of cases should be punished. Judges, he said, "however stalwart are human" and "the delicate task of administering justice ought not to be made unduly difficult by irresponsible print." He made a distinction between the judiciary on the one hand and the legislative and executive on the other as instruments of government. The latter are organs of the public will, the former is not. Therefore, Frankfurter said, the courts require a strong weapon in the contempt power to facilitate their function and safeguard their integrity.

For most of his twenty-three years on the bench before retiring in 1962, Frankfurter was the high court's most outspoken critic of newspapers and editors. A waspish venom sometimes tipped his barbs. Frankfurter showed much solicitude for the authority of judges in the conduct of their constitutional responsibilities, viewing them as exclusive and somewhat insulated tenders of justice's sacred flame. He recognized that "There have sometimes been martinets on the bench as there have been pompous wielders of authority who have used the paraphernalia of power in support of what they called their dignity." And for this reason, a critical audit of behavior on the bench

was necessary and proper--but only when the "living process of adjudication" were done. He sought to apply stricter rules to the behavior of newsmen, than those favored by his colleagues generally. In Bridges v. California, Frankfurter began his dissent:

> Our whole history repels the view that it is an exercise of one of the civil liberties secured by the Bill of Rights for a leader of a large following or for a powerful metropolitan newspaper to attempt to overawe a judge in a matter immediately pending before him . . .

Frankfurter added:

> The administration of justice by an impartial judiciary has been basic to our conception of freedom ever since Magna Carta. It is the concern not merely of the immediate litigants. Its assurance is everyone's concern, and it is protected by the liberty guaranteed by the Fourteenth Amendment. That is why this Court has outlawed mob domination of a courtroom, Moore v. Dempsey, 261 U.S. 86, mental coercion of a defendant, Chambers v. Florida, 309 U.S. 227, a judicial system which does not provide disinterested judges, Tumey v. Ohio, 273 U.S. 510, and discriminatory selection of jurors, Pierre v. Louisiana, 306 U.S. 354; Smith v. Texas, 311 U.S. 128.
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> A trial is not a "free trade in ideas," nor is the best test of truth in a courtroom "the power of the thought to get itself accepted in the competition of the market." Compare Mr. Justice Holmes in Abrams v. United States, 250 U.S. 616,630. A court is a forum with strictly defined limits for discussion. It is circumscribed in the range of its inquiry and in its methods by the Constitution, by laws, and by age-old traditions. Its judges are restrained in their freedom of expression by historic compulsions resting on no other officials of government. They are so circumscribed precisely because judges have in their keeping the enforcement of rights and the protection of liberties which, according to the wisdom of the ages, can only be enforced and protected by observing such methods and traditions.
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> The dependence of society upon an unswerved judiciary is such a commonplace in the history of freedom that the means by which it is maintained are too frequently taken for granted without heed to the

conditions which alone make it possible. The role of courts of justice in our society has been the theme of statesmen and historians and constitution makers. It is perhaps best expressed in the Massachusetts Declaration of Rights:

"It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit."

The Constitution was not conceived as a doctrinaire document, nor was the Bill of Rights intended as a collection of popular slogans. We are dealing with instruments of government. We cannot read into the Fourteenth Amendment the freedom of speech and of the press protected by the First Amendment and at the same time read out age-old means employed by states for securing the calm course of justice. The Fourteenth Amendment does not forbid a state to continue the historic process of prohibiting expressions calculated to subvert a specific exercise of judicial power. So to assure the impartial accomplishment of justice is not an abridgment of freedom of speech or freedom of the press, as these phases of liberty have heretofore been conceived even by the stoutest libertarians. In fact, these liberties themselves depend upon an untrammeled judiciary whose passions are not even unconsciously aroused and whose minds are not distorted by extra-judicial considerations.

Of course freedom of speech and of the press are essential to the enlightenment of a free people and in restraining those who wield power. Particularly should this freedom be employed in comment upon the work of courts, who are without many influences ordinarily making for humor and humility, twin antidotes to the corrosion of power. But the Bill of Rights is not self-destructive. Freedom of expression can hardly carry implications that nullify the guarantees of impartial trials. And since courts are the ultimate resorts for vindicating the Bill of Rights, a state may surely authorize appropriate historic means to assure that the process for such vindication be not wrenched from its rational tracks into the more primitive mêlée of passion and pressure. The need is great that courts be criticized, but just as great that they be allowed to do their duty. (Emphasis added.)[16]

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[16] 314 U.S. 352 (1941).

Bridges v. California provided the foundation and set the tone for a long, twenty-nine-year line of U.S. Supreme Court decisions defining the modern American doctrine in that territory where First Amendment guarantees collide with the discarded notion of the English judge's contempt power under common law. Justice Black reflected the spirit underlying and the prevalent American attitude in these words:

> . . . (to affirm would be) to impute to judges a lack of firmness, wisdom or honor--which we cannot accept. . . . The assumption that respect for the judiciary can be won by shielding judges from public criticism wrongly appraises the character of American public opinion.[17]

Commenting on the doctrine enunciated by Black and expanded in years following, a leading student of the use of the contempt power--and the high court's attitude toward it--had this to say:

> Though recognizing the possibility of contempt treatment in the second category of press comments (interference with administration of justice) courts have been chary to find the instance where the need to protect the fairness of trials overrode the value to be gained from allowing free discussion. These cases indicate that the courts in their decisions are more concerned with the free press-fair trial civil liberties conflict than with developing a consistent doctrine with respect to the power to punish contempts by publication on theories bedded in the contempt power itself. "The Supreme Court's formula seems to grant the press a virtual immunity from contempt rather than resolve its historic struggle with the courts."[18]

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[17] Ibid.

[18] Footnote 1, supra, p. 23.

Five years after Bridges, the supreme court in Pennekamp v. Florida[19] reaffirmed the "clear and present danger" doctrine first articulated by Justice Holmes in a 1918 free speech case, and now applied to newspapers. Pennekamp also established that the pendency of a case under comment, while a matter for consideration in judging possible contempt, was not of itself controlling. The conviction of the Miami Herald's publisher was overturned. The Herald in two editorials and a cartoon had affronted a judge with its criticism of dismissal of some gambling charges, and other conduct that was deemed to have impeded prosecutions. One of the editorials said the handling of certain cases had "set people to wondering whether their courts are being subverted into refuges for law breakers." The newspaper proprietor, on appeal from his conviction, defended on the ground that the Herald's criticisms raised no clear and present danger to administration of justice in then pending cases, and accordingly operated within the protection of the First Amendment. The U.S. Supreme Court accepted this contention. Justice Stanley Reed noted that no jury was involved and comment was address to judicial actions already taken rather than prospective actions. Reed wrote:

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[19]328 U.S. 331 (1946).

> The danger under this record to thwart judicial administration has not the clearness and immediacy necessary to close the door of permissible public conduct. When that door is closed, it closes all doors behind it. . . .
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> . . . too many fine-drawn assumptions against the independence of judicial action must be made to call such possibility a clear and present danger to justice. For this to follow, there must be a judge of less than ordinary fortitude without friends or supporters, a powerful and vindictive newspaper bent upon a rule or ruin policy, and a public unconcerned with or uninterested in the truth or the protection of their judicial institutions.

The court in these words confronted the proposition of permissible timing in newspaper criticism with relation to the events criticized:

> Discussion that follows the termination of a case may be inadequate to emphasize the danger to public welfare of supposedly wrongful judicial conduct. It does not follow that public comment of every character upon pending trials or legal procedings may be as free as a similar comment after complete disposal of litigation. . . . Courts must have power to protect the interests of prisoner and litigants before them from unseemly efforts to pervert judicial action.

In a concurring opinion, Justice Frankfurter, adhering to his role as a frequent critic of the press, observed that freedom of the press was a means to an end in society, not an end in itself; and that the power granted by the free press privilege must be used responsibly. Correspondingly, he said, the theory of protection to the judiciary from exercise of the contempt power relates more to the safeguarding of functions a judge performs rather than to the judge himself.

The area of immunity from punishment by courts for contempt by publication was broadened to an important

degree by two other cases that came in rapid succession, Craig v. Harney[20] in 1947 and in the Baltimore Radio Show case of 1950. Their trust was to add stringency to the requirement that a court, in using the constructive contempt power, had to demonstrate more than the judge's dignity had been ruffled or that barbed words had stung or inconvenienced him. A strict standard of seriousness and immediacy in an alleged threat to the administration of justice was raised in this case. The court said:

> The history of the power to punish for contempt (see Nye v. U.S. 313 U.S. 33 . . . and Bridges v. California, 314 U.S. 252, . . .) and the unequivocal command of the First Amendment serve as constant reminders that freedom of speech and of the press should not be impaired through the exercise of that power, unless there is no doubt that the utterances in question are a serious and imminent threat to the administration of justice.

The court continued:

> This was strong language, intemperate language, and, we assume, an unfair criticism. But a judge may not hold in contempt one "who ventures to publish anything that tends to make him unpopular or to belittle him. . . . " See Craig v. Hecht, 263 U.S. 255 . . . Mr. Justice Holmes dissenting. The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil.[21]

Thus, the court said, the prospect of engendering some disrespect for the judiciary must be countenanced as one of the prices of free speech.

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[20] 331 U.S. 367 (1947).

[21] Ibid.

Further reinforcement of the essential view in Bridges appeared in two 1964 cases, Garrison v. Louisiana[22] and New York Times Co. v. Sullivan,[23] involving the fields of defamation and libel. Sullivan concerned an action by a public official to punish wrongful criticism of his official conduct. The supreme court ruled that an out-of-court statement must be shown to be not only false but made with reckless disregard for the truth. It also reiterated the theme that even unjust criticism of a judge was no warrant for invoking the contempt power. On this point, the supreme court said:

> Injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error. Where judicial officers are involved this Court has held that concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge or his decision. Bridges v. California, 314 U.S. 252. This is true even though the utterance contains "half truths" and "misinformation." Pennekamp v. Florida, 328 U.S. 311, 342, 343, n. 5, 345. Such repression can be justified, if at all, only by a clear and present danger of the obstruction of justice. See also Craig v. Harney, 331 U.S. 367; Wood v. Georgia, 370 U.S. 375.

On the truth-falsity and purposefulness issue, the court said:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"--that is, with

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[22] 379 U.S. 64 (1964). [23] 376 U.S. 254 (1964).

knowledge that it was false or with reckless disregard of whether it was false or not.[24]

In Garrison, the U.S. Supreme Court applied the New York Times rule governing civil libel matters to limit the power of a state to punish by criminal statute for criticism of public conduct by public officials. The case had its inception in criticism of judges by James Garrison, the district attorney in New Orleans. Garrison blamed clogged criminal dockets to the "inefficiency, laziness and excessive vacations of judges." Garrison also declared that the judges, by refusing to authorize financing of undercover investigations of vice, had hampered enforcement of anti-vice laws in New Orleans. For these statements, he was charged with and convicted of criminal defamation. The U.S. Supreme Court reversed and condemned the Louisiana statute on which the conviction was based. The statute, the high court found, permitted conviction even if the statements were true; or if false, even if they were made without reckless disregard for the truth. Justice Brennan, writing for the majority, declared:

> Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned. And since " . . . erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive' . . .," 376 U.S. at 271-272, only those false statements made with a high degree of awareness of their probably falsity demanded by New York Times may be the subject of either civil or criminal sanctions.

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[24] Ibid.

> For speech concerning public affairs is more than self-expression; it is the essence of self-government. The First and Fourteenth Amendments embody our "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." New York Times Co. v. Sullivan, 376 U.S., at 270.[25]

A case even more squarely in point, and expressly directed to alleged contempt by a newspaper in out-of-court, appeared in New Mexico v. Morris,[26] a 1965 decision of the Supreme Court of New Mexico. Here, one Will Harrison, author of a newspaper column, was charged with and found in criminal contempt for passages in six of his columns dealing with a manslaughter case. Five persons had been killed and five injured, all in a Mexican farm worker's family, in an auto accident. The offending driver, C. N. (Bill) Morris, an assistant district attorney, pleaded guilty to an involuntary manslaughter charge which recognized that Morris was drunk at the wheel. The court gave Morris a suspended $500 fine and placed him in a year's probation. Harrison contrasted the seeming leniency shown Morris with punishment meted out to two local game wardens caught shooting deer illegally and to a "humble" Santa Fe resident who, while driving drunk like Morris, struck another car, killing three persons. Morris retained his

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[25] 379 U.S. 64 (1964).

[26] New Mexico v. Morris, 75 N.M. 475, 406 P. 2nd 349 (1965).

driver's license for seven months after the manslaughter episode. Cited for contempt, Harrison pleaded the First Amendment and said his columns were informative discussions of a matter of wide public interest. The judge sentenced him to ten days in jail and fined him $250. On appeal, the State Supreme Court promptly posed the ever-present question: "where does the right of free speech or of the press end and the right to punish for contempt begin?" It immediately proceeded to consideration of U.S. Supreme Court pronouncements on the matter. It traced the "clear and present danger" doctrine as it unfolded through the years starting with Schenk v. U.S.[27] in which Justice Holmes said of restraint on the First Amendment privilege:

> The question in every case is whether the words are as used in such circumstances and are of such nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. . . .

After analyzing a series of U.S. Supreme Court pronouncements dating back a quarter century, the opinion said:

> However, insofar as the use of the contempt power in this jurisdication has been based upon comments that merely "tend to" interfere with or "tend to" obstruct the administration of justice in a pending case, without a determination of whether the claimed inherent tendency to obstruct amounted to a clear and present danger or imminent peril that the evil result may be accomplished, those cases can no longer serve as precedents in view of the principles laid down by the Supreme court of the United States since Bridges v. State of California . . .

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[27] 249 U.S. 47 (1918).

A little farther on, Smotherman v. U.S., a U.S. Court of Appeals case heard in California, was quoted approvingly:

> . . . while the remarks were, of course, vexatious and irritating, to say that they had the effect of intimidating, coercing or influencing the judge from his course of duty is to fail to accord him that strength of character and judicial fortitude common to the judiciary and so vividly exemplified by the long record of his judicial acts. . . .[28]

The contempt conviction of Harrison was set aside.

Meantime, within Michigan, it appears there was no occasion to apply the modern thinking of the federal high court. A long train of cases, some dating from the 19th century, support contempt convictions for out-of-court criticism in pending cases on two grounds. One is the ancient English dogma resting on Judge Wilmot's unpublished opinion, namely that the common law gives a court widely latitude in punishing those who would speak disrespectfully of it. The other, also long discredited outside the state, employs the "tendency" doctrine enunciated in the Toledo Newspaper Co. case and overruled in Nye. One of the principal Michigan cases apparently regarded by visiting Judge Breakey and attorneys sharing his views as having relevancy in the Turner case was an 1896 ruling, in re Chadwick.[29] In this seventy-three-year old case, an

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[28]U.S.C.A. 10th Cir., 186 F.2d 676.

[29]109 Michigan 588 (1896).

attorney, an officer of the court, wrote a letter to the judge criticizing his conduct and stirring his wrath. Judge Grant, in sustaining a contempt conviction, harked back directly to the autocratic, long discarded notions of Judge Wilmot who was approvingly quoted:

> The power to punish for contempt . . . is essential to the proper administration of the law . . . and to preserve the confidence and respect of the people without which the rights of the people cannot be maintained and enforced.

Judge Grant made it clear that he had little patience for a narrow construction of the pending case theory. He wrote that:

> . . . under respondent's contention, a party may threaten to do an act, or charge corruption upon the judge, or that he has submitted to private interviews with litigants, and, if the case is then pending, he will be subject to summary punishment by the court, but, if the decree has been pronounced, or judgment rendered, or order made, he may, the next moment, with impunity do the same acts or utter the same statements, and leave the judge to the sole remedy of an action for libel or slander. This is too narrow a construction of the law of contempts, and is not sustained by the best-considered cases.

Judge Grant took approving note of the language of Justice Kent in Yates v. Lansing,[30] as follows:

> Whenever we subject the established courts of the land to the degradation of private prosecution, we subdue their independence and destroy their authority. Instead of being venerable before the public, they become contemptible and we thereby embolden the licentious to trample upon everything sacred in society, and to overturn those institutions which have hitherto been deemed the best guardians of civil liberty.

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[30] 5 Johns. 282.

A vague link seemed to relate to the Turner situation in that the idea of judicial corruption was introduced by Chadwick in his letter. Judge Grant intimated that while criticism in other forms might be acceptable to mention corruption was to pass beyond the line of tolerance. Said Justice Grant:

> So long as critics confine their criticism within the facts, and base them upon the decisions of the court, they commit no contempt, no matter how severe the criticism may be; but when they pass beyond that line, and charge they have not had a fair trial or hearing on account of the corruption of the presiding judge, or his listening to arguments and personal interviews out of court, the tendency is to poison the fountain of justice, and to create distrust, and destroy the confidence of the people in their courts, which are of the utmost importance. . . .

A second case apparently accorded considerable weight came forty-two years later, still in advance of any of the landmark federal cases that began with Bridges v. California. The 1938 Michigan case was In Re Gilliland.[31] Among others, Gilliland made the point that a conscientious court had not only the right but the duty to repel criticism of a vilifying or contumacious nature by instituting contempt procedings. The Michigan court said:

> The remaining question in regard to the first charge of contempt is whether there is any evidence to support the finding of the trial judge. It is true that courts should not be overly sensitive. Criticism of the courts within limits should not be discouraged and it is a proper exercise of the rights of free speech and press. Such criticism should not subject the critic to contempt procedings unless it tends to impede or disturb the administration of justice. The courts should

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[31] 284 Michigan 604 (1938).

> realize that disappointed suitors, their attorneys, and agents, may be prone to criticize the court and possibly indulge in outbursts of disappointment or temper and make unguarded and improper remarks. Nevertheless, such remarks, if of a vilifying or contumacious nature, subject the makers thereof to accompanying penalties. It is the right and duty of a conscientious court to protect its good name, when the offending statements may impede or disturb the proper functioning of the court, and the fact that judges are apt to overlook transgressions of this character does not excuse or justify contemptuous utterances. See Campbell v. Judge of Recorders Court, 244 Mich. 165; in Red Chadwick, 109 Mich. 588, where we quote from Yates v. Lansing, 5 Johns. (N.Y.) 282.

The Gilliland case obviously followed the prevailing "inherent tendency" doctrine of the time as set forth in Toledo Newspaper Co. v. U.S., later expressly rejected in Bridges. The Campbell case mentioned in Gilliland and of the same vintage involved a contempt written by a party to a suit in a pending case. It was decided in 1928. Other contempt cases in Michigan history of the last eighty years all seemed to have some peculiarity that made them quickly distinguishable from a simple contempt by publication episode. Langdon v. Judges of the Wayne Circuit Court[32] arose out of an alleged attempt to bribe jurors. It did not involve disparagement of the court. The case was decided in 1889. Russell v. Wayne Circuit Court[33] dealt with an attempt to intimidate witnesses rather than an attack on the court. It was a 1904 decision. People v.

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[32] 76 Michigan 358 (1889).

[33] 136 Michigan 624 (1904).

Doe[34] concerned alleged false testimony by an attorney, an officer of the court. People v. Yarowsky[35] concerned civil contempt--alleged disobedience to an order of the court. Of the two prominent contempt cases in what might be called the modern era of the law in this field, In Re Oliver[36] related to false information given a grand jury, and In Re Huff,[37] disobedience by a circuit judge to an order by the supreme court to sit temporarily in the Wayne County circuit rather than in Saginaw where he was elected. One scholar, Fred S. Siebert, the retired dean of the Michigan State University College of Communication Arts, said diligent search failed to disclose a recent Michigan case raising the issue of what limitations the Michigan constitution's free press guarantee place on the court's power to deal with contempt by publication. Siebert is an attorney and a long recognized authority on law of the press. The applicable provision of the state constitution is a wordy paraphrase of the federal free speech guarantee. In

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[34]225 Michigan 5 (1924).

[35]236 Michigan 169 (1926).

[36]318 Michigan 7 (1947).

[37]352 Michigan 402 (1958).

[38]Mich. Const. Art. I, Sec. 5: "Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech or of the press."

Siebert's view, practically all Michigan case law in the contempt field was in effect overruled by Bridges v. California in 1941 even though no Michigan court, to this date, has seen fit to declare this to be true. Siebert's general rule makes an exception in the case of Huff, which can readily be distinguished as lying outside the purview of Bridges. The issue in Huff was a judge's contemptuous refusal to accede to an order from his own supreme court in its role as constitutionally superintending authority over the entire court system of the state.

CHAPTER III

THE TRIAL: IN RE TURNER

When James C. Turner was summoned to the Victorian-style courthouse in Howell to answer contempt of court charges on April 19, 1968, he had less than six months experience as a newsman behind him. Some of the 200 persons who crowded the courtroom thought of him as a relative newcomer to the community, even a bit of an interloper since by now he had stirred powerful passions and incurred the hostility of influential men. But Turner was a seasoned businessman not readily overawed by his surroundings. And he wasn't a stranger despite his sometimes disparaged origins in Lubbock, Texas. Nor was he altogether friendless or without confidence, bolstered by knowledge that his second wife was assured a most comfortable inheritance.[1]

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[1]At age forty-six, Turner, chunky and out-going, hardly tallied with the crusader's image of lean tenseness and stridency. He smokes, drinks, plays bridge and golf, and tells a good story--all alien to his Southern Baptist upbringing in the Bible Belt. "They used to think of me as something of a playboy around here. I like to mimic and carry on, to try to be the life of the party, and I guess I often was," he recalled in an interview. A successful sales career in women's fashion shoes bolstered

Important industrial and business leaders were behind Turner as he appeared to face trial that sunny day, at least to the extent of providing indispensable financial support for the publishing venture that led to the confrontation. State Representative Thomas G. Sharpe, Republican of Howell, an able and seasoned legislator already serving his fourth term, also was in his corner. Sharpe took a front row seat in the courtroom and visited with constituents before proceedings began and during recesses.

Turner's publishing enterprise was not a spur of the moment affair. Neither was it launched to expose or torment Livingston County judges and lawyers, although by this time it was firmly committed to this course by a series of chance events and Turner's aggressive nature. The stage had been set for his entry into the news field

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confidence that had begun to show many years before when he was president of his senior class in the Lorenzo, Texas, high school. Turner was emboldened to take his flyer in the risky publishing field by the promise of financial security for his family through an assured inheritance to his wife. His wife's father, the late James G. Muir, a Wolverine Shoe Co. executive and stockholder, was Turner's boss at one time, and the son-in-law came to regard him as a sound teacher and exemplar. Turner says he owes a great deal of his resolve to "do something for my community" to the example and advice of Muir who, Turner said, counseled wise use of money rather than a storing-up of it. Although Turner never went to college and was given to some common grammatical errors, he naturally commanded a peppy, no-nonsense writing style with considerable blunt impact. The foregoing is based on author's observation of Turner during and after his contempt trial and on interviews with Turner April 19, 1968, and April 8, September 11, October 3 and November 28, 1969.

in early 1965. Turner, a resident of Howell in the late 1950s, had returned to the community a short time before after serving in Maine, the west coast, and the south-eastern United States in executive posts for International Shoe Company. Most recently he had run the company's Clark Shoe division in Auburn, Maine, as general manager. He was under a physician's warning to relieve driving tensions that had threatened him with nervous exhaustion, and sought a thorough-going readjustment. Fond of the community, and recognizing its industrial growth potential, Turner toyed with the idea of getting into what gave promise of an expanding publishing market. He looked into acquiring the Livingston County News but abandoned such thoughts upon learning of what he regarded as the paper's astronomical debt. He looked into prospects for acquiring the Argus-Dispatch in Brighton. No sale, he was told. He inquired about the Fowlerville Review. Meantime, his appetite was whetted by a chance spell of running the local radio station, WHMI, while the station owner left for several months to adjust health and other personal problems. His confidence bolstered, Turner told himself a new publication could make itself economically competitive by adapting to offset printing production methods in place of the costlier letterpress process used by the existing weeklies. In January and February of 1965, Turner made the rounds of a dozen potential large advertisers, many of them

clients for his advertising business, Turner & Associates. He collected a batch of thirteen-week advertising contracts, and laid plans quietly for the prompt establishment of a new publishing venture. In late February, a blizzard hit south Central Michigan, snowing in Howell residents for days. Shoveling huge drifts in his driveway, Turner aggravated a wartime back injury. He was taken to St. Lawrence Hospital in Lansing. It was eighteen months before he was finally discharged. The rival weeklies had changed their production methods and his publishing dream had gone up in smoke--for the time being, at least. In the approaching autumn of 1966, Turner returned to his advertising agency and started rebuilding it. He had nineteen clients, including three or four large accounts, within a year. The business included placing advertisements in the Livingston County and surrounding papers, keeping him in close touch with publishing circles. With business flourishing, Turner had ample time to burnish business and industrial contacts, and to enjoy himself at golf and bridge.

> As the summer faded, my big sod account in the south part of the county (Emerald Valley Turf Nurseries, Gregory, Michigan) went into hibernation. I had by then picked up a couple of staff people. This left three choices. I had to get a new account to replace it, reduce my staff, or find some new or additional thing to do. So I decided on starting a new publication. I was confident of strong backing from the industrialists. Many of them could see opportunities that weren't being realized, that the community was being held back. There were backwaters of government obviously neglected. There were misgivings about the probate court. We had no juvenile division and things were just badly handled. There was much talk about it.

> As for the attorneys generally, the industry and some of the well established business people were unconcerned about their own affairs. Many of them depended on outside attorneys for their major business needs. But some were disgusted at mistreatment of their employees when these people would come up against the local ring. Still, there was no real thought at the beginning of tackling this, other than maybe finding out what could be done about probate court conditions.[2]

Turner unveiled his new publishing venture a few days after Thanksgiving with the December issue, Volume 1, Number 1 of Today. The format copied that of Time, the national news weekly magazine. It was conceived as a monthly to allow more scope for thoughtful and deep consideration of community and government affairs. A gray diagonal sliced across the upper right hand corner of the cover, bearing the words "issues-ideas-opinions." The cover picture showed William Doucette, president of Howell Gear Inc., a twenty-one-year old, sixty-five man operation just installed in new quarters opposite the Livingston County airport. Doucette was held forth as an example of responsible industrial leadership that had devoted time and money to community betterment. The lead article dealt with education, urging a new look at a defeated proposition for setting up a community college. Other departments of the publication included: "Vocational Study," "Politics and People," "County Supervisors," "Lower Court Reform" (dealing with impending abandonment of justice of the peace courts), "Banking," "Pollution," and "Farming and

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[2]Interview with Turner, April 8, 1969.

Industry." Only in an article discussing bumbling by the county board of supervisors in deciding on a jail site did Turner show any sign of the aggressive probing approach that marked work that was to follow. Advertisements in the magazine revealed impressive support from industry and commerce. Four advertising pages were taken by Howell Town & Country, Inc., a thriving real estate-insurance-mobile homes-construction enterprise, three were devoted to the new Howell Gear plant, including two apparently paid for by contractors and suppliers on the project, three more by Howell and Brighton banks and building and loan institutions, two pages by sign firms, a couple of pages by a sod farm and sod cutting machinery manufacturer, and two pages by insurance agencies. Other full pages were taken by a dairy, a Brighton printer, a retail appliance dealer, an auto dealer, and a funeral home. There was nothing much to suggest an unorthodox publishing approach beyond the striking Time-like format and the magazine's monthly timetable.

When he entered the courtroom that Friday in April at 1:30 p.m., Turner was flanked by Attorney Paul Mahinske, a salaried member of Michigan's Workmen's Compensation Appeal Board who agreed to represent him in the case. Mahinske lived in Howell but did not practice there, commuting daily to Lansing or Detroit. In 1961, Mahinske, then a resident of Hamtramck, had been elected to the

1961-62 Michigan Constitutional Convention. In the convention, he had made common cause at key junctures with the George W. Romney faction.[3] When Romney became governor, Mahinske received the state appointment. The post involved dividing time between Detroit and Lansing, and Mahinske chose to live in Howell near the mid-point between the cities. His practice in the community was negligible. He took the Turner case on a volunteer basis, presumably not unaware of the limelight the role might bring and the possible political preferment. (Seven months later he was elected to a six-year term as circuit judge.) State Representative Tom Sharpe was conspicuous in the courtroom crowd. He, too, was sympathetic toward Turner, and may have foreseen political gain by identifying with a popular cause.

By arrangements that are not precisely clear, Circuit Judge James R. Breakey, Jr. of Ann Arbor occupied the bench that day, sitting in place of Circuit Judge Michael J. Carland of Owosso. Carland normally presided but had disqualified himself. Michigan Court Administrator William R. Hart recalls that the Breakey-for-Carland substitution was cleared by his office, but informally and perhaps on the suggestion of Carland or someone else in Howell. Breakey, then twenty-five years on the bench, was geographically close by--fewer than thirty miles separate

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[3] Today, January, 1970, p. 11.

Ann Arbor and Howell--and the Washtenaw County circuit was then well stocked with three judges and its dockets were current almost continuously. Breakey had a reputation as a hard-working judge and strict disciplinarian and could be expected to get down to business quickly with a tough case. Also a trifle obscure was the arrangement for counsel to prosecute the show cause petition directed against Turner. Townsmen of Breakey, they were Louis E. Burke, an outstanding criminal law practitioner in earlier years but then in semi-retirement, and Richard W. Ryan, a Burke partner, who carried the courtroom load 100 per cent. They were men well known to Breakey, attorneys who practiced before him, who moved in the same social circles, and who hobnobbed with him at monthly meetings of the Washtenaw County Bar. That they should take up the cudgels of the law before Breakey in Carland's behalf bespeaks something at least approaching fraternal ties to forces arrayed against Turner, and could be taken to support the notion later documented at bar disciplinary hearings that Turner was the target of a coordinated effort to discredit him. After twenty-one months of service by Burke and Ryan in the case, the Livingston County Treasurer's records disclosed no disbursement to them. Ryan said Carland had engaged them and that payment had not specifically been discussed. The amount, timing, and source of compensation conceivably could be decided after the case came to final rest, and depending somewhat on the outcome. Although the

time had run by January, 1970, for applying for leave to appeal to the State Supreme Court, emergency leave remained a possibility in a case so sensitive for bench and bar. If Carland finally prevailed, it might not seem unreasonable for the state (Livingston County) to pick up the tab for successful defense against an attack on the judge's reputation; if Turner finally prevailed, Carland might reveal a plan to pay from his own pocket, or Burke and Ryan conceivably could announce that their services had been donated.

Breakey, late in arriving, quickly disposed of preliminaries. The judge accepted consents from opposing counsel for his sitting in Carland's place, exchanged recognitions with counsel, read the complaint and cited what he regarded as the test for a contemptuous statement--that it be "false, malicious and contemptuous," and secondly that it "hinder, impede or obstruct due administration of justice."[4] With little further ado, Mahinske, counsel for Turner, challenged the jurisdiction of the court over Turner and the subject matter, and moved dismissal of the petition. Mahinske argued that the alleged offense occurred outside the hearing and the view of the court, and further that the speech and publication complained of did not relate to a pending case. The coupling of the two

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[4]Account of April 19, 1968, and subsequent hearings based on author's personal observations and notes as reporter for the Detroit Free Press.

considerations--that Turner acted outside the presence of the court, and the lack of a pending case made the petition deficient as stating a cause of action, Mahinske said. Breakey, thumbing a stack of opened law books, quoted a Michigan statute condemning "false or grossly inaccurate" accounts of judicial proceedings as contemptuous, and turned next to in re Chadwick, apparently an anchor case in Breakey's mind despite its antiquity (seventy-two years old). He cited other cases. "The supreme court and other courts of general jurisdication have an inherent power over contempt that is not limited by statute except as it may infringe constitutional rights," he intoned from the bench. Mahinske in reply cited New York Times v. Sullivan, and Garrison v. Louisiana, seeking to show the courts were limited by the First and Fourteen Amendment guarantees. If there was any offense, Mahinske said, it would have to be alleged as criminal contempt out of the presence of the court, rather than civil, and that this injected a question of truthfulness and of a jury trial. In an allegation of contempt brought under the criminal theory, Mahinske argued, truth would be a defense. The U.S. Supreme Court established in the Times case, he added, that in criticism of a public official even when falseness of fact was determined it was still necessary to show further that a statement with knowing malice or in willful disregard of truth or probable falsity. Mahinske argued that if offense

occurred in such a situation the proper redress was through proceedings for libel or slander, not in contempt. Morever, Mahinske said there was no claim that Turner, in his criticisms, necessarily referred to the circuit court of Livingston County in particular, possibly not even in general. He said there was no showing that Turner's remarks interfered with the existing business of the court. Ryan urged the "inherent power" theory dating from Judge Wilmot, and said it was not limited to occurrences in the court's presence. As for the matter of a pending case, Ryan said the breadth of Turner's criticisms reached all docketed cases--there was no need of particularizing as to effect. Truth or falsity was no issue, Ryan said. Breakey broke in that all judges of Michigan, not alone all judges of the county, were concerned. "We're not in a position to let it go idly by. . . . The court considers there's an inherent power to treat of and, if need be punish for contempt. The court is not bound by the strict limits of the statute,"[5] Breakey said. He then announced that on the face of the pleadings and affidavits he was determining (1) that a cause of action had been set forth, (2) that jurisdiction was sufficient under the April 9 order, and (3) the court did not believe it was restricted to the alleged violations of a court order, but that its powers embraced any instance of "unwarranted criticism that tends

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[5] Ibid.

to impede or disturb the administration of justice."[6] Thereupon, Judge Breakey denied Mahinske's motion for summary dismissal of the complaint. This being so, Mahinske said a jury trial would be necessary, and asked for a ruling. After a half hour recess, Breakey resumed the bench and denied Mahinske's request for a jury trial. There is no right to a jury in a contempt proceding, Breakey declared. He went on:

> It seems to me that these statements certainly hold the courts up to disrepute, and anything that causes the courts to be held in disrepute causes a material lessening in respect for the courts, and tends to impede the proper administration of justice.[7] (Emphasis supplied.)

The judge then determined that truth or falsity was no issue as to determining guilt. But he intimated that a defendant could expect better treatment if he was shown to have spoken the truth. Thereupon, Breakey decided another important procedural matter; that he would not rest the burden of proof of truth on the plaintiff, that is Judge Carland; "the respondent [Turner] is at liberty to prove the truth of his statements."[8] Following another recess, Ryan asked Breakey to render judgment on the pleadings. This motion was denied without prejudice. Breakey thereupon swore Turner as a witness and questioned him on the affidavits. The Judge elicited from Turner the statement that he lacked personal knowledge of the mafia in Chicago

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[6] Ibid. [7] Ibid. [8] Ibid.

and New York, also that he could not accurately enumerate all the elements of the Livingston County court system. Turner said he considered the system to include its courts and its officers, the attorneys of Livingston County, but that he didn't know how many justices of the peace courts the county had, nor circuit court commissioners.[9] The day's hearing ended with a discussion of filing of written briefs, and responses that were to set the stage or oral arguments on May 17.

With Judge Breakey again on the bench in Howell, Mahinske on May 17 renewed his motion for summary dismissal of the charge against Turner. He argued that the critical references at issue were made outside the presence of the court and were directed against no particular pending case or cases. Ryan, arguing for Carland, and Breakey dwelt on these contentions: the firm, Lavan & Lavan, was counsel in seventy-eight March and May term cases--about 20 per cent of all those pending--and Turner's remarks, alleging corruption, constituted a "clear and present danger" to the proper administration of justice with respect to all of them; that Turner must prove corruption"; the burden was on him to show something, not on the court to defend itself; that even so, the accused was not entitled to a jury trial; that there is a distinction between alleging judicial corruption and mere criticism of

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[9] Ibid.

the courts.[10] Judge Breakey again insisted the publications "were contemptuous on their face; to say he's corrupt is about the worst thing you can say of a judge on the face of it."[11] Breakey again took the position that even proving the truth of his statements would not necessarily excuse Turner from punishment.

Cornered increasingly by Judge Breakey's rulings and expressions from the bench, Mahinske, after conferring with Turner during a recess, asked that hearings be continued to a later date to allow preparation of proofs of Turner's allegations and to produce witnesses. For the moment, it appeared the defense was prepared to ventilate in court the conduct Turner had assailed in Today. Judge Breakey overruled Ryan's objections but prescribed strict conditions for proceedings, which he set for June 26. Mahinske was instructed to file an outline of "exactly what is going to be claimed" nearly a month in advance--on May 31. Ryan was given until June 7 to file a reply brief. Judge Breakey made it clear he didn't want any surprises. "I don't want to just come on the bench and have counsel say 'I'm going to call so and so,'"[12] he said.

Mahinske filed a broad outline of how he wished to proceed on May 29. On June 3, Judge Breakey issued an order suppressing the case file, presumably to protect any persons Mahinske might single out in his pleadings.

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[10] Ibid. [11] Ibid. [12] Ibid.

Shortly afterwards, he ordered a resumption of hearings on June 10, sixteen days ahead of the date set earlier.

When the court convened on the tenth, Judge Breakey announced that WMSB-TV, the television station affiliated with Michigan State University, had asked the court's permission on May 31 to make sketches in the courtroom during the June 26 hearing for use at a subsequent time. Breakey refused permission, holding that Canon 35 of the American Bar Association governing such matters had been adopted by the Michigan Supreme Court to control behavior in state courts. He said sketches during court sessions, or during recesses, would be considered violations. Following the court's announcement, Attorney Ryan asked the court to strike what he described as a "bill of particulars" filed by Mahinske on May 29. He criticized it as too "vague," and that he had understood witnesses would be named, and prospective testimony outlined in some detail. Ryan also implied, in a concept further calculated to cut down Mahinske's room to maneuver, that any proofs and witnesses be limited to alleged corruption of the circuit court, and exclude other elements of the county judicial system.[13]

Mahinske had made his pleading purposefully vague. Although not admitting it publicly, Turner's counsel

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[13] Ibid.

confided privately[14] that he feared harrassment of witnesses identified in advance, and even that some might be dissuaded from taking the stand, once their identity became known. In typical passages, the document read:

> Respondent will also testify to, with support of other witnesses, his discoveries in attempting to put together articles for his magazine. Such testimony will show, or establish, that in the handling of a certain probate matter, three attorneys, acting in concert, secured for themsleves money and property from that estate via improper representations to their clients, the court and the estate. It will also be shown that at different times two of these three attorneys subsequently became members of the judiciary of Livingston County. . . .[15]
>
> It will be further shown by respondent that all the above facts, information and documents were presented to the local bar association for its consideration and action but the same were either refused or ignored and said association made no effort whatever to either prove or disprove the apparent improper activities of the parties concerned.[16]

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[14]Interview with Judge Mahinske, October 3, 1969.

[15]Outline of defense claim, filed May 31, 1968, in re Turner. Author's comment: This paragraph transparently is a summary of the Rosa Miller case involving chiefly Martin Lavan, Stanley Berriman and Francis Barron as published in Today, February, 1968. At this point, proceedings had become a charade. Considering that the contempt power had been used already to strike a body blow to Turner, and that the defendant had been ordered to the witness stand by Judge Breakey and grilled with obvious hostility, it should occasion no wonder that Mahinske sought to protect any friends of the defense from needless bullying by responding as he did.

[16]Ibid. Author's comment: This was an extremely mild statement of what happened, as hearings by State Bar Special Grievance Committee No. 10 were to establish in December, 1968. The series of hearings, on the basis of sworn testimony, set forth such a concerted effort on the part of the Livingston County Bar, with Judge Carland taking part, to discredit and silence Turner that the bar panel referred to conduct tantamount to "blackmail." Refer:

> Proofs will be presented to establish improper use of judicial offices to bring pressure upon advertisers in respondent's magazine after the above-mentioned findings had been published therein. . . .[17]

After attacking the sufficiency of the document, Ryan moved for a summary judgment finding that Turner was, in fact, guilty of contempt.

Judge Breakey, momentarily deferring action on Ryan's motions, joined Ryan in expressing displeasure with the Mahinske pleading. He brushed aside Mahinske's protest that no explicit demand had been made for witnesses names, and declared that unless names were produced, he would grant the Ryan request. He pointed out that he had suppressed the file in the case, limiting circulation of information in the pleadings. The judge said he wanted "dates, names and claimed ultimate facts," and hinted that he might require that the material be submitted under oath. "The person who indulges in this sort of thing should have to prove it,"[18] he remarked. Breakey declined Ryan's request to strictly limit allegations and testimony to the

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In the Matter of John R. Brennan, Grievance File No. 26061, A member of the State Bar of Michigan, Livingston County Circuit Court files.

[17] Ibid. Author's comment: Turner made many claims informally along this line, and perhaps had evidence but was never obliged to produce it. In one instance he related, Municipal Judge Berriman examined a new set of auto tires at a store in Howell that advertised in Today, then told the proprietor he would buy the tires if the store cancelled its future advertisements.

[18] Authors personal observations and notes as reporter of proceedings for the Detroit Free Press.

conduct of the circuit judge, Michael Carland, the complainant. But he did not exclude the possibility of such a ruling in the future. The threat of doing so was regarded on the Turner-Mahinske side as crucial to the defense strategy. On the assumption that "the entire judicial system" of the county was subject to courtroom scrutiny, the defense had planned to prepare and issue more than 100 subpenas.[19] This course was abandoned.

The climax came June 26. Mahinske told the court Turner was prepared to rest on the record made the first day in court, April 19, subject to consent for minor corrective amendments in the pleadings of that day. It was a classic reliance on the First Amendment reliance on free speech.

> Turner does not have to come before anybody and explain how, why, when or whether he published something, whether it was malicious, true or false, or what was his intent. These are subject matters for somebody else's proof. His position is: he has made certain statements; if anybody wants to complain about them, they have their avenues--most probably in actions for libel, slander or defamation. There is no ground for answering to contempt.[20]

In reply, Ryan, arguing for Judge Carland, accused Turner of malice, said he had offered "not one iota" of supporting evidence and urged a conviction.[21]

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[19]Interview with Turner, June 26, 1968.

[20]Ibid., notes and observations.

[21]Ibid.

Judge Breakey disposed of accumulated motions, and then launched into an eighty-minute recital from the bench of his opinion. He said a state statute protecting Michigan courts against out-of-court contemptuous statements was controlling. He found that Turner's assertions were made maliciously. He held that Turner's unwillingness to accept the burden of proving their truth by bringing witnesses into court showed bad faith. He ruled that Turner was not entitled to a jury trial, and that the claim of privilege under the First Amendment was without merit. At one point, after he had declared that Turner had acted in malice, the judge thought he detected levity in the courtroom audience. Breakey broke off his dictation to instruct the bailiff to halt "snickering and smiling" among the spectators. He admonished all hearers that he would not tolerate such conduct. He wound up by pronouncing Turner guilty. After a brief recess, Judge Breakey at 12:25 p.m. fixed the punishment--fifteen days in jail and a $150 fine, and adjourned court.[22]

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[22] Ibid.

CHAPTER IV

THE APPEAL

Mahinske, his mind now settled on a strategy, served oral notice of appeal immediately upon pronouncement of sentence. He soon after began the formal procedures--the filing of notices, ordering preparation of transcript, drafting of a brief for the reviewing judges of the State Court of Appeals.

Word of the conviction fell with a dull thud in the news publishing community, until then slumberingly unaware of what was going on in the Howell courtroom. As previously noted, the great metropolitan dailies in Detroit were shut down by labor difficulties. Shock was the first reaction. Gradually, various segments found their voice. With Knight Newspapers Inc., leading the way, four newspaper groups rallied to the defense of the embattled Turner, recognizing that his fight was the fight of them all, and that the First Amendment was under ominous attack. Besides the Knight organization, prominently including the Detroit Free Press; the Central Michigan Chapter of Sigma Delta Chi, professional journalism society, the Michigan Press

Association and Local 24 of the American Newspaper Guild, comprising editorial employees of the Lansing State Journal, hastened to enter the case as friends of the court.[1] A fifth organization, the Lansing Chapter of the American Civil Liberties Union, also sought to intervene but was denied the privilege because of a late filing.[2] Brownson Murray of Detroit, attorney for Knight, in addition to signing the Knight brief appeared "of counsel" on briefs of the MPS and Sigma Delta Chi, both prepared by Fred S. Siebert. Murray's sponsorship was necessary because Siebert, although a licensed attorney, lacked certification required to practice in Michigan. Oddly, a three-judge appeals court panel split two to one in granting the Knight and MPA motions to intervene. Judge Timothy Quinn of Caro dissented. He gave no reason.

All the intervenors saw the Turner conviction as an attempt to stifle legitimate criticism of public agencies--and the courts in particular--in violation of the U.S. constitutional guarantee. In announcing its decision to its members to intervene, a Michigan Press Association official said:

> MPA is not willing to let go unchallenged the precedent that a court can call in a person who criticized its actions, demand proof, rule on its validity and set a penalty for contempt. Judges and lawyers can deal with such charges through the same channels of libel and

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[1] In re Turner, Michigan Court of Appeals, Docket #5846.

[2] Ibid.

> slander as others, but not through contempt. When one realizes how this precedent would prevent anyone from criticizing courts, no matter how valid the cause, the danger to the nation is clear.[3]

By the time the battle was joined at the appeals court level, state officials, moving in tortoise-like stride, began to trickle forth scattered hints that something indeed might be amiss in Livingston County, as Turner had alleged. In September, the Michigan State Bar finally reacting to Turner's demand for investigation and punishment of wrong-doers in its ranks, announced that ten charges had been filed under secret grievance procedures against "certain" unnamed Livingston County attorneys. A special blue ribbon grievance panel was established to carry forward the procedings that conceivably could lead to censure, suspension or disbarment of accused attorneys.[4]

The appeals judges, as they tackled the case, doubtless were aware of other events inextricably linked with Turner's endeavors, and his plight. Representative Thomas G. Sharpe, Republican of Howell, was preparing to introduce a bill for licensing and disciplining of attorneys by a predominantly lay board appointed by the governor, a notion that made leaders of the integrated bar shudder. The Sharpe bill was much in the mind of

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[3]Michigan Press Association, Confidential Bulletin No. 40, Oct. 3, 1968, p. 1.

[4]Detroit Free Press, Sept. 26, 1968.

President-Elect A. DeVere Ruegsegger when he delivered an address at the 1969 convention of the American Bar Association in Dallas entitled: "Is the Organized Bar on Trial--The Michigan Story." State licensing had been staved off, Ruegsegger told his Dallas audience, but the threat might well be renewed with greater prospects of success unless the bar showed more zeal in disciplining erring members.

Attorney General Frank J. Kelley, like the state bar a recipient of sixty-nine pages of documentation from Turner, by now had applied to the circuit court for help in running down missing records in 150 minor arrest cases brought before Martin J. Lavan's son, Brian, when the son served in 1965-67 as a Justice of the Peace in Brighton. However, nearly a year was to elapse before Kelley finally lodged criminal charges against Brian Lavan.

And the Michigan Supreme Court, late in October, reacted belatedly to Turner's request for an investigation. It did so in a way that stirred severe criticism and possibly cost one of the justices, then seeking voter approval for another term, a renewed tenure on the court. The event was thus reported in several outstate newspapers:

> Lansing--The Michigan Supreme Court, with a dose of seeming "selective justice," apparently has cleared a Livingston County judge of misconduct charges and let him disclose that decision to a local weekly newspaper two days before it was officially made public.
>
> Officially, the announcement Thursday said the court administrator's office had concluded an investigation of the Livingston Circuit Court and found "no evidence of misconduct or irregularity on the part of Circuit Judge Michael Carland."

> It stressed that the statement should not be interpreted as an expression of Supreme Court opinion on the appeal which led to the charges.
>
> Actually, it is the Supreme Court itself which must make the decision in such an investigation, and Court Administrator William R. Hart, as in all press releases from his office, follows the instruction of Chief Justice John R. Dethmers.
>
> The mystery is, which justice spilled the decision to Judge Carland before the court administrator was even officially permitted to issue it? . . .[5]

New light was shed on the event in the next three days. Dethmers disclosed himself as the author of the leak, saying it was in response to a telephone inquiry from Carland. Inspection of the minutes of the supreme court's action, made available only after the terse announcement from Hart's office, further revealed that the decision was supported by only four of the seven justices. In sharp dissent, Justice Paul Adams disclosed that the court moved in response to a letter appeal, dated September 30, from Carland asking "clearance" of any charges. Adams noted that the deputy administrator labeled a report the previous March 29 on conditions in Livingston County as "preliminary." The document did not attempt to cover twenty-five criminal cases brought up by Turner in his February issue. Also, Adams said, Carland's conduct might come before the court in the appeal of Turner's contempt conviction. The only proper approach to granting Carland's plea was to first have a "full, complete and final investigation,

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[5]Grand Rapids Press, Oct. 25, 1968.

hearing and determination by this court," Adams wrote.[6] Justice Thomas M. Kavanagh declined to vote. Justice Harry F. Kelly was absent from the October 21 conference of the court, and was not recorded on the question. Justice Michael D. O'Hara proposed the resolution absolving Carland, a fact that came to be closely scrutinized by observers of his then pending candidacy for a new term.[7] There is no way of measuring whether the supreme court's action influenced the court of appeals review of the Turner conviction, then in progress.

Counsel for Carland in the litigation against Turner filed their brief with the court of appeals December, and oral arguments were heard in April, 1969, by a three-judge panel of that courts consisting of Judges S. Jerome Bronson, R. B. Burns and Charles L. Levin. In anticipation of election to the circuit bench in November, Attorney

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[6]Michigan, State Supreme Court, minutes of conference, Oct. 21, 1968.

[7]Michigan, Department of Administration, Official Canvass of Votes, August 6 primary and November 5, 1968 general election; also, Interview with O'Hara Oct. 1, 1969. O'Hara was defeated for reelection to the supreme court by Appeals Court Judge Thomas Giles Kavanagh, losing 1,034,764 to 1,063,342, a plurality of 28,578. Detroit Free Press editions of Friday, Nov. 1, 1968, hit the streets four days before voters went to the polls with a lead editorial, topped by a three-column head reading: "Supreme Court Justices Were Rash in Their Hasty Clearing of Carland." Immediately below appeared a second editorial endorsing judges in the forthcoming election. As to the supreme court contest, it concluded: "Justice O'Hara, however, made a serious error in judgment last week, as noted above. For this reason alone, we lean to Judge Kavanagh . . . " O'Hara blamed the episode for his defeat.

Mahinske had brought in State Representative Thomas L. Brown, Republican of Lansing, as co-counsel.[8] With Mahinske disqualified by virtue of election as judge, Brown appeared before the appeals tribunal, arguing opposite Ryan, attorney for Carland.[9] From a legal standpoint, the oral arguments produced nothing new of significance. Permeating the atmosphere in the courtroom in Lansing, but unmentioned by counsel, was knowledge that eight members of the Livingston County Bar accused by Turner by now had been cited to answer why they should not be disciplined for improper conduct. Martin Lavan was under court order to answer in the circuit court at Howell, thirty-seven miles distant, on April 18--seven days hence--and former Judges

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[8]Ironically, while the Livingston County dispute triggered by Turner was simmering, Public Act 127 of 1968, enacted June 11, went into effect dividing the thirty-fifth judicial circuit presided over by Carland into two circuits, one comprised of Shiawassee County, where Carland resided in Owosso, the second consisting of Livingston County. Mahinske, suddenly projected as a public figure by his representation of Turner, entered his candidacy for the new circuit bench seat as part of a reform slate organized by Turner. He was elected easily. The events were covered by the author in his employment as Lansing bureau chief for the Detroit Free Press.

[9]Ryan appeared alone to make the appeals court argument. During the trial court phase of the case, Louis E. Burke, in his seventies and semi-retired, was constantly at Ryan's side. Burke is the senior partner of Burke, Burke, Ryan and Rennell, and undisputably a member of "The Establishment" in the City of Ann Arbor, Breakey's home town. Curiously, Ryan handled courtroom argument exclusively, Burke signed all motions, answers and other documents in the case. (Author's personal observations as reporter for the Detroit Free Press.)

Berriman and Barron, on April 25. Ryan told the appeals panel that exonerating Turner might have the effect of condemning a fellow judge. In a statement that was to become arresting in hindsight, Ryan declared: "Either Judge Carland is corrupt, or Mr. Turner is guilty of contempt."[10]

A unanimous decision reversing the circuit court conviction and vindicating Turner was handed down exactly eight months later, on December 11. If the opinion written by Judge Bronson gave little comfort to Judge Carland and others on the losing side, neither did it signal universal rejoicing among those upheld. Knight Newspapers, Inc., an amicus curiae in the case on Turner's behalf, spoke through a lead editorial in the Detroit Free Press the next day. The editorial, entitled "Decision Clears Turner But Doesn't Clear Courts," the newspaper criticized the appeals court for taking eighteen months to decide a "transparent" case and for "[seeking] to create the impression that Judge Carland was a study of rectitude."[11] The appeals court ruling was bottomed squarely on the Bridges, Pennekamp and Craig v. Harvey decisions of the U.S. Supreme Court.[12]

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[10]Detroit News, April 12, 1969, Article by Allen Phillips.

[11]Detroit Free Press, Dec. 12, 1969.

[12]Bridges v. California, 314 U.S. 252 (1941); Pennekamp v. Florida, 328 U.S. 331 (1946) and Craig v. Harney, 331 U.S. 367 (1947).

Pennekamp in particular was quoted at great length in the eighteen-page opinion of text and footnotes. After stating the facts, the opinion posed just these questions: whether Turner was entitled to a jury trial, and whether it was error for the circuit court to convict. The court then confined itself to the question of guilt or innocence. Bronson wrote that the appeals judges could not accept the contention that Turner's criticism served to taint all subsequent rulings of the Livingston court system, and accordingly interfered substantially with the administration of justice. He said the right of free speech must be weighed against the danger of coercion and intimidation of courts. The opinion concluded:

> Here we are dealing with a general accusation leveled at an entire bench. What is the best course of action for a judge, a member of the bench so accused? The answer must, we feel, be nothing, for "public men, are, as it were, public property," and "discussion cannot be denied and the right, as well as the duty of criticism must not be stifled." Beauharnais v. Illinois, 343 U.S. 250, 264, 72 S Ct. 725, 734, 96 L ed 919. New York Times Co. v. Sullivan, supra, at 268.
>
> The Livingston bench was made the subject of disparaging statements. The best defense they may present to the public is the unsullied performance of their judicial duties. For ultimately it is that very public trust and confidence which petitioner fears the erosion of, which must be depended on to vindicate the court.
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> Reversed. No costs, a public question being involved.[13]

For students of the entire Turner-Livingston County-Michigan State Bar saga, the appeals court opinion had an eerie quality. No mention was made of the Michigan

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[13] In re Turner, 21 Mich. App. 40 (1969).

statute, nor eight Michigan cases, which Judge Breakey had ruled controlling in the Turner case.[14] Indeed, in a bizarre twist, Ryan, although cataloging the case law in his brief, had presented his oral argument on April 11 without any reference to these, or any other cases, Michigan or federal. The appeals court, while relying on tenets enunciated in five federal cases that contradicted earlier Michigan case law, omitted to overrule earlier Michigan cases or the statute Breakey found controlling, or otherwise to advert to the head-on constitutional conflict. The Bronson opinion took no cognizance of contemporaneous events, including disciplinary acts by the State Bar against attorneys and judges accused by Turner, notwithstanding the trial judge's demand on Turner for proofs of corruption, and stress on Turner's failure to adduce such proofs in court. There was no discussion or evaluation of Breakey's handling of his trial court responsibilities, nor the absence of so much as a threat of libel or slander action against Turner by any of those assertedly

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[14]Michigan case law relied on Ryan and cited by Judge Breakey dated from the nineteenth century, and was in the main more than forty years old. Brown, in pleading Turner's cause, dwelt in oral arguments on the inapplicability of a ninety-seven year old Illinois case cited in Ryan's brief, People v. Wilson, 64 Ill. 195, 16 Am. Rep. 528. The currently held U.S. Supreme Court view of the contempt power, viz., the free speech guarantee stems from Bridges v. California, a 1941 case.

aggrieved.[15] Thus, the Michigan statute is at least nominally left standing--certainly not explicitly struck down--and temptingly available to future state court judges for bullying editorial critics:[16]

> When any contempt is committed other than in the immediate view and presence of the court, the court may punish it by fine or imprisonment, or both, after proof

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[15]Twice, on February 5, and February 20, 1968, the Livingston County Bar had held councils of war to rebut Turner's attacks and to mount a counterattack. The evidence is in sworn testimony taken from participants, some of them later disciplined, by a State Bar of Michigan special investigating tribunal. The tactics, the blue ribbon panel concluded in early 1968, included "bringing pressure amounting in fact to blackmail upon this man. . . ." An illustrative instance is the way John Brennan, a hostile attorney investigated Turner's divorce from his first wife thirteen years before, using a fictitious name and fraudulently using official "Friend of the Court" stationery in approaches to the first Mrs. Turner, Mrs. Dortha (cq) Rosson, of Idalou, Texas and Texas civil authorities. Roger Lane, unpublished manuscript, prepared Sept. 30, 1969 for Detroit Free Press.

[16]Interviews with Turner, October 3, 1969 and November 28, 1969. Just short of two years after launching his publishing venture, and eighteen months after his conviction for contempt, Turner had gone through $20,000 of starting capital and had plunged $70,000 in debt. He blamed his plight largely on what he termed a conspiracy to discredit and muzzle him. He regards the contempt proceding as the central force in this effort. Livingston County prosecutor Tom Kizer, Jr., elected on the Turner reform slate in November, 1968, wrote Attorney General Kelley August 14, 1969 asking Kelley to investigate the possibility of bringing criminal conspiracy charges against the Livingston County Bar, including Judge Carland, then a member. After Turner learned informally that Kelley, a probable candidate for reelection or for governor in 1970, was reluctant to procede in this fashion, Turner weighed using the same basis in fact for bringing suit for civil damages. Such a suit remained under consideration when this study was being written.

of the facts charged has been made by affidavit or other method and opportunity has been given to defend.[17]

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[17]Michigan Statutes Annotated, Sec. 27A.1711 (2).

CHAPTER V

HOW THE NEWS WAS COVERED

Howell and Livingston County lie in a backwater on the news flow map of Michigan, apart, of course, from the rhythm of local happenings that provide the grist for weekly newspapers. No congressman, no state or U.S. Senator, no prominent state government official, no top ranking political leader, no great institution, industry, union, sports or cultural figure attracts periodic or even seasonal attention to the area. Hence, it is not the kind of place that would worry a metropolitan editor for lack of a capable and faithful correspondent.

Nearly all of Livingston County's 13,900 households[1] would appear to be reached by the three weekly newspapers, the Livingston County Press at Howell, the Livingston County Argus-Dispatch at Brighton, and the Fowlerville Review, with combined circulations of more than 20,000. Four dailies are sent into the county in quantity from outside. Foremost in circulation among the dailies

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[1] Michigan Newspaper Directory, 1969 (East Lansing: Michigan Press Association) p. 69.

is the Detroit Free Press, with a paid daily circulation of 3,570.[2] The Free Press is Michigan's only morning newspaper of general circulation. The afternoon Detroit News ranks second with 3,162 paid daily, nearly two thirds in the Brighton area in the southeastern corner of the county on Interstate 96, nearest Detroit.[3] Somewhat behind are the Lansing State Journal with 1,840, reaching 14 per cent of the homes, and the Ann Arbor News, with a paid daily circulation of 1,532 and reaching 12 per cent of the households.[4] The Journal circulation is concentrated largely in the central and northwest sectors, nearest Lansing, and the Ann Arbor News in the southern portion just over the Washtenaw County line.[5] The Journal maintained a string correspondent who filed stories daily in Howell, the county seat. In late 1967 and in most of 1968, the Ann Arbor News lacked any such regularized news coverage arrangement, so also did the Associated Press and United Press International, newsgathering and distributing

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[2]Audit Bureau of Circulations, Audit Report for Six Months Ending Sept. 30, 1969, (Chicago: Audit Bureau of Circulations, 1969), p. 18.

[3]Ibid., p. 15.

[4]Newspaper Circulation Analysis, 1969-70 (Skokie, Ill.: Standard Rate and Data Service Inc.), p. A166.

[5]Interview with Art Gallagher, Editor, Ann Arbor News, Dec. 29, 1969.

agencies that relied primarily on member newspapers (or clients in the case of UPI). The Detroit Free Press and the Detroit News both had suspended publication in a strike-lockout situation on November 16-17, 1967--some two weeks before Turner introduced the maiden issue of Today, and two or three months before he locked horns in earnest with lawyers in his county.

The Livingston County Press reported circulation of 9,700 copies, equal to roughly three-fourths of the county households.[6] The Argus-Dispatch reported 6,000 and the Fowlerville Review 5,500, the latter almost exclusively in the northwest quadrant of the county.[7] It may be relevant that during the period concerned and until December, the Argus-Dispatch was published by Brighton Argus, Inc., with Dr. Thomas A. Barton, a physician, as president and owner, and Martin J. Lavan as secretary-treasurer. Barton, it will be recalled, had received $25,000 from the Rosa Miller estate as part of the transaction in which Lavan, as attorney for the executor, induced Lyman and Dorothy Vandercook, chief beneficiaries under the Rosa Miller will, to turn over $72,500 in checks on a visit to the Vandercooks in Florida in January, 1960. The money received by Barton, who attended Miss Miller in her last illness, was to

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[6] Michigan Newspaper Directory, 1969 (East Lansing: Michigan Press Association), p. 25.

[7] Ibid., pp. 12, 20.

establish trusts for the five Barton children. Martin Lavan, as related, emerged as the central target of Turner's charges. Neither, then, was without a particular interest in unfolding events.

Turner's original blast in Today aimed at alleged looting of the Rosa Miller estate and taking to task the County Bar hit county newstands on February 3, a Saturday. He had revealed its contents beforehand to Frank Hand, state editor of the Lansing State Journal, and on Friday, February 2, the Journal on page A-8, under a five-column head, printed about fifteen-column inches setting forth the essence of Turner's allegations. In January, Turner had visited the deputy state court administrator, Robert L. Drake, urging a Michigan Supreme Court investigation of his findings, and was preparing dossiers with sixty-nine photostats to support requests for separate investigations by Attorney General Frank J. Kelley and the Michigan State Bar.

Reaction from the county's two principal weeklies followed on their next publication date, Wednesday, February 7. The Argus-Dispatch based its story on a February 5 statement issued by the county bar, which defending the condition of the circuit court docket, questioned Turner's veracity on certain criticisms of the court and otherwise rebutting portions of the Today presentation. No mention was made of Rosa Miller case particulars including the

$25,000 paid from the estate for trusts for the children of Argus-Dispatch owner--Thomas Barton. The Livingston County Press responded more aggressively, publishing three stories, all on page one. The main story, running more than a column in length, was headed "Magazine Publisher Raps County Courts and Judge of Probate." The story related essential facts of the Rosa Miller case, said Lavan was ill and unavailable for comment, quoted Berriman in defense of his role as executor and referred to the Livingston County Bar statement supporting conduct of the circuit court. It noted: "However, probate court has not illicited [sic] such approval. The illness of Judge Barron, his frequent hospitalizations are commonly known." Attorney General Kelley and Drake were quoted. Drake was quoted as having made two visits to Howell in pursuance of Turner's complaint, and as saying "If there is any action to be taken against attorneys it should be initiated by the State [Bar] Grievance Administrator." A second County Press story detailed an eight-point analysis by the county bar of Today broadside, and a third four-paragraph item cited a rebuttal by Turner. A week later, on February 14, the Argus-Dispatch, self-styled "Watch Dog for eighty-seven years," touched in sketchy fashion on some of Turner's criticisms, and said it would conduct its own inquiry.

On February 24 and 29, the Lansing State Journal followed up with stories by Jerry Moskal, each about two-thirds column long, relating that illnesses of Lavan and

Judge Barron were impeding investigatory efforts by Drake, that Attorney General Kelley was looking into the situation to determine if a full-scale investigation was warranted, and that the supreme court was weighing possible action. Leading facts of the Rosa Miller case were repeated. Other somewhat lengthy stories, in large part repetitive, were written by Moskal and published in the State Journal on March 13, anticipating windup of a preliminary examination by Supreme Court staff aides, and citing a public vow by the state bar, voiced by Grievance Administrator Armand Kunz, to pursue its investigation diligently.[8] By this time, other wheels of the judiciary were turning much faster. This was the machinery directed at punishing Turner for contempt in unmasking the misconduct in the first place.

The Livingston County Press and the Argus-Dispatch fell silent for about two months after the first flurry--until Judge Carland leveled his contempt of court charge April 9, an event that awakened broad general interest in the story for the first time. Brief, routinely handled

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[8]Moskal was an investigative reporter for the Lansing State Journal. A few months later, he was transfered to the Washington bureau of Federated Newspapers, Inc., parent organization of the State Journal. He and other Journal newsmen confided to colleagues that higher-ups were restrained in their approach to the story, fearful of provoking a libel suit by Martin Lavan. Counsel for the paper, Richard B. Foster, reportedly advised caution. The Journal shortly before had been hit with a costly judgment in an unusual libel action involving a deaf mute.

stories on the contempt show cause order marked the beginning of news coverage by the Associated Press and United Press International. The State Journal, which had given the story most attention of any daily, devoted six paragraphs to the development on April 9, the day the contempt of court charge was filed. The Press and Argus-Dispatch, in issues for April 10, splashed the news, breaking a long silence interrupted only by stories reporting that Judge Barron had resigned from the probate bench effective May 1. The Barron resignation stories made no mention of the Turner charges. Under a three-column head, just below the paper's nameplate, the Argus-Dispatch story began: "County lawyers and Circuit Judge Michael J. Carland came out swinging Tuesday against Publisher James C. Turner . . . " The Press carried twin page-one stories, one under a six-column headline, "James Turner Faces Contempt Charges," the other a five-column headline, "Representative Sharpe Asks for Court Probe--To Investigate Alleged Corruption." The Sharpe story demanded that Attorney General Kelley act in the Rosa Miller and Orpha Bowe estate cases. On April 24, accounts of Turner's initial hearing before visiting Judge Breakey appeared in both weeklies. Thereafter, scant attention was paid to the court procedings until judgment was rendered in late June. However, the Press reported in seven paragraphs on May 8 the State Bar's vow to see through the investigation of alleged misdeeds

by attorneys, and separately, that Wilfred Erwin, county bar president, commended the circuit court in a Law Day speech May 1.

Meantime, the Lansing State Journal carried reports on various contempt case hearings on April 19, May 17 and June 10. The Ann Arbor News commenced its file April 18 with a brief notice that Breakey, the home circuit presiding judge, had been assigned to sit in the contempt procedings in Howell. The Ann Arbor News did not follow the case on a hearing-to-hearing basis.

The case erupted into general attention again on June 26 when Judge Breakey returned his verdict of guilty. The State Journal and Ann Arbor News both printed brief bulletins and followed with elaborate stories the next day. The State Journal account, reported by Frank Hand, the state editor, ran as "state news" under a four-column headline, inside the paper. Hand related that Turner stood on his right of free speech guaranteed by the First Amendment to the U.S. Constitution, and contended that no proof of his veracity was required. A thirteen paragraph story, by Bill Hensley, in the Ann Arbor News devoted four paragraphs to Judge Breakey's comment, as dictated from the bench, and was silent on the First Amendment aspect of the case or Turner's contention concerning proof, presumption of innocence, jury trial or libel as a remedy rather than contempt. The weeklies, in their next editions on July 3,

printed extensive stories on the trial outcome, including Attorney Mahinske's announced intention to appeal. The Argus-Dispatch account ran about one and one-third columns long, and included several paragraphs of Mahinske's argument in court. The county newspapers then lapsed into relative silence with one notable exception, the Argus-Dispatch presentation of July 17. On that day, starting with a two-column spread carried on the left side of page one, the Brighton weekly devoted a full six-columns of space to what was described as an "editorial," but what in actuality was the virtually complete transcript of Judge Breakey's opinion given orally from the bench on June 26. The heading, set in large type, was "Judge Breakey Comments." Immediately preceding the transcript, there appeared this paragraph:

> Editor's note:
> Following are excerpts from the official court recorder's notes on the Contempt of Court trial of James Turner. The notes contain statements made by Circuit Court Judge James R. Breakey, Jr., concerning the responsibility of the news media to the courts. The Argus feels Judge Breakey has made many fine points throughout his statements and we therefore present it to Argus readers as a representative example of the medias' responsibility in reporting.[9]

Needless to say, this type of statement caused news professionals to cringe. From this point forward, news coverage of the case was broader in scope and reported more freely and more aggressively than earlier. On July 24, the

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[9]The Livingston County Argus-Dispatch, July 17, 1968.

capitol bureau of Booth Newspapers, Inc., representing eight of the largest outstate dailies, made its debut in direct coverage of the story.[10] A Booth staff member, Bill Cote, under a Lansing dateline, wrote of events that followed a plea by the industrial committee of the Howell Chamber of Commerce, which backed Turner, to Governor George W. Romney to press for a quick conclusion to the pending investigations. Romney passed the buck to Attorney General Kelley who was said to be pursuing the matter. Cote's story appeared in the Ann Arbor News, among other Booth newspapers. Immediately upon resumption of publication after a nine-months shutdown, the Detroit Free Press ran with a two-column story by Roger Lane and James Dewey to bring readers up to date. It appeared under a slightly misleading three-column headline: "Editor's Crusade Puts Him in Jail."[11] Three weeks later, the Detroit News ran a similar story, reported by Howard T.Warren, under a five-column headline, "Charges Jolt Livingston County." This story, published September 1, was followed the next day by reporter John F. Nehman's account of shenanigans with

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[10]Bill Cote, a member of the capital bureau of Booth Newspapers, Inc., in Lansing, was president at the time of the Central Michigan chapter of Sigma Delta Chi, and more sensitive than most reporters to the free speech implications of the case. Cote had much to do with the chapter's decision to enter the appeal as amicus curiae.

[11]Detroit Free Press, Aug. 10, 1968.

traffic tickets that was to blossom a year later into criminal charges against a former Justice of the Peace, Brian Lavan, Martin Lavan's son. From August 14, until the end of 1968, the Lansing State Journal carried eleven stories, and the Ann Arbor News fourteen stories, relating to still fumbling investigatory procedings by the Attorney General, the supreme court and the state bar, in addition to interventions in the pending appeal of Turner's conviction, changes in counsel, and the political campaign in which the Turner reform slate swept top offices in Livingston County. A half dozen stories each were run by the Detroit News and the Detroit Free Press, chiefly dealing with the start of closed hearings and taking of testimony by the special grievance committee of the state bar. The Detroit Free Press ran a comprehensive three and one half column story by Glenna McWhirter on December 1, exhaustively limning the stormy past of Martin Lavan and reciting that Lavan might have been practicing law illegally for thirty-seven years. A Free Press lead editorial spread half the width of the page on November 1 was captioned: "Supreme Court Justices Were Rash In Their Hasty Clearing of Carland." The reference was to the court's surreptitious adoption of a motion exonerating Carland of wrongdoing--at Carland's request in a letter to the Chief Justice. Earlier, a mince-no-words editorial on August 13 counseled "Back to the Books Judges" on use of the contempt power to shut up critics.

So far as could be determined, the case received its first significant out-of-state news attention on October 12, 1968. The New York Times, under a Howell, Michigan dateline, ran a column length story. The account summarized the basic facts, recited the collision between the First Amendment guarantee and the judiciary's contempt power, and related that four journalistic organizations had intervened in the appeal.[12] The industry's leading trade magazine, Editor & Publisher, carried a similar story in an October issue.[13]

If anything, the tempo of news coverage quickened in 1969 as results of Turner's attacks a year earlier began to surface--the disciplining of seven Livingston County lawyers and judges, state bar actions to tighten attorney discipline rules, a beefing up of the bar's internal policing unit, the defeat of Justice Michael D. O'Hara, and the installation of successor Justice Thomas Giles Kavanagh, Representative Sharpe's push for state licensing of lawyers, a hastening of long-delayed promulgation by the State Supreme Court of stricter probate rules, and the functionings of the new reform administration in Livingston County. Events that sprang directly from the legislative process or the work of the supreme court predictably generated a

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[12] New York Times, Oct. 12, 1968.

[13] Editor & Publisher, Oct. 16, 1968.

larger flow of news from the two principal wire services, and of course brought facets of the story to all of Michigan's fifty-six daily papers.[14] Turner's appeal remained in a kind of legal limbo, attracting news column attention only on April 11 when lackluster oral arguments rehashing some of the legal issues were heard by the three-judge appeals court panel in Lansing. The Detroit News, Detroit Free Press and the Lansing State Journal sent reporters to report the arguments.

With the constitutional issue posed by Turner's trial now dormant, newspaper editorial writers stepped forward with more apparent relish for the question of lawyer discipline. There was the Sharpe bill on one hand, calling for state licensing by a board appointed by the governor with senate consent and including laymen; on the other, as if to blunt Sharpe's thrust, there were the revised rules being drafted by the bar for submittal to the supreme court. The court, under Michigan's integrated bar setup, has authority to promulgate and enforce rules of conduct, ultimately by disbarment. In both cases, there was recognition that the status quo was defective. At least this was superficially true, although Sharpe argued the proposed bar rules revision was merely a smokescreen to relieve the threat of his bill, and thereafter

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[14] Michigan Newspaper Directory, 1969 (East Lansing: Michigan Press Association), p. 1.

something to blow away.[15] Editorialists confined themselves chiefly to calling for change. But there was no tub-thumping endorsement of the Sharpe plan. Somewhat ambivalent comment in the Ann Arbor News was typical. The following extracts were printed eight days apart after three attorneys accused by the bar, and summoned to testify, begged off pleading illness:

> The man who made the charges against these attorneys, Livingston County newsmagazine publisher James C. Turner, found the legal processes moving swiftly enough when he was accused of contempt of court . . . the public should expect the same expeditious handling of the investigation into Livingston County affairs. . . .[16]
>
> We oppose the Sharpe bill. The power to regulate lawyers resides with the State Bar which is where it should stay. The trouble in Livingston County was an isolated affair, not a general condition that should become a basis for determining statewide policy . . .[17]

Without doubt, the Detroit Free Press struck the most critical editorial stance. During a seventeen-month period, the Free Press had commented editorially twelve times, starting on August 13, 1968--the third day after publication was resumed--with its "Back to the Books, Judge" admonition to Judge Breakey on the law of contempt. Several others were hard-hitting, most often aimed at the state bar or the supreme court. On November 1, 1968, the supreme court was called "rash" for a hasty clearing of Judge Carland, and

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[15]Lansing State Journal, March 16, 1969.

[16]Ann Arbor News, Dec. 8, 1968.

[17]Ibid., Dec. 16, 1968.

an accompanying endorsement of Appeals Court Judge Thomas Giles Kavanagh for Justice Michael D. O'Hara's seat on the court may have tipped the balance in Kavanagh's favor. Comment on June 28 was captioned "Lavan Gets Off the Hook But Wrong's Still There," and on October 30 the heading to another editorial was "State Bar Whitewash Fails to Cover the Dirt." After the appeals court vindicated Turner, a Free Press editorial was entitled, "Decision Clears Turner But Doesn't Clear the Court."[18]

The occasional editorial commentaries by the Detroit News probably were little more comforting to Bar leaders. Not long after resuming publication in August, 1968, a News survey of the situation began with this sentence: "A simmering mood of suspicion and mistrust hangs over Livingston County--a mood not likely to change quickly."[19] The Lansing State Journal was comparatively more restrained.

The wave of newspaper editorial criticism was taken seriously enough by the state bar leadership. In captioning a speech given to a panel on discipline at the American Bar Association convention in Dallas, Texas, in August 1969, President-elect A. DeVere Ruegsegger of the state bar chose these words: "Is the Organized Bar on Trial--The Michigan Story." In speaking of events in Livingston

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[18] Detroit Free Press, Dec. 12, 1969.

[19] Detroit News, Sept. 1, 1968.

County, Ruegsegger twice referred to "the explosiveness" and "a somewhat explosive" situation. He mentioned the Sharpe bill and bar proposals for revising its discipline code. He said the bar, while it had fought off the Sharpe legislation in 1969, might have to go through a similar contest in 1970 "depending on what occurs during the following six months." The inference seemed to be that public clamor for reform would subside if the bar's revision was accepted as a good faith effort to elevate standards. The bar proposals--except for one lifting secrecy from formal grievance hearings--were rejected as unacceptable patchwork by the supreme court. In their place, the supreme court promulgated a code of its own drastically revising and streamlining the lawyer discipline machinery. The court, recognizing a principle advocated by Sharpe, provided for introduction of laymen into the process. It provided for appointment of two laymen to a seven-man State Grievance Board established to run the new setup, effective March 1, 1970.

The newspaper dialog fastened at more than one juncture on the extreme secrecy of bar discipline procedures. Finally, the bar--before proceding with general revision--asked the supreme court to summarily amend one rule so as to open to the public any formal hearings stemming for the filing of a grievance. Formal hearing was an advanced stage of consideration and such a change actually was a token affair. Nevertheless, even Supreme

Court Chief Justice Thomas E. Brennan expressed disbelief at the extent to which secrecy was enjoined. He said he was amazed to learn that acknowledgments by the bar of complaints filed against an attorney bore a legend, stamped in red, informing the complainant that he was subject to contempt penalties--meaning imprisonment--for disclosing information as to the substance of the complaint.[20]

Secrecy requirements notwithstanding, word of at least some of what went on at hearings of Special Grievance Committee No. 10 starting December 21, 1968, seeped out and into the newspapers. On the basis of leaked testimony, Turner was able, a few days after the hearings began, to allege that the transcript would show Judge Carland "conspired" with other members of the Livingston County Bar to discredit the publisher and wreck his business.[21] His allegation was at least partly confirmed when the committee, in evaluating the conduct of Attorney John R. Brennan, said a clique of the bar had brought "pressure on [Turner] that in fact amounted to blackmail" to stifle his criticism.[2] John R. Brennan's sworn testimony disclosed that: (1) he had telephoned on February 20, 1968, to the

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[20]Gongwer Report, March 5, 1969.

[21]Detroit Free Press, Dec. 7, 1968.

[22]Lansing State Journal, April 4, 1969.

district court in Lubbock, Texas, to verify presence there of records of Turner's divorce from his first wife; (2) he had requested copies of these records by letter written on Livingston County Friend of the Court stationery when in fact he did not hold that office; (3) he had used an assumed name, Fred Warner of Pinckney, when he telephoned Mrs. Dortha Rosson, Turner's former wife, in Texas, to question her about an apparent arrearage in Turner's support payments; (4) he had reported his discoveries to Judge Carland and turned over the divorce file to Carland because "he (had) wanted the papers because he wanted to give them to his attorneys"; (5) he had done so at about the time Carland had initiated contempt procedings against Turner; (6) he had known, in connection with inquiries to Mrs. Rosson about delinquent support, that if she had instituted reciprocal procedings in Michigan to collect arrearages, that Carland would have presided over them, and that they would have been prosecuted by Prosecutor Charles Gatesman, with whom Brennan also discussed his findings; (7) Carland had retained possession of the Turner divorce records from early April, 1968, until about December 1, when Brennan was under subpena to testify to Special Bar Grievance Committee No. 10; (8) no steps had been taken to directly and publicly refute allegations made by Turner against the bar and bench in Today magazine; (9) other members of the county bar, following meetings on February 5 and February 20, 1968, in which Judge Carland

had taken part, had caused inquiries to be made whether Turner had a criminal record, blemishes on his credit record, or had incurred bankruptcy; (10) it had been the "consensus" of the bar that Turner should be investigated; (11) Joe Cox, of Fowlerville, an attorney, had been informally designated by other members of the bar to look into Turner's past and that he--Brennan--had taken up the burden after Cox had failed to do the job.[23] It is possibly significant that the attorneys engaged by Carland to prosecute the contempt case against Turner, and to whom Carland had turned over the divorce file, were Louis Burke and Richard Ryan of Ann Arbor, lawyers with a long and close professional relationship to Judge Breakey of Ann Arbor, the circuit court jurist sitting in Livingston County in the contempt case.

Although there was no direct connection, Michigan newspapers in late 1969--before the appeals court reversal of Turner's conviction--carried two separate stories that dovetailed with the Howell publisher's theme that bar ethics left much to be desired. One story stemmed from a

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[23]Interview with Turner, Nov. 28, 1969; In the Matter of John R. Brennan, Grievance File No. 26061, a member of the State Bar of Michigan, Livingston County Circuit Court files. In an interview, Turner, who received much information informally from bar prosecuting officer Chris Youngjohn and other investigators for the bar, contends that a committee of five was set up to get the dirt on him. The others besides Brennan and Cox, according to Turner, were Brian Lavan, William D. McCririe and E. Reed Fletcher.

news conference in which Burke Dailey, Director, Bureau of Workmen's Compensation, Michigan Department of Labor, criticized the bar for failure, despite repeated pleas, to stamp out a "claims mill" racket that preyed mostly on the big auto companies and their retired employees.[24] The second story, a product of Detroit Free Press enterprise, disclosed that the State Court of Appeals had resorted to fines backed up by the threat of contempt punishment to halt professional carelessness in which counsel appointed to represent indigent convicted felons squandered their appeal rights.[25]

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[24] Detroit Free Press, Oct. 29, 1969.

[25] Ibid., Nov. 20, 1969.

CHAPTER VI

EVALUATION

What meanings can be found in the saga of James C. Turner and his encounter with the assumed power of a judge summarily to sentence a citizen to jail for an alleged indignity to the court expressed in spoken and written words outside the court? What light does Turner's experience shed on the vulnerability of newsmen to judicially directed punishment? on the sensitivity of bench and bar to an abuse of the contempt power? on additional protections needed to ward off a similar abuse in the future? The sequence of events has many meanings, among them:

1. A court critic engaged in a courageous service for the public good, whose accusations of improper conduct were proven right over time, can face economic reprisals, legal harassment, a jail sentence, and the time and anguish of an appeal.
2. An editor in a small town in the vigorous pursuit of his profession must be prepared for counter pressures through creditors responsive

to the lawyer-judiciary network which sometimes dominates the business and social life of the community.

3. The power of the press is real and vital when applied courageously and persistently--as real and vital today as it was for the patriotic pamphleteers of the eighteenth century American War for Independence. The best justification for freedom of the press is this power to expose corruption by discovering and publishing facts which malefactors seek to suppress.
4. A news editor, however right, who attacks a key element in the Establishment in a small town, is unlikely to find sympathy or support from other publications in the county. The other editors and publishers far too often have developed a comfortable live-and-let-live affinity with the community's ruling clique.
5. An invisible and immeasurable element in Turner's success was the implied support and independence furnished by his wife's prospective inheritance. His endeavor was further fortified by social attachments with persons of some influence in the community formed in years before he turned to publishing.

6. Reform of lawyer discipline must come from within the structure of the bar itself or it will come through direct legislative action in response to some revolting and widespread scandal that forces a political solution to public dissatisfaction with lawyer conduct. Turner's exposure of what happened to a sick, helpless and nearly destitute widow ought to be warning enough. The known clannishness of the law profession in protecting its own stands against adequate reform from within the profession.
7. The possibility of reform through legislative action, however, faces an equally difficult barrier. Eleven of the fifteen members of the Judiciary Committee of the Michigan House of Representatives in 1970 are lawyers. Any lawyer licensing bill must go through that committee, where the same "protect our own" standard prevails.
8. Any effective procedure for disciplining attorneys must provide for shielding lawyers in the ranks from retaliation by judges who hear their cases and this possess power to ruin them professionally.

9. Although untrained as a writer, Turner showed a native gift for penetrating expression and an instinct for when and where to use it. His bold charge that Lavan "had almost totally corrupted the entire judicial system of Livingston County" was an arrow of words to the heart of the issue.

10. The move by the State Bar of Michigan to reform its disciplinary rules was revealed by its president, Ruegsegger, to be in large measure a red herring to undercut Representative Sharpe's bill for lawyer licensing.

It is this author's conclusion that, in the language of the underworld, Turner was "framed." The only other conclusion--that Judges Breakey and Carland, who between them had more than forty years experience on the circuit court bench of Michigan, were totally ignorant of the settled law on constructive contempt--stretches belief to the breaking point. Turner and his attorney, Mahinske, were on sound ground in asserting that the remedy for those aggrieved by Turner's publications was a suit for libel, slander or defamation.

The contempt of court route was, in this author's opinion, an attempt to crush Turner. It did crush him, or helped crush him, financially. The ordeal it began, the author further believes, over two years bred a sense of

persecution in Turner that deflected his energies into a quixotic political crusade against the "law Establishment." However, despite this mauling, the contempt pressure fell short of what may have been its ultimate goal--forcing Turner to abandon the fight, or to make a "deal" with his accusers. That this result was not achieved is remarkable testimony to: (1) Turner's composure in the courtroom where a defiant outburst in the presence of a judge known widely among his peers as a martinet would have brought swift and deserved punishment for direct contempt, and implied guilt in the phony case of constructive contempt; and (2) the editor's impeccable accuracy in laying out the crucial and complex facts portraying Lavan's questionable transactions.

Further support for the "framed" conclusion appears in Breakey's crafty tactics to stitch Turner into a legal corner by refusing to face the issue of criminal versus civil contempt, by denying Turner a jury trial, and by imposing on Turner the burden of proving his innocence. Breakey ignored the controlling line of U.S. Supreme Court decisions and used instead Michigan case law dating into the nineteenth century. Breakey created withering pressures on prospective witnesses by requiring Turner under oath to give a detailed blueprint of the proofs he might wish to adduce. In addition, sworn testimony established that Carland attended and took part in meetings

of the Livingston County Bar on February 5 and 20 at which retaliatory tactics against Turner were planned. And Attorney John R. Brennan testified to turning over to Carland--in advance of the citation order--the divorce file and other materials discreditable to their publisher-antagonist.

The arguments before the Michigan Court of Appeals bolster the conclusion that the protagonists in the lower court contempt action against Turner did not expect their case to survive successive reviews, possibly all the way to the U.S. Supreme Court. This author believes the protagonists hoped to force Turner to the wall before appeals were exhausted. It seems astonishing that on oral argument Ryan, the attorney who argued for Judge Carland, did not mention a single Michigan Supreme Court or U.S. Supreme Court ruling in support of his client's position. More significantly the court of appeals in its formal decision overturning the contempt did not cite any Michigan statute nor any Michigan court rulings either in the text of the decision or in footnotes, though Breakey's decision was pinned squarely on a Michigan statute. Does the statute still stand? Is its application narrowed from what Breakey interpreted it to be? The court of appeals was silent on these matters, leaving the observer to wonder whether it exhibited such restraint to spare embarrassment to a dead judge and to prominent attorneys

who lent prestige to the attempt to silence an editor through a sentence for contempt which could not be justified in settled law.

The Michigan Appeals Court found Turner not guilty of contempt. Perhaps the best summary then lies in Attorney Ryan's own words on oral argument before that court:

"Either Judge Carland is corrupt, or Turner is guilty of contempt."

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APPENDICES

APPENDIX A

A Letter From the Publisher

Who was ORPHA BOWE? What's more important, who cares? When and where did she die? And why is she so important to the citizens of Livingston County and the State of Michigan today?

You will find the answers to some of these questions in this issue. And really what is most important of all is what you and I do now that we know the complete story!

ORPHA BOWE, who died a poor, frightened, destitute, and bewildered 71 year old woman, because of the loss of her property and her efforts to receive an explanation from her attorney, Martin J. Lavan, who took it from her; maybe did not leave us without serving a good purpose. This can be true if we now have the courage to use her cause to rid ourselves forever of a sinister illness in our community.

While Orpha Bowe was forced to live her last few years in near poverty, existing mainly on public assistance, her attorney, Martin J. Lavan, thought so little of the profits from this stolen property that he casually deeded it over to his two sons.

Martin J. Lavan, who did this to Orpha Bowe has almost totally corrupted the entire judicial system in Livingston County. We believe the judges and most of the attorneys either live in fear of this man, or, for some reason, are afraid or won't speak out against the system.

The probate files on this case were only closed last year. Why did Probate Judge Francis Barron suppress the evidence of possible fraud against Martin J. Lavan when he was told by Wilfred Erwin, the attorney for the executor of Mrs. Bowe's estate, that this evidence was available? Why did our Circuit Court Judge Michael Carland go straight to Attorney Martin Lavan, on March 14, 1968, when he was told that we had evidence against Lavan which was terribly incriminating? Did the circuit court judge go for information, or to inform?

It is no secret that our principal support for this magazine is the industrialists and a few courageous and concerned businessmen of Livingston County. We have appealed (three months ago) to the Attorney

> General's Office, the State Supreme Court and the State Bar Association for help in the Rosa Miller case and now the Orpha Bowe case is before the State Attorney General.
>
> These high authorities should know there is a movement now underway to form a Citizens' Committee in Livingston County. Are so many members of the system so hopelessly without honor or compassion they can not, or will not do or say anything?
>
> After you have read the story of Orpha Bowe we direct your attention to the poem of the month which starts and ends with the words . . . My God, How can it be?

The foregoing, which appeared in the April 1968 issue of Today, was chosen as an example of Turner's effectiveness as a writer. The fifth paragraph was quoted in the contempt citation against him.

APPENDIX B

In a manuscript summarizing his struggle in the contempt of court episode, Turner offered some thoughts about his experiences--more about what he hoped to accomplish and the obstacles he had met rather than the narrower journalistic aspects of what had occurred:

> To expect a lawyer to report misconduct of a fellow lawyer is to expect a child to tattle on his friends. . . . The legal fraternity is a close and secretive brotherhood, supported by its exalted members on the bench.
>
> To this gross inadequacy I directed my efforts. The beginning was a haphazard affair. Ignorance was not my bliss. The battle spread quickly to politics where I learned the ropes . . .
>
> My lessons were satisfying. I found out to my great pleasure that reform will succeed when initiated by a concerned citizenry with a belief in their [sic] cause.
>
> Once begun, this reform spreads faster and farther than the corruption that preceded it.
>
> I learned that politics is not a manner of disruption or distinction, but only a means of expressing the will of the people in attaining fulfillment for all, even the little guy.
>
> The people are the democracy, not the bureaucrats in authority.