

The Riddle of *Sub-judice* and the Modern Law of Contempt

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Abstract

Authority, and specifically the authority of courts, has become normatively suspect in contemporary political and legal theory, but its historical transformations and multiple interpretations have not received adequate scholarly attention. This essay explores the changing character of court authority by examining the common law offense of contempt of court, focusing on the *sub-judice* rule and its history in English law. Contrary to existing literature, the *sub-judice* doctrine does not preserve a traditional-monarchical conception of authority, nor can it be fully understood under the currently prevailing paradigm of obstruction of justice. The essay suggests that *sub-judice* reflects two distinct senses of authority, each premised on a different understanding of the role of courts in democratic societies and the relationship between courts, mass media, and public speech. The first account views the court as an insular sphere of an essentially bureaucratic authority. Under this account, *sub-judice* strikes a balance between freedom of speech and a fair trial, protecting the integrity of the legal process from undue influence by the public press. The second account views the court as a distinct forum of public speech. Here *sub-judice* guarantees the necessary conditions that allow the court to speak publically vis-à-vis the media's production of public opinion for mass consumption. The essay concludes by drawing some broader implications from this history for studies in historical jurisprudence.

I. Introduction

Hannah Arendt's essay "What Is Authority?"¹ begins with an unusual confession that she might have erred in labelling her own piece. "In order to avoid misunderstanding," she writes, "it might have been wiser to ask in the title: What was—and not what is—authority?" "For it is my contention," she continues, "that . . . authority has vanished from the modern world."² Arendt's self-pronounced reservations continue to plague us today as we acknowledge a crisis of authority in numerous spheres of social life.³ Political theorists, in particular, have struggled to reconcile authority with liberalism, autonomy, or democracy, working under the assumption that the very concept of authority is at odds

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¹ Hannah Arendt, *In Between Past and Future: Eight Exercises in Political Thought* 92 (1958).

² *Id.*

³ See, e.g., Mary Haywood Metz, *Classrooms and Corridors: The Crisis of Authority in Desegregated Secondary Schools* (1978).

with these modern values and institutions.⁴ Instead of lamenting the extinction of authority or celebrating it, the following essay seeks to trace authority's residues, its contemporary manifestations, and potential transformations, in a world that perhaps too hastily has declared authority dead. We ask "What is left of authority?" and take as our case study the authority of courts as manifest in the common law doctrine of contempt of court and specifically in the *sub-judice* offense.

Courts exhibit a particularly intriguing context in which to investigate authority, as the authority of the courts continues to concern legal scholars, especially in the common law tradition. But while the authority of law in general (the "rule of law") has undergone a process of rationalization and bureaucratization,⁵ the authority of the courts and their institutional practices still bear the characteristics of traditional authority, including placement of the judge on an elevated bench in a throne-like position,⁶ addressing judges with an honorific, and the clothing of judges in official vestments, which, as one commentator puts it, "conceals their mortality beneath a robe."⁷ Alongside these rituals, the common law continues to proscribe *contempt of court*—a legal doctrine that simultaneously celebrates the authority of the courts and punishes those who dare to defy it. Contempt of court, then, is a legal doctrine directly concerned with the authority of the court; it will be argued here that its distinctive history may serve to illuminate important aspects of the present state of court authority and may have broader implications for our understanding of the authority of law.

Courts have, for many centuries, incarnated a traditional, indeed an "authoritarian," sense of authority. During the nineteenth and twentieth centuries, many legal jurisdictions gradually abolished legal prohibitions against contempt, or at least renounced the terminology of contempt as obsolete and no longer valid for their laws.⁸ One simple explanation for the decline of contempt, which seems to have gained broad consensus, is that since authority is at odds with democracy and since we moderns no longer require "respect" for authority, we need not continue to endorse the law of contempt. Simple as that intuition may appear at first glance, a close inquiry into the law of contempt reveals a puzzling picture, rendering the above "away with authority, away with contempt!" conviction sparse and simplistic. This essay concentrates on one particular instance of contempt doctrine, the *sub-judice* rule and its history in the U.K. The *sub-judice* rule restrains or pun-

⁴ See, e.g., Robert Paul Wolff, *In Defense of Anarchism* (1970); Mark E. Warren, *Deliberative Democracy and Authority*, 90 *Am. Pol. Sci. Rev.* 46 (1996).

⁵ The rationalization of the authority of law in modern times is described in Max Weber's seminal work *Economy and Society*. Max Weber, *Economy and Society: An Outline in Interpretive Sociology* 215 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., 1978) (1922).

⁶ David A. Anderson, *Democracy and the Demystification of the Courts*, 14 *Rev. Litig.* 627, 640 (1995).

⁷ *Id.*

⁸ As Lord Scarman characteristically observed in a 1980s case: "It is high time, I would think, that we re-arranged our law so that the ancient but misleading term 'contempt of court' disappeared from the law's vocabulary." *AG v. BBC*, [1981] AC 303, 362, [1980] 3 All ER 161, 184 (HL). See further discussion of the development of the doctrine below.

ishes the publication—most commonly media publication—of matters that might prejudice a pending or forthcoming trial. We focus on *sub-judice* and its history in England, as the English common law provides not only the historical origin of the *sub-judice* rule, but also continues to enforce the prohibition today, unlike some other common-law jurisdictions.⁹ We turn to the doctrine of *sub-judice* and its distinctive history to ask what is left of authority and specifically of judicial authority.

We approach the topic as an exercise in historical jurisprudence, a mode of questioning, which we understand as exploring foundational questions of jurisprudence by examining historical materials. We show that *sub-judice* cannot be considered in continuation to pre-modern conceptions of authority and contempt, on the one hand, but neither can it be fully understood under the counter-authoritarian, modernist paradigm of obstruction of justice. Rather, *sub-judice* is a legal rule reflecting a distinctly modern sense of contempt, which may shed new light on the political authority of courts in our times. The analysis proceeds as follows. The second part of the essay provides an overview of contempt of court offenses in common-law jurisdictions,¹⁰ and portrays their currently dominant conceptualization under an obstruction of justice paradigm. We focus specifically on *sub-judice* in the U.K. and argue that the new paradigm of obstruction does not capture the full sense of the offense. The third part turns to the eighteenth century and early nineteenth century in order to inquire into the history of the *sub-judice* rule. Placing *sub-judice* in the historical context of eighteenth-century England shows that it is a modern legal doctrine reflecting a shift in the sense of contempt that harbors a fundamental ambiguity. On the one hand, the courts interpreted *sub-judice* as protecting the integrity of the legal process from the influence of the public press, and thus portrayed the authority of the court as an insular sphere of impartial and essentially bureaucratic authority. Under this account, modern media was identified as furthering public discourse as long as it does not encroach on the integrity of the court and its professional competence. On the other hand, the court viewed itself as a distinct public forum that needs to be protected from the homogenizing power of mass media. Under this account, modern media was identified as a threat to public deliberation and to the possibility of the trial as a public event. The fourth part of the paper highlights the theoretical implications of this revisited history and draws broader implications for an understanding of the political authority of the courts. Specifically, the critique developed in this essay diverges from other critical strands in contemporary scholarship that identify authority as a power structure and as a form of domination which, though essentially at odds with the promises of liberal democracies,

⁹ See Eric Barendt, *Freedom of Speech* 322 (2d ed. 2005) (“English law . . . has been relaxed by the Contempt of Court Act 1981, but it still imposes restrictions on the media which are more onerous than those imposed in some other Commonwealth jurisdictions and which would certainly be regarded as incompatible with freedom of speech and of the press in the United States.”).

¹⁰ Contempt of court is not proscribed as such in continental legal systems as opposed to common law jurisdictions. See generally Michael Chesterman, *Contempt: In the Common Law, but Not the Civil Law*, 46 *Int'l & Comp. L.Q.* 521, 536 (1997).

continues to flourish in these societies.¹¹ Our account of authority and, specifically, judicial authority, shows how authority may be entirely compatible with democratic aspirations, and that a new form of authority, public authority, which is neither traditional nor bureaucratic, may be a condition *sine qua non* of courts in contemporary democracies. By way of conclusion, the fifth part provides lessons for historical jurisprudence, understood neither as sub-discipline nor as methodology but rather as a way of questioning, which turns to historical materials in order to answer foundational questions of jurisprudence.

II. From Contempt to Obstruction?

A. Contempt of Court—Overview

Contempt of court is a wide-ranging legal category, and includes conduct as diverse as disobeying court orders or injunctions, shouting within the courtroom, abusing witnesses or parties to the legal process and more. Historically, the crime of contempt was not limited to the court. The common law knew of “contempt of the King,” “contempt of the bishop,” “contempt of Parliament,” and others.¹² And yet it is significant that the most frequent and the most persistent contempt crimes have involved contempt of courts.¹³ There seems to be little doubt about the historical justification of contempt of court as an offense. It was an affront not only to the court but to the King himself, as a renowned contempt case from the eighteenth century suggests:

By the constitution the King is the fountain of every species of Justice, which is administered in the kingdom (12 Co. 25). The King is “de jure” to distribute justice to all his subjects; and because he cannot do it himself to all persons he delegates his power to his judges who have the custody and guard of the King’s oath and sit in the seat of the King “concerning his justice.”¹⁴

Today, contempt of court is still prohibited, albeit on different grounds. In a world that no longer recognizes the political authority of kings, and where separation of powers is a guiding principle of political government, the authority to judge is entrusted with the judiciary as an independent branch of government. More importantly, requiring individuals to show respect for the superior authority of others is treated with suspicion in contemporary society. Nevertheless, contempt of court prohibitions are currently effective in many common-law jurisdictions.¹⁵ According to the prevailing view, the underlying

¹¹ See, e.g., Markus D. Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (2005); Catherine A. MacKinnon, *Toward a Feminist Theory of the State* (1989).

¹² See generally 4 William Blackstone, *Commentaries on the Laws of England* ch. 9 (1769) (“Of Misprisions and Contempts, Affecting the King and Government”).

¹³ Contempt of court (*contemptus curiae*) has been recognized in English law from the twelfth century. See John C. Fox, *The History of Contempt of Court* 1 (1927).

¹⁴ *R. v. Almon*, (1765) Wilm. 243, 255, 97 Eng. Rep. 94, 99.

¹⁵ In the U.K., contempt of court is derived from statute—mainly the Contempt of Court Act 1981—and common law. For a useful summary of contempt statutes and case-law in the U.K., see Law Commission, Consultation Paper No. 209—Contempt of Court, Appendix F: List of contempts and associated statutory provisions (2012) (http://lawcommission.justice.gov.uk/docs/cp209_contempt_of_court.pdf) [hereinafter

justification of these offenses has been transformed, and no longer privileges the higher authority and dignity of the courts. Contempt serves as mere title, which no longer captures the rationale and essence of modern contempt of court offenses. Lord Salmon put it as follows in an important English case addressing a television comment on a religious sect: “The description ‘contempt of court’ no doubt has a historical basis but it is nonetheless most misleading. Its object is not to protect the dignity of the courts but to protect the administration of justice.”¹⁶ Contempt, in other words, has been reconceptualized as obstruction of justice.¹⁷

This is evident with respect to the two traditional sub-categories of contempt: civil contempt and contempt “in the face of the court,” known as criminal contempt.¹⁸ We may begin by considering *civil contempt*,¹⁹ which punishes those who disobey court orders or injunctions. While noncompliance with court orders has been proscribed for centuries as contempt of court, the modern framing of this type of offense has little to do with contempt as disrespect for authority. Rather, this area of law is perceived today as a mechanism for the enforcement of judicial decisions, “the ultimate sanction against a person who refuses to comply with the order of a properly constituted court.”²⁰ While the title “contempt” may suggest a historical, morally-charged meaning, implying not merely noncompliance, but also degradation and defiance of authority, this variety of contempt is

Consultation Paper No. 209]. In the U.S., federal contempt regulation is derived from statute—18 U.S.C. § 401 and Fed. R. Crim. P. 42—as well as common law. For a useful summary of contempt offenses under US federal law see Charles Doyle, *Obstruction of Justice: An Overview of Some of the Federal Statutes That Prohibit Interference with Judicial, Executive, or Legislative Activities*, CRS Report for Congress Prepared for Members and Committees of Congress 28-34 (2010). In Canada, New Zealand, and Australia, contempt of court is by and large derived from common law, which has been supplemented by certain acts of legislation over the years. For a survey of the Canadian Law, see Jeffrey Miller, *The Law of Contempt in Canada* (1997); for New Zealand see Law Commission Issue Paper No. 36, *Contempt in Modern New Zealand* (http://www.lawcom.govt.nz/sites/default/files/publications/2014/05/nzlc_ip36_contempt_web.pdf); for Australia, see Australian Law Reform Commission, *Contempt*, Report No. 35 (1987) and *Report on Review of the Law of Contempt*, Project No. 93 (2003).

¹⁶ *AG v. BBC*, [1981] AC 303, 344, [1980] 3 All ER 161, 170 (HL).

¹⁷ The view that modern contempt of court offenses are intended to prevent obstruction of justice is predominant in court decisions as well as in legal commentary. For a case law example, see *AG v. Leveller Magazine Ltd.*, [1979] AC 440, 449, [1979] 1 All ER 745, 749 (HL) (Lord Diplock’s assertion that “although criminal contempts of court may take a variety of forms they all share a common characteristic: they involve an interference with the due administration of justice, either in a particular case or more generally as a continuing process. It is justice itself that is flouted by contempt of court, not the individual court or judge who is attempting to administer it.”); see also C.J. Miller, *Contempt of Court* 19 (3d ed. 2000) (describing the rationale of contempt of court offenses as protecting “the due administration of justice from wrongful interference”).

¹⁸ See Miller, *supra* note 17, at 3.

¹⁹ *Id.* at 3-5.

²⁰ *Id.* at 4. As Moskowitz put it in a notable article, “[T]he value of a right to a litigant is no greater than the available remedy” and “the remedy, the injunction, is worth no more than its sanction, contempt.” Joseph Moskowitz, *Contempt of Injunctions, Civil and Criminal*, 43 *Colum. L. Rev.* 780, 780 (1943).

nowadays understood—whether remedially or punitively²¹—as complementary to other enforcement tools.²² Similarly, the second variety of contempt, *criminal contempt*, also known as contempt “in the face of the court,”²³ has also been reconceptualized under the obstruction of justice paradigm. This category includes various forms of disruption within the courtroom or in close proximity thereto, ranging from disorderly courtroom behavior (shouting,²⁴ throwing tomatoes, throwing law books at the Court of Appeal bench²⁵), to witness misconduct (failing to attend court in disobedience of a witness summons,²⁶ refusal to be sworn or to answer questions²⁷), and juror misconduct (jurors being absent from court without leave, or a jury determining a verdict by “hustling half-pence in a hat”),²⁸ to physical attacks on the judge or other court officials. Originally intended to vindicate the authority of the court, such contempt offenses were tried under a special summary proceeding, allowing the court itself to immediately commit the contemnor and determine her punishment.²⁹ While the summary proceeding is still effective, the justification for proscribing contempt in the face of the court has significantly changed: these prohibitions are currently understood as intended to allow the orderly management of the trial³⁰ and to create a courtroom atmosphere that “lends itself to deliberation.”³¹ This type of contempt too, is currently understood as protecting the due administration of justice rather than protecting the dignity or authority of the court.

Bearing in mind these developments in the two leading categories of contempt, the answer to our initial question “What is left of court authority?” may appear obvious. Under the currently dominant view, the authority of the court no longer plays an important role in justifying these offenses, as the authority of the court, according to the

²¹ Doyle, *supra* note 15, at 29 (“Civil contempt is coercive and remedial, calculated to compel the recalcitrant to obey the orders of the court or to compensate an opponent aggrieved by the failure to do so. Criminal contempt is punitive.”).

²² Miller, *supra* note 17, at 5 (“Admittedly, in some circumstances compliance can be secured without resort to coercion through the contempt power. For example, disobedience of an order to pay a sum of money can be effectively countered by attaching the earnings, rather than the person, of the defaulter.”).

²³ Contempt in the face of the court concerns “some form of misconduct in the course of proceedings, either within the court itself or, at least, directly connected with what is happening in court.” David Eady & A.T.H. Smith, *Arlidge, Eady & Smith on Contempt* para. 10-2 (2d ed. 1999).

²⁴ Miller, *supra* note 17, at 85.

²⁵ *Id.* at 150-51.

²⁶ *Id.* at 163.

²⁷ *Id.* at 164.

²⁸ *Id.* at 161 (quoting *Parr v. Seames*, (1734) 94 Eng. Rep. 993, 993).

²⁹ *Id.* at 85 (“Where contempt is committed in the face of the court it is dealt with usually by the court itself, either by an immediate committal or summarily once the proceedings have terminated.”).

³⁰ *Id.* at 139 (“A court of law must be able to maintain within its confines an atmosphere conducive to orderly proceedings so that justice may be done.”).

³¹ *Id.* at 3 (“For example, it is a criminal contempt to disrupt proceedings in a court of law . . . [I]t is obvious that justice can be secured only within an orderly framework and against a background which lends itself to deliberation.”).

common assumption, deserves no special legal protection. Inasmuch as courts are presumed to exercise authority, it is the rational bureaucratic authority to manage the court as an apparatus of justice.

B. Contempt by Publication

The historical transition from contempt of authority to obstruction of justice has not been as smooth and homogenous with a third category of contempt known as *contempt by publication*. Contempt by publication emerged as a new category of contempt of court in the eighteenth century. It included two varieties: publications tending to prejudice legal proceedings known as the “*sub-judice* rule”³² and publications attacking the judiciary, known as “scandalizing the court.”³³ This particular area of contempt regulation reveals not only a lively scene but one that affords an intriguing site for investigating the historical progression of contempt regulation, and for inquiring into the modern meaning of authority and specifically what is left of court authority.

Contempt by publication was subject to serious challenges during the twentieth century. While other sub-categories of contempt successfully survived the course of modernization, *sub-judice* and scandalizing the court, which emerged in the eighteenth century as newborn, indeed “modern,” doctrines were heavily criticized by the twentieth century—mainly on the grounds of their violation of freedom of speech.³⁴ In the U.S. these attacks led to the actual abolishment of both scandalizing the court and *sub-judice*.³⁵ In the U.K. and other common-law jurisdictions, the fates of the two doctrines have been markedly different: scandalizing the court has tended towards abolishment,³⁶ *sub-judice* towards re-

³² *Sub-judice* as a variety of contempt of court can be traced back to the celebrated opinion of Lord Hardwicke in *Roach v. Garvan*, (1742) 2 Atk. 469, 26 Eng. Rep. 683 (Ct. of Chancery), also known as the *St. James’s Evening Post Case*.

³³ Scandalizing the court was defined as a variety of contempt in the celebrated opinion of Wilmot J. in *R. v. Almon*, (1765) Wilm. 243, 97 Eng. Rep. 94.

³⁴ In many jurisdictions contempt by publication offenses have been constitutionally challenged in the twentieth century for violating the right to freedom of speech, which is guaranteed by effective constitutional legislation in these countries. In the U.S., the discussion was conducted as part of the first amendment jurisprudence; in the U.K., the discussion was conducted as part of the ECHR jurisprudence; and in Canada, the discussion refers to the constitutional guarantees of the Charter. For a comparative account of the constitutional debate over contempt by publication in the U.S., U.K., and Canada, see Barendt, *supra* note 9, ch. ix.

³⁵ In a series of decisions, the Supreme Court of the United States consistently held that publication commenting on the court is protected speech under the First Amendment, unless it poses a “clear and present danger” to the due administration of justice. The leading case is *Bridges v. California*, 314 U.S. 252 (1941). For an elaborate discussion of additional cases and of the development of American law on this point see Comment, *Trial by Newspaper*, 33 *Fordham L. Rev.* 61 (1964). For a critique of the American contemporary approach toward *sub-judice* prohibitions, see Gavin Phillipson, *Trial by the Media: The Betrayal of the First Amendment’s Purpose*, 71 *Law & Contemp. Probs.* 15 (2008).

³⁶ In the U.K., scandalizing the court was recently abolished through an official act of Parliament, following the recommendation of the Law Commission. *Crimes and Courts Act*, 2013 § 33. In Canada the offense was not officially abolished but it would seem that scandalizing the court is now a dead letter in Canadian law. Barendt, *supra* note 9, at 321. The leading case is *Kopyto*, where the Ontario Court of Appeal discussed

form.³⁷ On the face of it, the disparate treatment of scandalizing the court and of *sub-judice* is neither surprising nor unwarranted. While scandalizing the court censures seemingly legitimate public speech and critique of the judges or the court,³⁸ hence allegedly violating freedom of speech with no apparent justification, *sub-judice* limits publicized comment on pending legal procedures for the purpose of preventing undue prejudice and protecting a fair trial.³⁹ In fact, it may initially appear as though scandalizing the court has been abolished precisely because it could not be justified under an obstruction of justice paradigm, as opposed to *sub-judice*, which is commonly represented as protecting the right to a fair trial. Nevertheless, this first impression is at least somewhat misguided.

The common-law rule of *sub-judice* prohibits publications that tend to prejudice a current or forthcoming trial.⁴⁰ Under the common understanding, prejudicing the trial refers to exposing the participants of the legal process—most notably jurors—to publicized comment or information that may risk the impartiality and fairness of legal decision-making.⁴¹ Publication of an accused's past criminal record, which is inadmissible as evi-

the compatibility of scandalizing the court with the right to freedom of expression guaranteed by the Charter. The court ruled that scandalizing the court could be held in contempt only when it posed a real danger to the fair administration of justice. *R. v. Kopyto*, (1987) 47 DLR (4th) 213 (Ont. Ct. App.). In Australia and New Zealand scandalizing the court has been utilized with relative frequency in recent years. See A.T.H. Smith, *Reforming the New Zealand Law of Contempt of Court—An Issues/Discussion Paper* paras. 3.15-3.21 (Australia), 3.28-3.40 (New Zealand) (2011).

³⁷ In the U.K., *sub-judice* has become a central focus of reform since the publication of the Phillimore Committee Report in the 1970s. The offense of *sub-judice*, also known in the U.K. as “the strict liability rule,” was then substantially revised by the Contempt of Court Act 1981 following the *Sunday Times* case, in which the European Court of Human Rights found that the law on strict liability contempt was incompatible with article 10 of the European Convention on Human Rights. Recently, the Law Commission commenced comprehensive consultations towards yet another reform in the field. For the consideration of *sub-judice* under the U.K. Commission consultation paper see Consultation Paper No. 209, supra note 15, paras. 2.1-3.87 (<http://lawcommission.justice.gov.uk/consultations/contempt.htm>). The leading authority on *sub-judice* in Canada is currently the Supreme Court decision in *Dagenais v. Canadian Broadcasting Corp.*, (1994) 120 DLR (4th) 12, which adopted a restrictive approach toward *sub-judice* prohibitions, similar but not identical to the U.S. position. On the potential reform of *sub-judice* under New Zealand Law, see New Zealand Law Commission, *Contempt in Modern New Zealand* ch. 4 (2014).

³⁸ Thus Lord Atkins famously asserted in a 1936 case that “no wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public, the public act done in the seat of justice. The path to criticism is a public way: the wrong headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely expressing a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.” *Ambard v. A-G for Trinidad and Tobago*, [1936] AC 322, 335 (PC).

³⁹ The view that *sub-judice* is premised on the right to a fair trial is currently the dominant interpretation of *sub-judice*, which is referred to in virtually every account of the offense. See, e.g., Consultation Paper No. 209, supra note 15, para. 2.4 (“The rationale for an offense of contempt by publication arises from the need to protect the right to a fair trial, now enshrined in article 6 of the ECHR.”).

⁴⁰ See Chesterman, supra note 10, at 536.

⁴¹ *Id.* at 537 (“The most important instance of ‘prejudice’ to a trial is the exertion of influence on key participants—in particular, the jury, but also in some instances the witnesses or possibly even the parties.”).

dence during a criminal trial, is a clear case of such prejudice and a paradigmatic example of *sub-judice*.⁴² The fair trial interpretation provides not only a commendable justification for the *sub-judice* rule, but also one that fits the larger framework of obstruction of justice currently dominating contempt jurisprudence. When *sub-judice* is considered alongside classic contempt doctrines such as criminal contempt and civil contempt, a plausible argument can be made that, much like these historical doctrines, it too is intended to prevent obstruction of justice. Moreover, all of these offenses can plausibly be understood as addressing distinct aspects of obstruction such as disrupting the effective administration of justice (criminal contempt), obstructing the enforcement of judicial decisions (civil contempt), and risking the fairness and impartiality of the judicial process as a process for the administration of justice (*sub-judice*).

The overarching framework for contemporary debates over *sub-judice* is the tension between the right to a fair trial and freedom of speech. Policy makers and commentators are currently pondering whether contemporary formulations of the *sub-judice* rule are appropriate for achieving the right to a fair trial, and whether the present legal practice of *sub-judice* on the whole is worth the sacrifice of violating freedom of speech.⁴³ Several critiques concentrate more particularly on the empirical verifiability of the assumption of prejudice with respect to jury⁴⁴ and on the challenges of the new media.⁴⁵ Another contemporary complaint is that the *sub-judice* rule has become complex,⁴⁶ vague, and uncertain.⁴⁷ In the U.K. and New Zealand, this has recently led to the establishment of special law commissions with the purpose of designing comprehensive reforms that aptly balance the competing constitutional values.

⁴² Id. (“The publication of the prior convictions of a person being tried by a jury is treated as a prime example of prejudice to the trial by way of influence on the jury, because in the normal course of events this information is treated as inadmissible in the trial and not to be revealed to the jury until they have delivered their verdict.”).

⁴³ Reaching the appropriate balance between the right to a fair trial and the right to freedom of speech has been a central theme of consultation over reforming contempt of court in the U.K. See Consultation Paper 209, *supra* note 15, para. 1.10 (“Chapter 2 considers the law on contempt by publication both under the Contempt of Court Act 1981 and the common law. The nub of the problem examined in this chapter is how to balance the right of a defendant to a fair trial by an independent and impartial tribunal, with the right of the publisher to freedom of expression.”).

⁴⁴ Admittedly, the assumption that at least in some circumstances media publicity might have considerable impact over members of the jury is a fairly reasonable one. Barendt, *supra* note 9, at 323. Nevertheless, according to the Law Commission of New South Wales, Australia, empirical support to the premise of influence is unequivocal. Law Commission of New South Wales, Discussion Paper No. 43—Contempt by Publication para. 2.55 (2000).

⁴⁵ See, e.g., Lorne Sossin & Valerie Crystal, A Comment on “No Comment”: The *Sub-judice* Rule and the Accountability of Public Officials in the 21st Century, 36 *Dalhousie L.J.* 535, 566 (2013). The challenges of the new media have been a focus of discussion in the U.K. Law Commission Consultation as well. See Consultation Paper No. 209, *supra* note 15, ch. 3 (“Publications, Publishers, and the New Media”).

⁴⁶ Miller, *supra* note 17, at 208 (“the law governing what are usually called ‘*sub-judice* contempts’ is now both complex and, in part, unsatisfactory”).

⁴⁷ See Smith, *supra* note 36, at 22 (referring to “uncertainty/lack of clarity in the law” as one of the main problems in the contemporary law of contempt).

Whether one is advocating abolishment or reform, considering *sub-judice* through the method of constitutional balance has been dominant in recent years. In what follows we suggest that such presentation veils a basic difficulty to accommodate *sub-judice* within an obstruction of justice interpretation. *Sub-judice*, we argue, should be analyzed not only in terms of the tension between competing constitutional values (the right to a fair trial versus the right to freedom of speech) but rather as contesting the prevailing historical narrative “from contempt to obstruction.”

C. The Riddle of Sub-Judice

Looking more closely into the contemporary jurisprudence of *sub-judice* reveals the complexity of fully explaining and justifying it within the obstructionist framework of fair trial.

There is a fundamental ambiguity within the *sub-judice* rule itself. The obscurity of the rule emanates from an equivocality of the meaning which is embedded in the doctrine of *sub-judice*. The doctrine harbors two distinct understandings of prejudice. While under the fair trial interpretation *prejudice* refers to influence in the sense of distorting the outcome of the legal proceeding,⁴⁸ there is a second sense of prejudice known in the literature as the *public prejudgment principle* (or simply the prejudgment principle),⁴⁹ which however is not clearly defined nor easily justified.

The public prejudgment rationale is often discussed with reference to one particular category of cases. Such cases involve civil rather than criminal trials and, more importantly, address media publications which do not provide new information or evidence relating to the case, but rather comment on its merits,⁵⁰ or otherwise assert views regarding the desirability of a certain outcome.⁵¹ Such media comment was brought into the center of attention in the famous English case of *Sunday Times*⁵² in the 1970s. The case concerned a notoriously tragic affair—the use of the thalidomide drug by pregnant women in the late 1950s, which has led to severe fetus deformations. A negligence action was filed against Distillers—the pharmaceutical company marketing the drug—and, while legal action was pending, *The Sunday Times* launched a campaign to pressure the Distiller Company to give the children more generous compensation than they had intended. The Attorney General initiated contempt proceedings against the newspaper, leading ultimately

⁴⁸ Barendt, *supra* note 9, at 325.

⁴⁹ Miller, *supra* note 17, at 379.

⁵⁰ *Id.* at 275-381 (discussing *sub-judice* “prejudicing the merits of a case” in civil proceedings).

⁵¹ Smith, *supra* note 36, at 24 (“A further possible ground of liability in this context is the so-called ‘prejudgment’ test, the objection here being that if a person couches comment upon a forthcoming trial in a way that asserts views as to the desirability or otherwise of a particular outcome, it might provoke the proponents of the other side to enter the public arena with a different view. The danger is that this might give rise to trial by the media, as opposed to trial by properly constituted courts, on the basis of properly tested evidence.”).

⁵² *A-G v. Times Newspaper Ltd.*, [1974] AC 273.

to a ruling by the House of Lords, and later on by the European Court of Human Rights.⁵³ We shall return to the *Sunday Times* case in more detail later. For our present purposes, suffice it to say that the case stirred controversy as to the legitimacy of proscribing publication under a public prejudgment understanding of *sub-judice*—a controversy that continues to preoccupy commentators and policy makers long after the opinions of the Lords, as well as those of the European Court of Human Rights reviewing the House of Lords’ decision, were delivered. There seems to be general agreement that inasmuch as publication in such cases is proscribed, it is not by virtue of its influence on the participants to any particular legal proceeding,⁵⁴ but rather due to its function as “trial by the media.”⁵⁵ What precisely is wrong with trial by the media is far from clear. A common argument is that trial by the media undermines public confidence in the judiciary as a whole, since it might lead to the impression that judges can be influenced by press campaigns.⁵⁶ The difficulty with the above argument, which transforms the issue of influence into a problem of the public appearance of influence, lies with its circularity. If the risk of biasing judges is taken to be a real problem, why speak of the appearance of such influence in separation from the influence itself? If, on the other hand, judges are presumed to sustain external influences, as they commonly are,⁵⁷ why should we accord the appearance of such influence any real weight so as to establish upon it a criminal prohibition?

Facing the above hurdle, one possible response has been to declare the *sub-judice* prohibition as unjustified in public prejudgment cases, and to limit its application to cases involving prejudice in the sense of distorting or biasing the course of judicial decision-making within a particular legal process.⁵⁸ However, this essay assumes that the public

⁵³ *Sunday Times v. United Kingdom*, Series A, No. 30, (1979) 2 EHRR 245.

⁵⁴ Chesterman, *supra* note 10, at 537 (“[A] publication which prejudices the outcome of one or more of the principal issues in current or forthcoming proceedings may be in contempt even though it does not give rise to prejudice by virtue of influence on any of the relevant participants.”).

⁵⁵ Barendt, *supra* note 9, at 325 (“There is a second justification for *sub-judice*, namely, that trial by the media is intrinsically abhorrent.”).

⁵⁶ *Id.* at 327 (“[T]he clam is that public confidence in the administration of justice and resort to the courts might seriously decline if it were widely believed that judges were influenced by press campaigns.”); Chesterman, *supra* note 10, at 537 (“The element of ‘embarrassment’ arises from the fact that the court hearing the proceedings may be thought by the public to be ‘giving in to’ the publication if it decides the case in accordance with the prejudgment, or to be deliberately ‘standing out against’ the publication if it takes a contrary view.”)

⁵⁷ Barendt, *supra* note 9, at 322 (“Juries are a priori more likely to be prejudiced by damaging newspaper articles about the accused than are judges”); Smith, *supra* note 36, at 49 (“The chances of prejudice are generally less [in the stage of appeal, after the verdict has been given by the trial court] because any prejudicial comment made will have an impact, if any, upon the sentencing judge and the Court of Appeal rather than the jury, and judges can be expected to put out of their minds any such prejudicial comment.”).

⁵⁸ Whether or not English law, through the Contempt of Court Act 1981, actually rejected the public prejudgment interpretation of *sub-judice* discussed in the *Sunday Times Case* is a matter of some debate. Miller, *supra* note 17, at 376 (“the precise relationship of this [the *Sunday Times*] decision to the strict liability rule of the Contempt of Court Act and the statutory test of liability contained in s. 2(2) of that Act is not wholly clear”).

prejudgment cases provide a key for understanding *sub-judice* as a modern doctrine of contempt of court. The point of the following analysis is to locate both the fair trial interpretation and the public prejudgment interpretation of *sub-judice* within a larger jurisprudential inquiry into the modern meaning of contempt, and to question the common wisdom that *sub-judice* has nothing whatsoever to do with contempt of authority but is rather premised on the counter-authoritarian conception of obstruction of justice.

So far, we have seen that *sub-judice* is commonly conceptualized on two axes: diachronic and synchronic. Diachronically, it has been understood as part of a historical shift from contempt understood as protecting the honor of the court to contempt as protecting a fair judicial process and preventing obstruction of justice. *Sub-judice* obstructs justice by prejudging the court and especially the jury against one of the parties. Synchronically, *sub-judice* is placed between two competing normative concerns: freedom of expression and fair process. The scope of the prohibition is an outcome of a proper balance between these two poles. As one scholar characteristically and uncritically portrayed contempt:

The concept of contempt, which is rooted in totalitarianism, has seen a fundamental shift in the era of expansion of human rights. Today's main thrust is to adopt a balance between two conflicting principles, i.e. administration of justice and freedom of speech and expression. Democracy demands to do justice with each and every individual.⁵⁹

In what follows, we will offer a competing framework for understanding *sub-judice*, through revisiting the historical context of its inception. The proposed framework offers both a more accurate account of the historical development and a seldom-appreciated rationale for the doctrine. We wish to suggest that for *sub-judice* to be understood it first needs to be freed from both the diachronic and synchronic framings. Historically, *sub-judice*, along with scandalizing the court, is a new kind of contempt. It does not continue a traditional authoritarian approach, and consequently its recent history cannot be explained as a move from authoritarianism toward democratization. Rather, as we shall suggest, it is better understood as the courts' response to the emergence of the modern press, which challenged the authority of the court as a public institution. On the synchronic plane, we reject the common rendering of *sub-judice* as located in the tension between freedom of expression and fair trial. Rather, our return to the history of *sub-judice* offers an alternative reconstruction of its justification, and one better situated within the historical context. Under this reconstruction, the justification for *sub-judice* concerns a different binary opposition, not between freedom of expression and fair trial, but rather between two competing understandings of the doctrine—one based on rational-bureaucratic legitimacy, the other on "public authority," that is, the authority of public institutions *qua* their publicness. Ultimately, at stake in these competing narratives are clashing understandings of authority, contempt, and the public character of both the press and the judicial process.

⁵⁹ Bibha Tripathi, *Contempt of Court and Freedom of Speech: Exploring Gender Biases* 27 (2010).

III. *Sub-Judice*—History

A. *Moments of Inception*

Up until the eighteenth century contempt of court was embedded in the broader structures of political authority.⁶⁰ The authority of the court emanated from the authority of the Crown and was understood as an extension of its majesty. But a shift in the sense and sensibilities of contempt took place toward the second half of the eighteenth century, when two new offenses were introduced into the common law: *sub-judice* and scandalizing the courts. Though the two were presented as continuous with a long and lasting common law tradition of contempt of court,⁶¹ they were, in fact, unprecedented in two related ways. First, both centered on contempt outside of court. Admittedly, contempt outside of court was not in itself a novelty, but traditionally contempt outside of court was modeled after contempt in the presence of the court, merely expanding its rationale by way of a legal fiction, and was dubbed quite appropriately “constructive contempt.”⁶² In contradistinction, the new offenses were specifically concerned with contempt in the public sphere as such. Second, both *sub-judice* and scandalizing the court were a response to the rise of mass media and specifically to the rise of modern newspapers. It is the threat posed by the press in a newly emerging public sphere that concerned the courts and concerns us.

Since the eighteenth century, obstruction of justice by prejudicing the court has become not only the most common justification of *sub-judice*, but practically the only valid justification for the new doctrine.⁶³ The justification, convincing as it may sound, ignores the full historical, political and, most importantly, jurisprudential context in which *sub-judice* was formed and formulated. Specifically, it ignores the relationship between the courts and the press, which is key for understanding the rule’s full significance. Surprisingly, very little has been written on the history of *sub-judice* other than in a purely doctrinal context, which more often than not has misconstrued the historical records.

⁶⁰ Blackstone, *supra* note 12.

⁶¹ Blackstone, for example, incorporates the new offenses into the traditional framework when he writes,

Some of these contempts may arise in the face of the court . . . others in the absence of the party, as by disobeying or treating with disrespect the king’s writ . . . by speaking or writing contemptuously of the court or judges, acting in their judicial capacity; by printing false accounts (or even true ones without proper permission) of causes then depending in judgment; and by anything in short, that demonstrates a gross want of that regard and respect which, when once courts of justice are deprived of, their authority (so necessary for the good order of the kingdom) is entirely lost among the people.

Id. at 285.

⁶² Gordon Borrie & Nigel Lowe, *The Law of Contempt* 35-74 (1973).

⁶³ For example, in a leading *Harvard Law Review* article from 1935, the author discusses “prejudicing the jury” and “prejudicing the witnesses” as the most important justifications for *sub-judice*. The article also mentions “abusing parties and witnesses” but here too the framing is that of fair trial and obstruction of justice. Arthur L. Goodhardt, *Newspapers and Contempt of Court in English Law*, 48 *Harv. L. Rev.* 885, 888-98 (1935); see also Borrie & Lowe, *supra* note 62, at 75-128.

The first court decision to offer a rationale for *sub-judice*⁶⁴ was in a 1742 case, known as the *St. James's Evening Post* case.⁶⁵ The case concerned a civil law suit brought by Mrs. Roach, the widow of John Roach, a late major of the garrison of Fort St. George in the East Indies, against Mr. Hall and Mr. Garden, the executors of his estate. During the trial, two leading newspapers, the *Champion* and the *St. James's Evening Post*, published articles taxing the executors and other witnesses in the trial with perjury. The defense claimed that this was a simple case of libel, but Lord Chancellor Hardwicke accepted the claim that it was a case of contempt by publication.

Lord Hardwicke's novel formulation of *sub-judice* has been quoted repeatedly and is considered canonical, but has seldom been properly understood. He famously listed a catalogue of contempt offenses:

There are three different sorts of contempt. One kind of contempt is, scandalizing the court itself. There may be likewise a contempt of this court, in abusing parties who are concerned in causes here. There may be also a contempt of this court, in prejudicing mankind against persons before the cause is heard.⁶⁶

Further elaborating on the third category, "prejudicing mankind," later to be known as *sub-judice*, he wrote, "nor is there anything of more pernicious consequence than to prejudice the minds of the public against persons concerned as parties in causes, before the cause is finally heard."⁶⁷

Already in its time,⁶⁸ Lord Hardwicke's ruling was considered the authoritative common law statement of contempt of courts and it continues to be quoted as a leading authority today.⁶⁹ For all its authority and clarity its account of *sub-judice* is puzzling. At first it may seem that Lord Hardwicke is simply formulating the now dominant justification of *sub-judice* as obstruction of justice through prejudicing the court. And yet this is not what Lord Hardwicke says. He speaks of "prejudic[ing] the minds of the public" and its equivalent, "prejudicing mankind,"⁷⁰ and not about prejudicing the court and the jury. Was Lord Hardwicke concerned with prejudicing the court and did he simply formulate this concern in different words, or did he have a very different challenge in mind?

⁶⁴ The courts at the time did not use the term "*sub-judice*" to refer to the rule of contempt by publication and the term was used more generally to speak about matters currently being considered by the court.

⁶⁵ *Roach v. Garvan*, (1742) 2 Atk. 469, 26 Eng. Rep. 683 (Ct. of Chancery) (*St. James's Evening Post* case).

⁶⁶ *Id.* at 470.

⁶⁷ *Id.* at 471.

⁶⁸ Hardwicke's tripartite analysis of contempt and its justification was popular also in the United States. In 1788, a case of contempt of court was tried in Pennsylvania and the accused was found guilty. A petition for pardon was brought before the House of Representatives and the House sought a legal opinion, which refers to Hardwicke's holding. 12 Samuel Hazard, *Pennsylvania Archives*, [1st Ser.], Selected and Arranged from Original Documents in the Office of Secretary of the Commonwealth 84 (1852-56); see also *Ex parte Van Sandau*, (1844) 1 Ph. 445, 41 Eng. Rep. 701.

⁶⁹ E.g., Nigel Lowe & Brenda Surfin, *Borrie and Lowe's Law of Contempt* 131 (3d ed. 1996).

⁷⁰ There are other cases in which the phrase "prejudicing the public" or "prejudicing mankind" have been used, but only in the context of quoting Lord Hardwicke's original decision.

Some commentators have simply glanced over the textual discrepancy. Others, more attentive, have put new words into the mouth of the court. Under the heading “Doubtful Categories of Contempt,” Borrie, a leading authority on contempt of court, writes:

The most probable explanation of this statement is that Lord Hardwicke in referring to effect upon the public was really concerned with effect upon a jury, which would be selected from the public. Thus to prejudice the public would be likely to prejudice a jury and so impair the impartiality of the court Prejudicing the public therefore, cannot be considered as a separate ground of contempt.⁷¹

This interpretation has the obvious advantage of bringing Lord Hardwicke’s account into accord with the currently prevailing justification of *sub-judice*. This is also, of course, the major disadvantage of an anachronistic reading. There are at least three reasons why Hardwicke cannot be read as embracing the obstruction of justice as his rationale. First, and in direct contradiction to Borrie’s explanation, the *St. James’s Evening Post* case was not a jury trial. It was a judge-tryed case, and Lord Hardwicke was the presiding judge. Hardwicke could not have been worried that prejudicing the public would prejudice the jury in this case. Second, the Lord Chancellor’s use of “prejudicing the public” and “prejudicing mankind” should be taken seriously. He was concerned with prejudicing the public outside the court as a distinct problem, and not with its influence on jury or judge. It is in this context that he discusses a previous court decision “of this kind” concerning one Captain Perry, who had published his brief while the case was pending in court. The court found Perry guilty of “prejudicing the world with regards to the merit of the cause.”⁷² Third and finally, Lord Hardwicke was concerned about damage being done to the dignity of the court, and to the reputation of the parties to the trial, and not with the need to preserve the impartiality of the court, or even with the ability of the court to do justice. He alone was responsible for the judgment, and it is unlikely that he would have considered himself at risk of being influenced by articles in the *Post*.⁷³

A more plausible interpretation of Lord Hardwicke’s phrasing opens the possibility of an alternative interpretation and justification of the *sub-judice* doctrine. Lord Hardwicke may have meant precisely what he said. A publication concerning matters legally pending may “prejudice the public,” that is, lead the public to form an opinion independently of the legal process. Why would this amount to a concern? In what sense would such an attempt constitute contempt of court? And why did Lord Hardwicke leave

⁷¹ Borrie & Lowe, *supra* note 62, at 111.

⁷² 2 Atk. at 473. See also Lord Hardwicke’s decision in the 1754 case of *Cann v. Cann*, (1754) 2 Ves. Sen. 520, 28 Eng. Rep. 332, 332 (“Lord Chancellor said, his reason for committing was not only for the sake of the party injured by such advertisement, but for [the] sake of the public proceedings in this court, to hinder such advertisements, which tend to prepossess people as to the proceedings in the court.”).

⁷³ Richard Danbury, *Can I Really Report That? The Decline of Contempt* 1, 6 (Reuters Institute, Oxford University, 2008).

these questions unaddressed? Is it because he had not thought them through or because the answers were all too obvious to him?

Hardwicke and other jurists of his time were increasingly concerned with the influence of the newly emerging press on the English public. The fear was not merely undue influence, but went to the heart of the court as a public institution and to the way the newly emerging press, the precursor of today's mass media, altered the public sphere and threatened to undermine the authority of the court. The tension between the court and the press was not only and simply between the state and an emerging civil society, but between two institutions with very different conceptions of what speaking publicly entailed. Understanding the precise threat the new press posed and the ways courts devised new legal doctrines to counter these perceived threats requires a closer look at the rise of the English public press and the relationship between the courts and the new mass media.

B. The Court, Public Opinion, and the Mass Press

In his renowned book, *The Structural Transformation of the Public Sphere*, Jürgen Habermas traced the rise of an independent public sphere, as we know it today, back to eighteenth-century Europe.⁷⁴ He showed how the public sphere first emerged in Great Britain⁷⁵ and attributed an important role to the English press in the formation of the new phenomenon of “public opinion.”⁷⁶ Habermas depicted the emerging public sphere as a site of open public deliberation that holds authority accountable and that brings political power under the scrutiny of an enlightened public. He joined Edmund Burke in describing this process as “transforming dominion . . . from a matter of will into a matter of wisdom.”⁷⁷

Habermas's contribution to the understanding of the rise of the public sphere, the distinctly modern notion of “public opinion,” and the central role the English press played in this history is invaluable. And yet, we should not accept uncritically Habermas's evaluation of these processes as synonymous with democratic processes and with an open public sphere of deliberation, and ignore the way these processes, from their inception, posed a threat to public institutions whether monarchical or democratic. As long as we accept Habermas's alignment of the English press solely with democratic forces countering monarchic authority, it is easy to conclude that *sub-judice* was merely an attempt to

⁷⁴ Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Thomas Burger trans., 1991) (1962).

⁷⁵ *Id.* at 57.

⁷⁶ *Id.* at 89-97. While the rise of the modern English newspaper is commonly traced back to the seventeenth century it is only in the eighteenth century that newspapers emerge as a significant and highly influential social force. For the earlier history see, e.g., Joseph Frank, *The Beginnings of the English Newspaper 1620-1660* (1961).

⁷⁷ *Id.* at 100. To be fair, Habermas does mention in passing the dialectic nature of the public sphere from its inception. And yet, the story he tells is that of a democratic public sphere in the eighteenth century that was corrupted only during the second half of the nineteenth century. Habermas, *supra* note 74, at 162 (“Since the middle of the nineteenth century, the institutions that until then had ensured the coherence of the public as a critical debating entity have been weakened.”).

safeguard the traditional authority of Crown and Parliament from the free press as an emerging democratic force.

Indeed, a similar alignment of the press with the rise of democratic forces has led Douglas Hay, in the most comprehensive account of the eighteenth- and early nineteenth-century history of scandalizing the court, to conclude that the new crimes of contempt served the interest of monarchical powers.⁷⁸ Hay, working within a neo-Marxian tradition, does not ignore the role that the new press played in the history of scandalizing the court, but he identifies the press with popular uprising as opposed to the courts' support of state authority and the old regime.⁷⁹ The courts, in his account, treated the press as a threat to the ruling power and used the law of contempt to suppress negative publicity and buttress the honor and dignity of the bench as a state ideological apparatus. Hay developed his argument by a careful study of the history of scandalizing the court, where the public image of the court is at stake in the most direct way. He addresses *sub-judice* offenses only in passing, and his account seems much less applicable to *sub-judice* where the public reputation of the court is not under direct attack. Furthermore, by addressing questions concerning the authority of the courts as inseparable from matters concerning the power of the state, Hay's account fails to see the distinctness of court authority precisely at the historical moment when the latter emerges as semi-independent.⁸⁰ Finally, Hay places power in the hands of the state and the courts, and he ignores the emerging power of the press and the danger as much as the promise that the newly emerging "public opinion" harbored. However, more recent scholarship on eighteenth-century England has challenged Habermas's account on two important grounds, offering a very different account of the press and the public sphere and paving the way to revisit Hay's historical account of contempt.⁸¹

First, while the press played an important role in English society of the time and contributed to the formation of the new phenomenon of "public opinion," the latter was far from its Habermasian idealization. Rather than a space of free public deliberation, the press and "public opinion" more generally became a highly influential power best characterized by its uniformity rather than polyphony.

The legal regulation of newspapers, at the time, reflected this new concern with the power of the press to mold public opinion. The tension between public authority and the press shifted from a fight against the very existence of an independent public opinion

⁷⁸ Douglas Hay, *Contempt of Scandalizing the Court: A Political History of the First Hundred Years*, 25 *Osgoode Hall L.J.* 431 (1987).

⁷⁹ Lord Hardwicke, also known as Philip Yorke, served as the Solicitor-General and became Lord Chancellor in 1737 until 1756. Hay writes in the specific context of the *St. James's Evening Post* case, "The undoubted advantages of attachments for contempt over all other forms of proceeding were the elimination of those unpredictable juries, both grand and petty, and the speed with which the court could proceed." *Id.* at 439.

⁸⁰ Sam J. Ervin, Jr., *Separation of Powers: Judicial Independence*, 35 *Law & Contemp. Probs.* 108, 110-12 (1970).

⁸¹ See Jeremy Black, *The English Press in the Eighteenth Century* (1987), especially at 79-94; Victoria E.M. Gardner, *Eighteenth-Century Newspapers and Public Opinion*, in *The Routledge Companion to British Media 195* (Martin Conboy & John Steel eds., 2015).

to a struggle to control public opinion. Siebert's comprehensive research depicts a change in the regulatory frame from licensing to censorship and subsidies in the eighteenth century.⁸² Until the end of the seventeenth century the most effective legal response to the rise of newspapers and the perceived threat emanating therefrom was licensing, which aimed to limit the proliferation of newspapers. By the eighteenth century, new measures were taken to regulate rather than oppose the press. As Siebert explains, "By the second quarter of the eighteenth century, as it became evident that the group in power in the government was subject to change under shifts in public opinion, a new theory of the place of the press in society became necessary."⁸³ The new regulation exposed the double threat at stake in the proliferation of the public press. On the one hand, it threatened traditional authority by creating a public sphere of democratic deliberation. On the other hand, it contributed to the formation of a dominant and often monolithic public voice, which threatened the authority of emerging democratic institutions such as the courts. The celebration of the plurality of public *opinions* was challenged by the danger of a monolithic public *opinion*. It is in this light that we may understand the new contempt offenses and, more specifically, Lord Hardwicke's concern with "prejudicing the public." This is best understood not as an attempt to assert the authority of the court and silence public dispute, but rather to allow an open dispute of the matter in a public trial, and prevent the case from being silenced by public opinion.

Second, contra Habermas, newspapers were much less an arena of public debate and much more a site of public voyeurism, gossip, and chatter, and it is the latter, rather than lofty political ideals, which comprised the actual content of "public opinion." One need not deny the importance of the press in creating a new public sphere, in order to acknowledge that engaging in political debates was not its main interest. In an important study of eighteenth century newspaper archives, Ann Dean has claimed that

[r]ather than moving away from the court to the town, as in Habermas's account, eighteenth-century British newspapers describe the public moving to the periphery of the court, where readers were invited to participate, at a distance, in politics as practiced by the king and his courtiers. Newspapers created an image of their readers eavesdropping at the palace rather than declaiming in the public square.⁸⁴

Taken together, these two characteristics of the press and public opinion offer a very different understanding of the threat that the press posed to the courts and it is precisely against the background of these developments in mid-eighteenth-century England that the two new offenses of contempt by publication, *sub-judice* and scandalizing the court,

⁸² Frederick S. Siebert, *Freedom of the Press in England 1476-1776* (1952).

⁸³ *Id.* at 6. Thus, towards the end of the eighteenth century the prohibition on publishing Parliamentary proceedings was removed, in 1771 (the House of Commons) and 1775 (the House of Lords). And while seditious libel continued to play an important role well into the nineteenth century, the battle for the right of juries to decide the criminal nature of the publication was won in Parliament in 1792 with the approval of Fox's Libel Bill. *Id.* at 391.

⁸⁴ Ann C. Dean, *Court Culture and Political News in London's Eighteenth-Century Press*, 73 *Eng. Lit. Hist.* 631 (2006).

emerged within the common law. This history is especially interesting in light of contemporary jurisprudence and scholarly accounts, which have depicted *sub-judice* and scandalizing the court as proceeding in opposite directions. Scandalizing the court, so the argument goes, emerged as a conservative attempt to protect the authority of the court and was thus doomed to fade away, whereas *sub-judice*, which was at its core concerned with the integrity of the legal process and championing the rights of the individual to a fair trial, continued to survive well into the twenty-first century, even if it may have required adaptation and a new balancing between freedom of the press and fair trial.

In fact, the two offenses emerged during the same time and out of similar concerns. *Sub-judice*, in very similar ways to scandalizing the court, was a response to the new power of the press to undermine the authority of the courts.⁸⁵ In a new age of a highly influential public press, the court found itself threatened by “public opinion,” not because public opinion would oppose the courts as part of the ruling class, but rather because “public opinion” would replace the court and render the court irrelevant. The tension between the courts and the press was not over control of the public, it was a tension between competing notions of the public.

Hardwicke believed that publication of matters relevant to a legal trial undermined the power of the court. While his alignment with the ruling classes has been well documented and should not be overlooked,⁸⁶ his concern with contempt had more to do with the specific and new challenges facing the courts as public institutions. The history of *sub-judice* opens a very different perspective for understanding its underlying jurisprudence. *Sub-judice*, at least at its early moments of inception, had little to do with the danger of obstruction of justice so commonly associated with the doctrine. It was, rather, about a new challenge confronting the courts when faced with the rise of the public press and the transformation of the public sphere. The courts’ claim to authority was no longer to be grounded solely in the authority of the Crown, but was gradually emerging as an independent public authority. *Sub-judice* was a way in which the courts sought, without fully articulating it quite in this way, to newly establish their authority and protect it from contempt by publication.

Admittedly, even at the time, Lord Hardwicke’s original understanding was not the only possible understanding of *sub-judice*. A competing interpretation of the doctrine emphasized the risk of prejudicing the court. This alternative account appears already in *R. v. Fisher* in 1811, where the court considered the effect of newspaper reports on juries in terms of obstruction of justice. The reports contained the prosecution’s evidence, which had been heard without challenge by the defense in a committal hearing. Several newspa-

⁸⁵ The importance of scandalizing the court for understanding the new shape of contempt should not be underestimated. It is no mere accident that Hardwicke begins with it. Contrast Goodhardt, *supra* note 63, at 887 (“It will, however, give a truer picture of the subject if we reverse the order of contempts, for ‘scandalizing the court’ is only of minor importance when compared with the two other kinds.”).

⁸⁶ Hardwicke, for example, was involved in the drafting of the infamous Black Act. See E.P. Thompson, *Whigs and Hunters: The Origins of the Black Act* 208-09 (1975).

pers had published it before the start of a trial. The court disapproved of the publication and explained its discontent:

It is of infinite importance to us all, that whatever has a tendency to prevent a fair trial should be guarded against. Every one of us may be questioned in a Court of Law, and called upon to defend his life and his character. We would then wish to meet a jury of our countrymen with unbiased minds. But for this there can be no security, if such publications are permitted.⁸⁷

Already in the nineteenth century, Hardwicke's own words were reconciled with this new interpretation of *sub-judice*. In the case of *King v. Clement*, the court considers the publication of evidence that had been previously used to convict the accused. Finding the publisher guilty, the court reframes Hardwicke's ruling by fusing "prejudicing the public" with "prejudicing the jury" and concludes, "This was therefore a contempt from its tendency to prejudice the minds of the public and the jurors who were to try the other cases; and it comes directly within the law laid down by Lord Hardwicke."⁸⁸ Ultimately, Hardwicke's opinion was masked over the years by courts that emphasized the danger of influencing the minds of the jury and obstructing justice.

In light of our discussion thus far, this alternative understanding of *sub-judice*, too, should be understood in the context of the relationship between the courts and the new press. The courts decided to buttress their authority not by claiming their place in the public sphere, but by limiting themselves to a specialized field of legal expertise, objectivity and neutrality.⁸⁹ But even under this alternative account of the doctrine, which identifies *sub-judice* not with "prejudicing the public" but rather with "prejudicing the court," the familiar doctrinal explanation of *sub-judice* requires revisiting. *Sub-judice* did not emerge as a natural response to an ahistorical interest of the court in avoiding the obstruction of legal process. Rather, the image of a just trial as an unobstructed legal process was a novel outcome of the rise of "public opinion" as a historical phenomenon. With the emergence of "public opinion," the court had to secure its position of authority within the public sphere and claimed for itself a new kind of legitimacy based on the impartiality of judge and jury.⁹⁰

⁸⁷ *R. v. Fisher*, (1811) 2 Camp. 563, 170 Eng. Rep. 1253.

⁸⁸ *King v. Clement*, (1821) 4 Barn. & Ald. 218, 106 Eng. Rep. 918, 919. There are other cases from the period that convey a similar rationale. See, e.g., *R. v. Fleet*, [1818] 1 Barn. & Ald. 379, 384 ("Nothing can be more important to individuals than that their trials should take place without any prejudice in the minds of those who are ultimately to decide upon the facts in evidence.").

⁸⁹ Scandalizing the court was also understood as an attempt of the court to protect its impartiality. Already in 1765, Wilmot, J. expressed this opinion in *R. v. Almon*, (1765) Wilm. 243, 255, 97 Eng. Rep. 94, 100 ("The arraignment of the justice of the Judges, is arraignment the King's justice; it is an impeachment of his wisdom and goodness in his choice of his Judges. . . . To be impartial and to be universally thought so are both absolutely necessary for . . . justice."). On the rise of a neutral jury, see Marianne Constable, *The Law of the Other: The Mixed Jury and Changing Conceptions of Citizenship, Law, and Knowledge* (1994).

⁹⁰ Scandalizing the court seems to have undergone a similar transition. The greatest concern of the court was public allegations of bias and corruption. Borrie & Lowe, *supra* note 62, at 152-74.

C. Modern Reincarnations

Throughout the nineteenth century and up to the present the most common justification for *sub-judice* has been obstruction of justice, namely, prejudicing the jury rather than prejudicing the public. There have been, however, several occasions on which Hardwicke's original rationale rose to the surface. One notable case is *Ilkley Local Board v. Oswald Lister*.⁹¹ The presiding judge held that

[it was an abuse of a party] to publish injurious misrepresentations directed against the party in the action . . . because it may, in the case of the plaintiff, cause him to discontinue the action from fear of public dislike or it may cause the defendant to come to a compromise which he otherwise would not come to for a like reason.⁹²

This case, however, emphasizes the effect of *sub-judice* on the parties and not directly on the authority of the court and thus differs from Hardwicke's original statement and, in the final analysis, is a variation on obstruction of justice.

A much clearer formulation of the "prejudicing the public" rationale appeared, strikingly enough, in one of the most renowned cases of *sub-judice* in twentieth-century England—the *Sunday Times* case.⁹³ As mentioned, the case concerned a media publication commenting on the merits of a high-profile negligence case, which led to a decision by the House of Lords, holding that the publication was indeed in contempt of court. The House of Lords concluded that publication was wrong because the article would lead to public prejudgment of the case, as Lord Reid explained:

[A]nything in the nature of prejudgment of a case or of specific issues in it is objectionable, not only because of its possible effect on that particular case but also because of its side effects which may be far-reaching If people are led to think that it is easy to find the truth, disrespect for the process of law could follow and, if mass media are allowed to judge, unpopular people and unpopular causes will fare badly.⁹⁴

Lord Diplock, explicitly referring to the dangers of trial by newspaper, wrote that "parties to litigation should be able to rely upon there being no usurpation by any other person of the function of that court to decide that dispute according to law."⁹⁵ Similarly Lord Cross, quoting Lord Denning, argued, "We must not allow trial by newspaper or trial by television or trial by any other medium than the courts of law."⁹⁶

The main difficulty with the House of Lords' decision is its diversion from the standard fair trial interpretation of *sub-judice*. The Lords speak of trial by the media, but what precisely is wrong with trial by the media? As noted above, one possible answer is that trial by the media contributes to the appearance that judges might be influenced by

⁹¹ (1895) 11 T.L.R. 176 (Maugham, J.).

⁹² Quoted in Borrie & Lowe, *supra* note 62, at 108.

⁹³ *Supra* note 53.

⁹⁴ *Id.* at 300.

⁹⁵ *Id.* at 309-10.

⁹⁶ *Id.* at 304.

the popular media, whether this in fact is true or not. Another argument, appearing in the House of Lords' decision, is that trial by the media entails the usurpation of the functions of the court by the media. The wrongfulness of such usurpation is, however, not entirely clear. As one commentator rightly observes, such usurpation cannot be understood literally since the "press cannot make a legally binding decision so in that precise sense the functions of the court cannot be usurped."⁹⁷ Contemporary accounts have been unable to explain or justify the prohibition of publication in such cases. In the absence of such a theory, proscribing media publication as contempt of court, in the *Sunday Times* case and in like cases, seems to echo a traditional, if not tyrannical, understanding of authority, where the court requires the oppression of the press in order to preserve its own power.

It is due to this last concern that Hardwicke's all but forgotten rationale of "prejudicing the public," which seemed to have finally won the day, ended up having a short-lived victory. Distillers appealed to the European Court of Human Rights, which overruled the decision of the House of Lords. A majority of eleven judges held that the restriction imposed on the *Sunday Times* by the House of Lords was unreasonable, rejecting most of its justifications and holding that restraining publication under the circumstances was not necessary in a democratic society for maintaining the authority and impartiality of the judiciary.⁹⁸ Following a Parliamentary Committee that published the Phillimore Report,⁹⁹ the Parliament eventually enacted the Contempt of Court Act 1981 and obstruction of justice returned to be the dominant justification for *sub-judice*. Following our historical investigation above, the next section will seek a rationale that turns away from the logic of obstruction, without reverting to a traditional understanding of authority and contempt.

IV. Contempt and the Public Authority of the Court

This brief account of *sub-judice* has placed the rule within the history of the relationship between the court and the press and revealed a competing rationale, which has all but been forgotten. It is now time to return to where we began and ask about the broader implications of the study of *sub-judice* for our understanding of contempt of court and more broadly about the place of authority in modern democratic societies. Prejudicing the court and prejudicing the public, we shall see, are not merely two different interpretations of the *sub-judice* doctrine. They are two very different understandings of authority and more specifically the modern authority of the court in the public sphere vis-à-vis the press.

The most common conceptualization of political and legal authority is Weberian.¹⁰⁰ Weber equated authority with the legitimate use of power or legitimate domination and

⁹⁷ Barendt, *supra* note 9, at 326.

⁹⁸ The Court based its decision on Article 10 of the Convention.

⁹⁹ The Parliamentary Committee was appointed in 1971 and reported in 1974. See Stephen J. Sauvain, *The Report of the Committee on the Contempt of Court*, 38 *Mod. L. Rev.* 311, 311-14 (1975).

¹⁰⁰ Weber, *supra* note 5, at 212-16. For a discussion of the relationship between Weber's typology and democratic authority, see Martin E. Spencer, *Weber on Legitimate Norms and Authority*, 21 *Brit. J. Sociology* 123 (1970).

distinguished between different kinds of authority—traditional, charismatic, and rational-bureaucratic. In Weberian terms, the historical transformation of contempt of court is best described as a move from traditional authority to rational-bureaucratic authority. This is a shift from judicial authority grounded in the hierarchical system of royal power to rational bureaucratic authority grounded in the objectivity and neutrality of the courts as an autonomous sphere protected from external influence including public opinion. Contempt, in the former case, degrades the dignity of the court and its judges and, in the latter case, threatens to undermine the court's neutrality and objectivity by passing public judgment on matters under trial. The Weberian account of bureaucratic authority captures *sub-judice* as prejudicing the court, because bureaucratic authority is most vulnerable to corruption and to the undermining of judicial impartiality. Under this account the media promotes democracy and furthers freedom of expression. This freedom must be balanced against the rights of individual defendants and due process. The image of the court is that of an institution defending itself by sealing itself off from the public sphere and from public opinion. The court is guarded as an autonomous realm of semi-professional decision making.

There is, however, an alternative account of authority, which Hannah Arendt developed and is better suited for understanding *sub-judice* as prejudicing the public.¹⁰¹ Its point of departure is that the authority of the court is based on its public role rather than its professional capacity. Authority, Arendt argues, contra Weber, has nothing to do with domination and the legitimacy of coercive measures. Recourse to violent enforcement is a clear failure of authority. Indeed, what *sub-judice* protects is not the court's decision and its coercive enforcement, but the judicial process. Challenging the court is perfectly legitimate once the legal process has been concluded. Once the court has had its final word, the press may raise whatever doubts it has about the decision. To be sure, the public role of the court envisioned here does not lie in its capacity to voice the norms of the community, as others scholars have emphasized.¹⁰² It is the deliberative process, not its expressive outcome, which is meaningful. *Sub-judice* protects the trial as a distinct event of public adjudication in which legal adversaries debate questions of justice and in which the power of words, not violent force, is at stake.¹⁰³ Since the authority of the courts—more than that of any other branch—lies in the power of its words, it is clear why contempt has become so central to protecting the authority of courts.

Contempt by publication does not protect the process from external influence, but rather from having its public authority undermined by prejudicing the public with respect to the case. A prejudiced public, one which has established its opinion on a case,

¹⁰¹ See *supra* note 1.

¹⁰² See, e.g., Owen M. Fiss, *Against Settlement*, 93 *Yale L.J.* 1073 (1984); see also David Luban, *Settlements and the Erosion of the Public Realm*, 83 *Geo. L.J.* 2619 (1995). Luban interprets and supports Fiss's analysis by stressing the public role of the court as derived from republican political theory and specifically Hannah Arendt's conception of political action. Yet, while stressing the deliberative aspects of the judicial process, he too accentuates the judicial determination and decision more than the deliberation itself.

¹⁰³ Robert Cover, *Violence and the Word*, 95 *Yale L.J.* 1601 (1986).

will not be able to take the judicial process seriously. The press is especially likely to undermine the authority of the court. It might short-circuit the judicial process by arriving at conclusions in the absence of a public trial, thus substituting public opinion for public court deliberation. The underlying assumption of *sub-judice* is that as long as the trial is under way the court is the only legitimate arena for adjudicating the case. The legitimacy of the judicial process does not stem from the neutrality of the jury and judges, but rather from the public spectacle of the adversarial process. If the court is a theater, the challenge posed by the mass press is not that the script of the actors might be influenced, but rather that the stage might be removed.

This alternative interpretation of *sub-judice* also entails a radically different understanding of the public presence of the media. For Habermas, the rise of the modern press is an integral part of the emergence of a public sphere and a necessary condition for democracy. But courts, already in the eighteenth century, saw the rise of the modern press and mass media as a threat to the court's authority as a public institution. The public speech of the courthouse is very different from the public speech of the press. The eighteenth-century press created a new public sphere but, as we have seen, one which is governed not by freedom of expression, but rather by opinion produced for mass consumption. The press strives to draw public attention and thrives on public scandal. The court's public authority stems from its pursuit of justice, and as long as it has public authority it does not need to fight for public attention. From this perspective, public speech and deliberation take place in court, whereas the media distorts public speech. Courts wish to preserve their authority not because they hold themselves in higher esteem than other citizens and social institutions, but rather because they are well aware of the dangers of the media—its ability to undermine the very possibility of meaningful public speech. It is this sense of authority that was first formulated by Hardwicke and has been all but forgotten in later generations.

V. Conclusion: Lessons for Historical Jurisprudence

There are different ways of thinking about historical jurisprudence and it may be helpful by way of conclusion to clarify our specific understanding of the term and contribution to the field.¹⁰⁴ Historical jurisprudence, as we understand it, is neither a sub-discipline nor a methodology, but rather a way of questioning.¹⁰⁵ It turns to historical materials to answer foundational questions of jurisprudence, such as in our case: What is legal authority or, more specifically, the authority of the court?

Historical jurisprudence should not be understood as combining legal history and philosophy. In fact, it offers a critical perspective on both these sub-disciplines. First, as opposed to the prevalent ahistorical discussion of philosophical and jurisprudential ques-

¹⁰⁴ See also Shai Lavi, *The Changing Ethics of the Deathbed: A Study in Historical Jurisprudence*, 4 *Theoretical Inq. L.* 729 (2003).

¹⁰⁵ See Galia Schneebaum & Shai Lavi, *Criminal Law and Sociology*, in *The Oxford Handbook of Criminal Law* 152 (Markus D. Dubber & Tatjana Hörnle eds., 2014).

tions, historical jurisprudence strives to expand the jurisprudential imagination by turning to history. Contemporary philosophical debates are often trapped within the confines of current legal controversies, such as between formalism and realism, positivism and natural law, deontology and utilitarianism, normative theory and critical theory. This has clearly been the case with respect to *sub-judice*. Current jurisprudence has been dominated by the obstruction of justice rationale and the tension between fair trial and freedom of expression, and has not been able to see past them. Our turn to the history of the doctrine and to the challenges facing the court with the rise of the modern press provided an alternative rationale, one which offers a critical perspective on the present understanding of the court as a bureaucratic rather than a public institution.

Second and more importantly, historical jurisprudence departs from the prevailing “law and society” approach which has dominated historical analysis without falling back on either doctrinalism or historical positivism. Historical jurisprudence, we have suggested here and developed in previous writings,¹⁰⁶ should not apply existing theories of “power,” “social structure,” and “political legitimacy” to the legal phenomenon, as if law was merely a docile subject matter to which other disciplines apply their analytic tools. Rather, historical jurisprudence turns to the legal materials in their historical context to decipher how law itself offers its own understanding of basic conceptual categories such as authority, which differ from the prevailing accounts in the social sciences. Within “law and society” the phenomenon of authority has been reduced most commonly to questions of power (e.g., Marx) or to questions of bureaucratic legitimacy (e.g., Weber). Turning to history has allowed us to recognize the ways in which authority remains a viable jurisprudential alternative, thus broadening our legal imagination.

It is true, of course, that we have relied in our analysis on Hanna Arendt’s understanding of authority, which may seem to be yet another social theory of law. In fact, however, Arendt’s account is an important alternative to law and society in two important and interrelated ways. First, Arendt borrows her understanding of authority from Roman law and not from the social sciences.¹⁰⁷ Second, Arendt was highly critical of the social sciences and their ability to understand politics, and in this sense turning to her work is compatible with a critical stance toward “law and society.”¹⁰⁸

Historical jurisprudence, to paraphrase the above and conclude, offers us a critical distance both from jurisprudence understood as abstract philosophy and from legal history read through the lens of the social sciences. One may wonder whether these two moves are not closely related. This is a problem to which we hope to return on a different occasion. Suffice it to recall Arendt’s opening statement that authority had its home in a historical age and has all but vanished from our own. For Arendt, prior to the eighteenth

¹⁰⁶ Shai Lavi, Turning the Tables on “Law and . . .”: A Jurisprudential Inquiry into Contemporary Legal Theory, 96 Cornell L. Rev. 811 (2011).

¹⁰⁷ Hannah Arendt, On Revolution 186-88 (1963).

¹⁰⁸ Hannah Arendt, Philosophy and Sociology, in *Essays in Understanding: 1930-1954*, at 28 (1994).

century authority depended not on civil society but on political authority, and the knowledge of authority was not reducible to social scientific analysis but had its grounding in legal and political thought. Returning to this history may help us better understand the challenges that juridical authority is facing today. More often than we tend to admit, the danger we face is not state authority trampling over free democratic expression, but rather the danger of bureaucratic institutions ruled by no one substituting for meaningful democratic institutions.