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Jeffrey Cole

Michael I. Spak

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DEFENSE COUNSEL AND THE FIRST AMENDMENT: "A  
TIME TO KEEP SILENCE, AND A TIME TO SPEAK."\*

JEFFREY COLE\*\*

And

MICHAEL I. SPAK\*\*\*

*In Sheppard v. Maxwell*<sup>1</sup> the Supreme Court importuned the lower courts to "take such steps by rule and regulation that will protect their processes from prejudicial outside interferences." The Court specifically noted that "extrajudicial statements by any lawyer . . . which divulged prejudicial matters" could be "proscribed" and that "neither prosecutors, counsel for the defense, [nor] the accused . . . should be permitted to frustrate [a court's] function. Mr. Cole and Professor Spak conclude that rules proscribing extrajudicial comments by counsel of record made during pending litigation, and for public dissemination, are perfectly consonant with the first amendment, and that the clear and present danger test of *Schenck v. United States*<sup>2</sup> is not the measure of the constitutionality of such rules.

Whether we like it or not, we must accept the fact that the "black art of publicity" has come to stay; every year adds to its potency and to the finality of its judgments. The individual is as helpless against it as the child is helpless against the formulas with which he is indoctrinated. Not only is it possible by these means to shape his tastes, feelings, desires and hopes, but it is also possible to convert him into a fanatical zealot.<sup>3</sup>

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\* *Ecclesiastes* 3:1, 7. "For everything there is a season, and a time for every purpose under heaven. A time to keep silence, and a time to speak."

\*\* B.S., J.D., 1968; Assistant United States Attorney. Mr. Cole has served as the Deputy Chief of the Appellate Division and the Assistant Chief of the Criminal Division in the Office of the United States Attorney for the Northern District of Illinois. He is the author of "Impeachment with Unconstitutionally Obtained Evidence: Coming to Grips with the Perjurious Defendant," 62 J. CRIM. L.C. & P.S. 1 (1971). The author's views do not necessarily represent the views of the U.S. Department of Justice.

\*\*\* B.S., J.D., LL.M., Northwestern University, 1962; Professor of Law, DePaul University College of Law. Professor Spak is the author of *M. SPAK, CASES AND MATERIALS ON MILITARY LAW* (Nexus: 1971), and numerous articles on Military and Constitutional Law.

1. 384 U.S. 333 (1966).

2. 249 U.S. 47 (1919).

3. L. HAND, *Mr. Justice Brandeis*, in *THE SPIRIT OF LIBERTY* 172 (Dillard ed. 1963).

It is not surprising, then, that the atmosphere essential to the preservation of a fair trial—"the most fundamental of all freedoms"<sup>4</sup>—is today threatened by excesses committed under the guise of freedom of speech. Indeed, with increasing frequency courts are importuned to review convictions in which substantial claims are made that a jury trial has been distorted because of inflammatory newspaper accounts exerting pressures upon potential jurors before trial and even during the course of trial, "thereby making it extremely difficult, if not impossible, to secure a jury capable of taking in, free of prepossessions, evidence submitted in open court."<sup>5</sup>

How courts can or should meet this constantly worsening situation<sup>6</sup> was considered by the Supreme Court in *Sheppard v. Maxwell*.<sup>7</sup> There, the Court decreed that reversals of criminal cases in which there was prejudicial pretrial publicity are but palliatives and that the cure lay "in those remedial measures that will prevent the prejudice at its inception."<sup>8</sup> The disturbing realization that many of the prejudicial items that had appeared in the press could be traced to *both* the defense and prosecution<sup>9</sup> prompted the Court to admonish trial judges to curb prejudicial news at its inception by effective control of counsel of record as well as of any party, witness, or court personnel whose comments could affect the outcome of the litigation.<sup>10</sup>

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4. *Estes v. Texas*, 381 U.S. 532, 540 (1965).

5. *Irvin v. Dowd*, 366 U.S. 717, 730 (1961) (Frankfurter, J., concurring).

6. *See Allen v. United States*, 4 F.2d 688, 697 (7th Cir. 1924), *cert. denied*, 267 U.S. 598 (1925).

7. 384 U.S. 333 (1966).

8. *Id.* at 363.

9. *See, e.g., Sheppard v. Maxwell*, 384 U.S. 333, 361 (1966); *Stroble v. California*, 343 U.S. 181, 201 (1952) (Frankfurter, J., dissenting); *United States ex rel. Bloeth v. Denno*, 313 F.2d 364, 378 (2d Cir.) (Lumbard, C.J., dissenting), *cert. denied*, 372 U.S. 978 (1963); A. FRIENDLY & R. GOLDFARB, *CRIME AND PUBLICITY* 241-42 (1967); Wright, *A Judge's View: The News Media and Criminal Justice*, 50 A.B.A.J. 1125, 1126 (1964). For a particularly egregious example of misconduct by a defense attorney, see the New Jersey Supreme Court's discussion of F. Lee Bailey's behavior in *State v. Kavanaugh*, 243 A.2d 225 (N.J. 1968). Thereafter, Bailey's clients unsuccessfully sought relief in the federal courts. *Matzner v. Brown*, 288 F. Supp. 608, 612 (D.N.J. 1968), *aff'd*, 410 F.2d 1376 (3d Cir. 1969), *cert. denied*, 396 U.S. 1015 (1970).

10. In *Sheppard v. Maxwell*, 384 U.S. 333 (1966), the Court adumbrated the following:

Effective control of [counsel for both defense and prosecution]—*concededly within* the court's power—might well have prevented the divulgence of inaccurate information, rumors, and accusations that made up much of the inflammatory publicity, at least after Sheppard's indictment.

*More specifically, the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as the refusal of Sheppard to submit to interrogation or take any lie detector tests; any statement made by Sheppard to officials; the identity of pro-*

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The adjuration of *Sheppard* has given impetus to one of the most searching debates in recent legal history concerning methods of solving the problems of fair trial and free press. In 1968 the American Bar Association's Advisory Committees on Fair Trial and Free Press, and the Judicial Conference Committee issued similar reports, called the Reardon<sup>11</sup> and Kaufman Reports,<sup>12</sup> respectively, after their chairmen. Both committees sought to implement the mandate of *Sheppard* by providing a "satisfactory accommodation"<sup>13</sup> between those interests which the first and sixth amendments seek to protect.<sup>14</sup> All those involved in the effort were profoundly aware of the delicacy of their mission, for they recognized the inevitable tension that would result from the simultaneous application of these two constitutional limitations to the administration of criminal justice. Yet, despite the recondite nature of the problem, both committees arrived at almost identical results.

One of the major areas in which action was recommended involved the recommendation that courts place limitations on extrajudicial statements by *all* counsel in criminal cases.<sup>15</sup> The bilateral nature of the

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spective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case. See *State v. Van Duyne*, 43 N.J. 369, 389, 204 A.2d 841, 852 (1964), in which the court interpreted Canon 20 of the American Bar Association's Canons of Professional Ethics to prohibit such statements.

From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent. Due process required that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused.

*But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.*

*Id.* at 361-63 (emphasis added). See also *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972). Prior to his appointment as Associate Justice of the Supreme Court, Louis Powell had advocated self-imposed professional restraints on attorneys. Powell, *The Right to a Fair Trial*, 51 A.B.A.J. 534 (1965).

11. Reardon, *The Fair Trial-Free Press Standards*, 54 A.B.A.J. 343 (1968). It has been codified in the ABA CODE OF PROFESSIONAL RESPONSIBILITY, DISCIPLINARY RULE 7-107 [hereinafter cited as ABA DISCIPLINARY RULE].

12. REPORT OF THE COMMITTEE ON THE OPERATION OF THE JURY SYSTEM ON THE "FREE PRESS-FAIR TRIAL" ISSUE, 45 F.R.D. 391 (1968).

13. *Id.* at 393.

14. *Id.* at 393.

15. The Judicial Conference also recommended that rules be promulgated prohibit-

suggested restrictions bespeaks the recognition that defense counsel, no less than counsel for the government, had been guilty of repeated infractions of ethical standards outlined in ABA Canon 20.<sup>16</sup>

Notwithstanding the plain mandate of *Sheppard*, the uncompromising avowal of the Judicial Conference Committee that the courts unquestionably have the power and the duty to regulate statements by defense and prosecution lawyers,<sup>17</sup> and the substantial degree of

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ing the release of prejudicial information by courthouse personnel and that each district court provide by local rule for special orders governing the proceedings in any case in which prejudicial influences might otherwise penetrate into the trial. *Id.* at 401.

Both the Reardon and Kaufman Committees warned against any attempt to directly regulate the press itself. The extraordinary problems which are involved in such attempts differ markedly from those encountered when counsel are sought to be restrained. For an analysis of those questions see *United States v. Dickinson*, 465 F.2d 496 (5th Cir. 1972); *Phoenix Newspapers, Inc. v. Jennings*, 490 P.2d 608 (Wash. 1971); *Younger v. Smith*, 106 Cal. Rptr. 225 (Ct. App. 1973); *Sun Co. v. Superior Court*, 105 Cal. Rptr. 873 (Ct. App. 1973); *State ex rel. Superior Court v. Sperry*, 483 P.2d 564 (Ariz. 1971).

16. ABA CANONS OF PROFESSIONAL ETHICS No. 20 provided:

Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the Court; but even in extreme cases it is better to avoid any *ex parte* statement.

See Reardon, *The Fair Trial-Free Press Standards*, 54 A.B.A.J. 343, 344 (1968).

17. ABA STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS 77, 102-106 (Tentative Draft 1966) [hereinafter cited as ABA STANDARDS]; REPORT OF THE COMMITTEE ON THE OPERATION OF THE JURY SYSTEM ON THE "FREE PRESS-FAIR TRIAL" ISSUE, 45 F.R.D. 391, 407 (1968). See *In re Sawyer*, 360 U.S. 622, 647 (1958) (Stewart, J., concurring); *State v. Nielsen*, 136 N.W.2d 355, 360 (Neb. 1965); *In re Bailey*, 273 A.2d 563 (N.J. 1971); *State v. Kavanaugh*, 243 A.2d 225 (N.J.), *cert. denied*, 393 U.S. 924 (1968); *State v. Van Dyne*, 204 A.2d 841 (N.J. 1964). Consequently, it was deemed desirable to replace Canon 20 with a more carefully defined constitutional standard. See Reardon, *The Fair Trial-Free Press Standards*, 54 A.B.A.J. 343, 344 (1968).

Prohibition of extrajudicial comment by attorneys in cases in which they are counsel of record was premised upon the lawyer's professional obligation "to maintain the integrity of the system he helps to administer." ABA STANDARDS 80. Upon this basis, both the ABA and Judicial Conference Committees commenced their proposed standards concerning extrajudicial statements by counsel with a series of criteria designed to fulfill constitutional demands:

It is the duty of the lawyer not to release or authorize the release of information or opinion for dissemination by any means of public communication, in connection with pending or imminent criminal litigation with which he is associated, if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.

ABA STANDARDS 82; REPORT OF THE COMMITTEE ON THE OPERATION OF THE JURY SYSTEM ON THE "FREE PRESS-FAIR TRIAL" ISSUE, 45 F.R.D. 391, 404 (1968). This paragraph was "not designed to serve as a basis for the application of sanctions but rather to state the broad principle underlying the specific restrictions which follow." ABA STANDARDS 85. The relevant restriction that followed was that:

During the trial of any criminal matter, including the period of selection of the jury, no lawyer associated with the prosecution or defense shall give or authorize any extrajudicial statement or interview, relating to the trial or the parties or issues

quasi-legislative consideration that underscored the promulgation of these rules,<sup>18</sup> there persists a chorus of strident objections predicated on the first amendment.

Many of those who have argued against the imposition of restrictions on comments by defense counsel<sup>19</sup> have succumbed to the mischievous tendency whereby beguiling formulas of respect for the first amendment are made to do service for critical analysis by being turned into dogma. Indeed, more often than not, the arguments against the restrictions are little more than panegyrics to the first amendment rather than sound and dispassionate analyses. Phillip Toynbee wrote with specific reference to obscenity and the law what can serve as a general commentary on the objections raised by the "free speech" people:

The smut-hounds are guilty of elevating personal prejudice above both art and freedom. The art-heretics are guilty of elevating art above life, the part above the whole, the by-product above the living process of creation. It is the old argument which divided some of us at the time of Monte Cassino, when the few held that the monastery should be spared even at the cost of soldiers' lives while the same majority considered this to be the most odious of blasphemies. Suppose that after an air raid a man had lain buried under St. Paul's in such a way that he could be rescued only by the demolition of the whole cathedral. Who but a monster would have hardened his heart against the victim's cries rather than against the man-made monument above him? *And just as there is a lunatic fringe of art lovers, so there is a lunatic fringe of libertarians who hold that the freedom to talk or print is, in all circumstances, sacrosanct. They would protest against any action being taken to prevent the publication of anti-Semitic pamphlets in modern Germany or of incitements to race-violence in Notting Hill. It is another heresy which prefers the part to the whole and attempts to deal with the complexity of life by a single supreme simplicity.*<sup>20</sup>

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in the trial, for dissemination by any means of public communication, except that the lawyer may quote from or refer without comment to public records of the court in the case.

*Id.* at 84.

18. In *In re Oliver*, 452 F.2d 111 (7th Cir. 1971), the court said that when enacting rules of practice, "courts should be treated more like legislatures than courts in that their rule-making decisions should be subject to the same sorts of challenges permitted for statutes." *Id.* at 114.

19. No one seems especially concerned about the *prosecutor's* right of free speech. The feeling apparently is that the sixth amendment justifies restricting his extrajudicial comments. However, a corresponding responsibility *should be* imposed on defense counsel.

20. Toynbee, *Two Kinds of Extremism*, London Observer, Feb. 8, 1959, at 20, col.

Since the salient objection to restrictions on defense counsel's extrajudicial comments invariably is pressed in terms of the clear and present danger test, it is appropriate to demonstrate the inapplicability of the danger formula to rules which regulate extrajudicial comment by counsel in criminal cases. The following is not an attempt to articulate the sound policy considerations which support the ABA and Judicial Conference Committee rules. Rather, we have sought to demonstrate that there are no constitutional impediments to local rules of practice which rely upon their precepts.

#### THE DEMISE OF CLEAR AND PRESENT DANGER

All rights tend to declare themselves absolute to their logical extreme. . . . All in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. . . . The boundary at which the conflicting interests balance cannot be determined by any general formula in advance . . . .<sup>21</sup>

When Mr. Justice Holmes came to the Supreme Court,<sup>22</sup> the contours of the first amendment were largely undefined. By a few opinions—a mere handful<sup>23</sup>—he gave philosophical direction to the inert ideas of a paper guarantee of freedom.<sup>24</sup> From the outset the Justice labored to articulate that spirit of tolerance and moderation upon which the first amendment rested.<sup>25</sup> For him the interest which the

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5-6, quoted in P. FREUND, *Mr. Justice Frankfurter*, in FELIX FRANKFURTER: A TRIBUTE 158 (W. Mendelson ed. 1964).

21. *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908) (Holmes, J.).

22. Holmes was commissioned in December, 1902.

23. See *Pierce v. United States*, 252 U.S. 239 (1920) (Holmes, J., dissenting); *Schaeffer v. United States*, 251 U.S. 466 (1920) (Holmes, J., dissenting); *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, J., dissenting); *Debs v. United States*, 249 U.S. 211 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919).

24. 'Every institution,' wrote Emerson, 'is the lengthened shadow of one man.' The observation is nowhere borne out more strikingly than in judicial doctrines, which often exert an influence truly institutional in scope. An outstanding example in the field of American public law is . . . afforded by Justice Holmes' personal responsibility for the 'clear and present danger' formula . . . .  
Corwin, *Bowing Out "Clear and Present Danger,"* 27 NOTRE DAME LAW. 325 (1952).

25. See, e.g., *Abrams v. United States*, 250 U.S. 616, 630 (1919). To the end of his life, he never faltered in his belief that the degree, in fact, to which a state permits criticism of its authority is the surest index to its hold upon the allegiance of the community. In the last dissent he wrote Mr. Justice Holmes said:

[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us, but freedom for the thought that we hate.  
*United States v. Schwimmer*, 279 U.S. 644, 654-55 (1929).

amendment was designed to protect presupposed that the dominant opinion prevailing at any given time may be wrong and that the most effective way to correct it is freedom of criticism and protest.<sup>26</sup> Holmes allowed speech to be punished only when a "clear and present danger" of harm was likely to result from the expression of the opinion and where there was no chance for effective counterargument.<sup>27</sup> "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence."<sup>28</sup>

Following Holmes' departure from the bench, the Supreme Court demonstrated its sensitivity to the truth—that the clear and present danger test is an oversimplified judgment unless it takes account also of a number of other factors. No matter how easily the phrase "clear and present danger" is uttered, it is not a substitute for the weighing of values.<sup>29</sup>

Even in the seminal cases concerning press interference with a fair trial, the Court emphasized that in using the term clear and present danger it was not expressing, even remotely, an absolutist test nor did it have in mind a danger in the abstract; these cases demonstrate the Court's recognition that the danger test is not a substitute for the weighing of values or a formula susceptible of automatic application. For example, in *Bridges v. California*,<sup>30</sup> the Court unhesitatingly avowed that while clear and present danger is "a working principle" which affords "practical guidance" in certain kinds of first amendment cases,<sup>31</sup> the answers to the delicate problems involved in such

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26. Writing to Harold Laski of the *Debs* case, he said:

When people are putting out all their energies in battle I don't think it unreasonable to say we won't have obstacles intentionally put in the way of raising troops —by persuasion any more than by force. *But in the main I am for aeration of all effervescing convictions—there is no way so quick for letting them get flat.*

HOLMES—LASKI LETTERS 203-204 (Howe ed. 1953) (emphasis added). See also F. FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 49 (1938).

27. See *Schenck v. United States*, 249 U.S. 47, 52 (1919).

28. *Whitney v. California*, 274 U.S. 357 (1927) (Brandeis, Holmes, JJ., concurring).

29. P. FREUND, ON UNDERSTANDING THE SUPREME COURT 27-28, quoted in L. HAND, THE BILL OF RIGHTS 60-61 (1958).

30. 314 U.S. 252 (1941). In this case, Bridges, a labor union official, sent a telegram to a local newspaper stating that the judge's decision in a case involving a labor dispute was "outrageous," was likely to tie up ports along the Pacific Coast, and would not be followed by the union. *Id.* at 276. For this conduct, Bridges was held in contempt of court. The story of the *Bridges* decision and the roles played by Justices Frankfurter and Murphy is told in J. HOWARD, MR. JUSTICE MURPHY: A POLITICAL BIOGRAPHY (1968).

31. *Bridges v. California*, 314 U.S. 252, 262-63 (1941).



cases "cannot be completely captured in a formula," for, any formula, "however helpful, does not comprehend the whole problem."<sup>32</sup>

In *Pennekamp v. Florida*,<sup>33</sup> the Court recognized that the danger formula inevitably had the vice of uncertainty and acknowledged that "[n]o definition could give an answer" to "[w]hat is meant by clear and present danger to a fair administration of justice."<sup>34</sup> It was, however, unflinching in its avowal that under any one of the phrases which had been employed in various opinions,<sup>35</sup> reviewing courts are asked, in cases of this type, to appraise the statement by balancing the desirability of free discussion against the necessity for fair adjudication, free from interruption of its processes.<sup>36</sup> The Court found that it must "weigh the right of free speech which is claimed by the petitioners against the danger of the coercion and intimidation of courts,"<sup>37</sup> and that the impact of the words must be weighed against the protection given by the principles of the first amendment to public comment on pending court cases.<sup>38</sup> *Pennekamp*, therefore, reaffirmed what *Bridges* intimated—that the phrase, "clear and present danger," is not self-defining but "involves in every case a comparison between interests which are to be appraised qualitatively."<sup>39</sup>

Notwithstanding these precepts of caution, the phrase clear and present danger became so deeply ingrained in judicial consciousness that the mere invocation of the formula obscured the considerations which gave it birth and guided its development as well as the nature of the questions which Holmes found "convenient to consider in terms of clear and present danger."<sup>40</sup> Thus, the Supreme Court itself has come to recognize that the term was a mechanical test which erroneously

32. *Id.* at 261.

33. 328 U.S. 331 (1946).

34. *Id.* at 348.

35. The Court noted that whether there must be "a clear and present or a grave and immediate danger, a real and substantial threat, one which is close and direct or one which disturbs the court's sense of fairness" is dependent solely upon semantics. *Id.* at 336.

36. *Id.* at 336.

37. *Id.* at 346.

38. *Id.* at 349.

39. *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).

40. *American Communication Ass'n v. Douds*, 339 U.S. 382, 394 (1950), *quoting Gompers v. United States*, 233 U.S. 604, 610 (1914). Ironically, Holmes himself regarded it as "one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis." *Hyde v. United States*, 225 U.S. 347, 391 (1912) (Holmes, J., dissenting). *See also Holmes, Law in Science and Science in Law*, 12 HARV. L. REV. 443, 455 (1899).

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placed form over substance.<sup>41</sup> It is the considerations that gave birth to the phrase clear and present danger, not the phrase itself, that are vital in deciding questions involving liberties protected by the first amendment.<sup>42</sup>

Today, when there is a constitutional challenge to a legislative enactment which seeks to reconcile conflicting constitutional rights, the clear and present danger test has no application. Rather, a sophisticated balancing test is employed to determine the permissibility of the endeavor. Hence, to admit that governmental action may affect freedom of speech, is to establish the condition for, not to arrive at the conclusion of, constitutional decision.<sup>43</sup> Against the impediments which particular governmental action creates to individual liberty, there must be *weighed* the value to the public of the ends which the regulation may achieve.<sup>44</sup> Some compromise is therefore necessary lest "in the clash of jarring rivalries the pretending absolutes will destroy themselves and ordered freedom too."<sup>45</sup>

The Court's awareness that "the societal value of speech must . . . be subordinated to other values and considerations,"<sup>46</sup> finds expression

41. *American Communications Ass'n v. Douds*, 339 U.S. 382, 394 (1950). A year later, *Dennis v. United States*, 341 U.S. 494 (1951) would help to dissipate the brooding omnipresence which the danger formula, in its pristine form, represented and against which Justice Frankfurter had so bitterly inveighed. See, for example, *Craig v. Harney*, 331 U.S. 367, 384 (1947) (Frankfurter, J., dissenting); *Pennekamp v. Florida*, 328 U.S. 331, 351 (1946) (Frankfurter, J., concurring); *Bridges v. California*, 314 U.S. 252, 296 (1941).

42. *American Communications Ass'n v. Douds*, 339 U.S. 382, 394 (1950).

43. This inexorably follows when it is realized that whatever promise the "preferred position" argument once held as an organon for judging, it has been laid to rest by more recent developments. Compare *United States v. Caroline Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938) with *Eisenstadt v. Baird*, 405 U.S. 438, 453 n.10 (1972); *United States v. Robel*, 389 U.S. 258, 268 n.20 (1967); *Koningsberg v. State Bar*, 366 U.S. 36, 49-50 (1961); *Ullmann v. United States*, 350 U.S. 422 (1956); *Kovacs v. Cooper*, 336 U.S. 77, 89 (1949) (Frankfurter, J., concurring). Cf. *Rowan v. United States Post Office*, 397 U.S. 728, 736 (1970); *Estes v. Texas*, 381 U.S. 532, 540 (1965); *United States v. Kahaner*, 317 F.2d 459, 470 (2d Cir. 1963); *Dietemann v. Time Inc.*, 284 F. Supp. 925, 929 (C.D. Calif. 1968). See also Will, *Free Press v. Fair Trial*, 12 DEPAUL L. REV. 197, 199 (1963).

44. See *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972); *Branzburg v. Hayes*, 408 U.S. 665, 681-82 (1972); *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 511 (1969); *Communist Party v. SACB*, 367 U.S. 1, 90-91 (1961); *United Public Workers v. Mitchell*, 330 U.S. 75, 90-91 (1947); cf. *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115 (5th Cir. 1973) "Any informational value in a statement violative . . . [of the "anti-blockbusting" provision of the Fair Housing Act of 1968] is clearly outweighed by the government's overriding interest in preventing blockbusting." *Id.* at 122.

45. CARDOZO, *Mr. Justice Holmes*, in MR. JUSTICE HOLMES 12 (Frankfurter ed. 1931). But see *Clark v. United States*, 289 U.S. 1, 16 (1933).

46. *Dennis v. United States*, 341 U.S. 494, 503 (1951). See also *Grayned v. City*

in the decisions regarding conflicts between first amendment interests and legislative investigatory needs. In those cases, the Court has required the sacrifice of first amendment freedoms if, *on balance*, the legislative need for information is compelling.<sup>47</sup>

The cases dealing with a public employee's freedom of expression are also instructive. In *Goldwasser v. Brown*,<sup>48</sup> the Court of Appeals for the Fifth Circuit recognized both the right of a public employee to speak freely and the interest of the employer in the efficient dispatch of its business. It acknowledged that "[w]here there is tension between the two, *accommodation* must be sought in the *balancing*

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of Rockford, 408 U.S. 104 (1972); cf. *Branzburg v. Hayes*, 408 U.S. 665, 681-82 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969). For example, in *Breard v. Alexandria*, 341 U.S. 622 (1951), the Court said:

The First and Fourteenth Amendments have never been treated as absolutes. Freedom of speech or press does not mean that one can talk or distribute where, when and how one chooses. *Rights other than those of the advocates are involved. By adjustment of rights, we can have both full liberty of expression and an orderly life.*

*Id.* at 642-44 (emphasis added).

More recently, the Court sustained, against a first amendment attack, Title III of the Postal Revenue and Federal Salary Act of 1967 under which a person may require that a mailer remove his name from its mailing lists and stop all future mailings to him. The petitioner contended that the statute violated his constitutional right to communicate. Mr. Chief Justice Burger responded that "*the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate.*" After "[w]eighing the highly important right to communicate . . . against the very basic right to be free from sights, sounds, and tangible matter . . ." the Court concluded that a "mailer's right to communicate must stop at the mailbox of an unresponsive addressee." *Rowan v. United States Post Office*, 397 U.S. 728, 733-37 (1970).

47. See *DeGregory v. Attorney General of New Hampshire*, 383 U.S. 825, 826-29 (1966); *Gibson v. Florida Investigation Comm.*, 372 U.S. 539, 545 (1963); *NAACP v. Alabama*, 357 U.S. 449, 460-67 (1958); *Watkins v. United States*, 354 U.S. 178, 187-88 (1957); *United States v. Rumley*, 345 U.S. 41, 46 (1953).

Not wholly unrelated to the problems encountered in the legislative investigation cases is that presented in *California v. Byers*, 402 U.S. 424 (1971). There, the Court was faced with the constitutionality of a statute which required a motorist to stop at the scene of an accident and give his name and address. In response to a fifth amendment challenge, the Chief Justice, speaking for the plurality, recognized that:

[t]ension between the State's demand for disclosures and the protection of the right against self-incrimination is likely to give rise to serious questions. *Inevitably these must be resolved in terms of balancing the public need on the one hand, and the individual claim to constitutional protections on the other; neither interest can be treated lightly.*

*Id.* at 427 (emphasis added). See also *Baker v. Wingo*, 407 U.S. 514, 530-32 (1972) (balancing in sixth amendment context); *United States v. United States District Court*, 407 U.S. 297, 314 (1972) (balancing in fourth amendment context); *Camara v. Municipal Court*, 387 U.S. 523, 534-37 (1967) (balancing in fourth amendment context); *Roviaro v. United States*, 353 U.S. 53, 62 (1957) ("The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense."); *United States v. Liddy*, 354 F. Supp. 217 (D.D.C. 1972) (balancing in first amendment context); *Sun Co. v. Superior Court*, 105 Cal. Rptr. 873, 878 (4th Dist. Ct. App. 1973) (balancing in first amendment context).

48. 417 F.2d 1169 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970).

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process which not infrequently characterizes the task of constitutional interpretation.”<sup>49</sup> Similarly, *NLRB v. Gissel Packing Co.*<sup>50</sup> eschewed any reliance on clear and present danger in assessing the protection afforded to certain statements by an employer to his employees. Speaking for the Court, Mr. Chief Justice Warren said that “an employer’s rights cannot outweigh the equal rights of the employees to associate freely, . . . and any *balancing* of those rights must take into account the” special and unique relationship between employees and employer.<sup>51</sup>

In *Government of the Virgin Islands v. Brodhurst*<sup>52</sup> the federal district court sustained a conviction against a newspaper editor for publishing the names of certain children under the jurisdiction of the court in violation of a statute which proscribed such publication without court authorization.<sup>53</sup> While paying lip service to the clear and present danger rule, the court relied extensively on *American Communications Association v. Douds*<sup>54</sup> and, in the last analysis, resorted to balancing.<sup>55</sup>

This same approach was employed to sustain a Wisconsin statute making it a criminal offense for any person to publish the name or identity of the victim of rape “except as . . . may be necessary in the institution or prosecution of any civil or criminal court proceeding . . . .”<sup>56</sup> The pertinent argument against the facial constitutionality of

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49. *Id.* at 1176 (emphasis added); see *Donovan v. Reinbold*, 433 F.2d 738, 741-42 (9th Cir. 1970); *Pred v. Board of Pub. Instruction*, 415 F.2d 851, 859 (5th Cir. 1969); *Blackwell v. Issaquena County Bd. of Education*, 363 F.2d 749, 753-54 (5th Cir. 1966); *United States v. Aarons*, 310 F.2d 341, 345 (2d Cir. 1962); *Dash v. Commanding General*, 307 F. Supp. 849, 853 (D.S.C. 1969); *cf. Lloyd Corp. v. Tanner*, 407 U.S. 551, 567, 570 (1972); *United Mine Workers v. Illinois State Bar Ass’n*, 389 U.S. 217, 227 (1967) (Harlan, J., dissenting); *International Ass’n of Machinists v. Street*, 367 U.S. 740, 773 (1961); *Dietemann v. Time Inc.*, 284 F. Supp. 925, 929 (C.D. Calif. 1968). See also *Central Hardware v. NLRB*, 407 U.S. 539, 543 (1972).

50. 395 U.S. 575 (1969).

51. *Id.* at 617.

52. 285 F. Supp. 831 (D.V.I. 1968).

53. *Id.* at 834.

54. 339 U.S. 382 (1950).

55. In so doing the court in *Brodhurst* considered that:

[l]egitimate attempts to protect the public, not from the remote possible effects of noxious ideologies, but from present excesses of direct active conduct are not presumptively bad because they interfere with and in some of their manifestations restrain the exercise of First Amendment rights. In essence, the problem is one of *balancing* the probable effects of the statute upon the free exercise of the right of speech and assembly against the legislative determination that certain evil conduct should be suppressed.

*Government of Virgin Islands v. Brodhurst*, 285 F. Supp. 831, 838 (D.V.I. 1968).

56. *State v. Evjue*, 33 N.W.2d 305, 308 (Wis. 1948). Florida, Georgia and South Carolina have similar statutes. FLA. STAT. ANN. § 794.02 (1965); GA. CODE ANN. § 26-2105 (1972); S.C. CODE ANN. § 16-81 (1962).

the statute was that it did not require a prerequisite showing of clear and present danger. In rejecting the contention, the Wisconsin Supreme Court held that the question of whether there is a clear and present danger which would justify the legislature in prescribing this limitation on the freedom of the press was one involving a consideration of matters relating to public policy.<sup>57</sup> It concluded with the forceful assertion that when the detriment to the victim of the crime was weighed against the benefit derived by the public from the publication, there could be *no doubt* that the slight statutory restriction of the freedom of the press was fully justified.<sup>58</sup>

This sampling makes it manifest that the clear and present danger test has fallen into desuetude. Indeed, in no recent Supreme Court decision has the test been employed, nor has it been employed to test the facial constitutionality of a statute. More significantly, with one apparent exception,<sup>59</sup> the test has not commanded the approval of the majority of any court of review in the context presented by extrajudicial comments of counsel in pending criminal litigation.<sup>60</sup>

#### JUDICIAL TREATMENT OF THE FIRST AMENDMENT IN THE CONTEXT OF EXTRAJUDICIAL COMMENTS BY COUNSEL

The Supreme Court's first exploration of the problems presented by extrajudicial comment by counsel in pending litigation occurred in *In re Sawyer*.<sup>61</sup> In *Sawyer*, the Court reviewed the Court of Appeals for the Ninth Circuit's affirmation of an order of the Supreme Court of Hawaii suspending an attorney from the practice of law. The attorney had been charged with making a public speech which "reflected adversely upon [the district judge's] impartiality and fairness in the conduct of [a Smith Act trial in which she was counsel] and impugned his judicial integrity."<sup>62</sup> The State Ethics Committee, which was investigating the case, concluded that Mrs. Sawyer "imputing to the Judge unfairness in the conduct of the trial, in impugning the integrity of the local Federal courts and in other comments' . . . , was guilty of violation

57. *State v. Evjue*, 33 N.W.2d 305, 311 (Wis. 1948).

58. *Id.* at 311-12. *See also* *Nappier v. Jefferson Standard Life Ins. Co.*, 322 F.2d 502, 505 (4th Cir. 1963); *Schuster v. Bowen*, 347 F. Supp. 319, 321 (D. Nev. 1972); *Johnson v. Simpson*, 433 S.W.2d 644, 646 (Ky. 1968).

59. *Chase v. Robson*, 435 F.2d 1059 (7th Cir. 1970).

60. The test was conceived as a test of the sufficiency of the evidence in certain types of cases. *Dennis v. United States*, 341 U.S. 494, 505 (1951).

61. 360 U.S. 622 (1959).

62. *Id.* at 624-25.

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of Canons 1 and 22 of the Canons of Professional Ethics of the American Bar Association . . . .”<sup>63</sup>

These findings were submitted to the Hawaii Supreme Court, which held that Mrs. Sawyer had willfully engaged in a verbal attack upon the administration of justice and had impugned the presiding judge’s integrity. The Hawaii court found that, as a result of the statements, Mrs. Sawyer was guilty of “ ‘gross misconduct.’ ”<sup>64</sup>

The Supreme Court’s plurality opinion, which reversed, was expressly limited to the narrow question of whether the facts adduced were capable of supporting the findings that the petitioner’s speech had impugned the district judge’s impartiality and fairness in conducting the Smith Act trial and thus reflected upon his integrity in the dispensation of justice in that case.<sup>65</sup> Justice Brennan noted that he was dealing with the Hawaii court’s findings, not with “misconduct” in the abstract. He carefully explained that

[s]ince no obstruction or attempt at obstruction of the trial was charged<sup>66</sup> and since it is [clear] . . . that the finding upon which the suspension rests is not supportable by the evidence adduced, [there is] no occasion to consider the applicability of *Bridges v. California*, . . . *Pennekamp v. Florida*, . . . or *Craig v. Harney* . . . .<sup>67</sup>

Hence, the plurality opinion neither “reach[ed] [n]or intimate[d] any conclusion on the constitutional issues presented.”<sup>68</sup> Justices Black and Stewart concurred separately.<sup>69</sup>

After carefully reviewing the evidence, Mr. Justice Frankfurter, in his dissenting opinion, concluded that the charges against the petitioner *were* amply proved. What is significant about his opinion, however, is its peroration in which four Justices made it luminously clear that the first amendment rights of a lawyer who is participating in on-going litigation are vastly different from those of a private citi-

63. *Id.* at 625 (footnote omitted).

64. *Id.* at 626.

65. *Id.* at 626.

66. *Id.* at 626.

Remarks made during the course of a trial might tend to such obstruction where remarks made afterwards would not. But this distinction is foreign to this case, because the charges and findings in no way turn on an allegation of obstruction of justice, or of an attempt to obstruct justice, in a pending case.

*Id.* at 636.

67. *Id.* at 626-27.

68. *Id.* at 627.

69. *Id.* at 646.

zen or a newspaper. With characteristic brilliance Mr. Justice Frankfurter spoke to the problem under consideration here:

The problem raised by this case—is the particular conduct in which this petitioner engaged constitutionally protected from the disciplinary proceedings of courts of law?—cannot be disposed of by general observations about freedom of speech. Of course, the free play of the human mind is an indispensable prerequisite of a free society. And freedom of thought is meaningless without freedom of expression. But the two great justices to whom we mostly owe the shaping of the constitutional protection of freedom of speech, Mr. Justice Holmes and Mr. Justice Brandeis, did not erect freedom of speech into a dogma of absolute validity nor enforce it to doctrinaire limits. Time, place and circumstances determine the constitutional protection of utterance. The First Amendment and the Fourteenth Amendment, insofar as it protects freedom of speech, are no exception to the law of life enunciated by Ecclesiastes: "For everything there is a season, and a time for every purpose under heaven." And one of the instances specifically enumerated by the Preacher controls our situation: "[A] time to keep silence, and a time to speak." Eccles. 3:1, 7. Of course, a lawyer is a person and he too has a constitutional freedom of utterance and may exercise it to castigate courts and their administration of justice. *But a lawyer actively participating in a trial, particularly an emotionally charged criminal prosecution, is not merely a person and not even merely a lawyer.* If the prosecutor in this case had felt hampered by some of the rulings of the trial judge, and had assailed the judge for such rulings at a mass meeting, and a conviction had followed, and that prosecutor had been disciplined for such conduct according to the orderly procedure for such disciplinary action, is it thinkable that this Court would have found that such conduct by the prosecutor was a constitutionally protected exercise of his freedom of speech, or, indeed, would have allowed the conviction to stand?

. . . .

It is difficult enough to seal the court-room, as it were, against outside pressures. The delicate scales of justice ought not to be willfully agitated from without by any of the participants responsible for the fair conduct of the trial.

. . . .

It is hard to believe that this Court should hold that a member of the legal profession is constitutionally entitled to remove his case from the court in which he is an officer to the public and press, and express to them his grievances against the conduct of the trial and the judge. "Legal trials," said this Court, "are

not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper." [Citation omitted.]

Even in the absence of the substantial likelihood that what was said at a public gathering would reach the judge or jury, conduct of the kind found here cannot be deemed to be protected by the Constitution. *An attorney actively engaged in the conduct of a trial is not merely another citizen. He is an intimate and trusted and essential part of the machinery of justice, an "officer of the court" in the most compelling sense.* He does not lack for a forum in which to make his charges of unfairness or failure to adhere to principles of law; he has ample chance to make such claims to the courts in which he litigates. As long as any tribunal bred in the fundamentals of our legal tradition, ultimately this Court, still exercises judicial power those claims will be heard and heeded.<sup>70</sup>

Mr. Justice Stewart concurred in the result only because he believed the judgment was not supported by the evidence.<sup>71</sup> However, his carefully worded opinion leaves the unmistakable impression that he agreed with the principles articulated in the dissent:

If, as suggested by my Brother Frankfurter, there runs through the principal opinion an intimation that a lawyer can invoke the constitutional right of free speech to immunize himself from even-handed discipline for proven unethical conduct, it is an intimation in which I do not join. A lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards.

Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech.<sup>72</sup>

These views, coupled with those of the *Sawyer* dissenters, make it apparent that five Justices have renounced clear and present danger as a standard to test the propriety of extrajudicial comments by lawyers during pending litigation.

An examination of the *en banc* decision in *Sawyer* is most edifying.<sup>73</sup> While the circuit court's factual finding that the evidence supported the charge against Mrs. Sawyer was overturned by the Supreme Court, its 4 to 3 determination that clear and present danger and

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70. *Id.* at 666-69.

71. *Id.* at 647.

72. *Id.* at 646-47. See also *State v. Nielsen*, 136 N.W.2d 355, 360 (Neb. 1965).

73. *In re Sawyer*, 260 F.2d 189 (9th Cir. 1958).



*Bridges* were inapplicable to cases involving extrajudicial comments by lawyers involved in pending litigation was left undisturbed.<sup>74</sup> Indeed, as noted earlier, five Justices appeared to have given it their imprimatur.

Years earlier, the Court of Appeals for the Seventh Circuit had implicitly recognized that the free speech rights of counsel of record had unique parameters. The background for this important pronouncement was an inauspicious reorganization in bankruptcy.<sup>75</sup> The trustee had petitioned the court to enjoin appellant and others from communicating with the creditors of the debtor or the shareholders of the corporation organized to receive the assets of the debtor. The appellant violated the order and was held in contempt. On appeal, he argued that the "order [was] void because it violated the right of free speech."<sup>76</sup> Mr. Justice (then Circuit Judge) Minton, speaking for a unanimous panel, unhesitatingly rejected the first amendment argument.<sup>77</sup>

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74. In the majority opinion, Judge Chambers said:

*Far different is this from the contempt cases of the Times-Mirror with its editorials and Bridges with his telegram. This is not a contempt case. The Times and Bridges were not court officers charged with the duty of keeping the temple clean. Nor was this a case of a lawyer unconnected with the case commenting at a public meeting or a lawyer who had carried his case past the point of decision, now carrying his cause to the people. Nor was it private grousing among friends to which we assume all lawyers are entitled when legal events are not going their way. It was a public meeting.*

*We reject the clear and present danger rule of third party contempts which is called upon in Bridges v. State of California. How could we accept the notion that before a lawyer in the very same case could be disciplined his voice would have to rise to a mighty cacophony reaching the point of causing the audience (a clear and present danger) to march on the courthouse, or to set up such a howl that the judge would be terrified? Maybe for others, but not for counsel of record.*

*Nor is this a case for a lawyer under strain making an ill-advised speech who later in calmer moments appreciates his error and is humble about it. Respondent is adamant that she only exercised her constitutional right. So, on that she stands or falls. In our view, she falls.*

*Id.* at 199 (emphasis added).

75. *In re George F. Nord Bldg. Corp.*, 129 F.2d 173 (7th Cir.), cert. denied, 317 U.S. 670 (1942).

76. *Id.* at 176.

77. Speaking for a unanimous panel, Judge Minton stated:

[T]he right of free speech . . . is a relative right that may be modified in its interplay with the rights of others . . . .

*The time limit argument fails to impress us. The order by its terms was to be in effect until 'further order' of the court, and it does not purport to be permanent.*

As far as the phrase 'general written communications' is concerned, a study of the pleadings which led to the order shows that the order referred to communications relating to the reorganization, not to irrelevant communications. Surely the lower court did not intend to enter a ridiculous order, but rather an order designed to protect the plan of reorganization.

*We are not here concerned with the case of one not a party to the record; nor with a communication not related to the reorganization; nor with a communica-*

The congruence between that order and the Kaufman and Reardon Committees' Rules is almost perfect. In each situation, the restrictions are temporally limited to the duration of the proceeding; in each they apply only to matters relating to the pending case; and, in each, they are not predicated upon a wish to selectively stifle criticism or the expression of opinion because it is offensive to certain segments of society.<sup>78</sup> Rather, they are imposed solely as a means to protect other compelling interests.

The significance of the case is the absence of any indication that clear and present danger has any bearing on the problem. Yet, *Bridges* had been decided almost seven months earlier. We cannot lightly assume that so careful a judge as Minton, to say nothing of Sparks and Major, was unaware of that decision. The conclusion is inescapable that, like the five Supreme Court Justices and the four circuit judges in *Sawyer*, the Court of Appeals for the Seventh Circuit did not find the *ratio decidendi* of *Bridges* applicable.

Also of considerable import is the decision of the Supreme Court of New Jersey in *State v. Kavanaugh*,<sup>79</sup> which involved the revocation of F. Lee Bailey's permission to appear *pro hac vice* in a criminal case. The trial in which Bailey was to appear had attracted an unusual amount of attention.<sup>80</sup> Shortly before the jury was to be selected, Mr. Bailey wrote a letter to the Governor of New Jersey and others in which he accused the state of knowingly preparing to conduct a trial based on perjured testimony. The letter was lengthy and cleverly constructed; in essence it communicated the idea that Bailey's clients were innocent victims of an impending miscarriage of justice. It received wide press coverage.<sup>81</sup>

The Supreme Court of New Jersey ordered the trial judge to conduct a hearing to determine whether Bailey's permission to practice *pro hac vice* should be revoked. After conducting the hearing, the judge revoked the permission.<sup>82</sup> Relief was sought in the federal dis-

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*tion delivered after a final decree had been entered. We are concerned with a party of record, against whom a proper restraining order might lawfully be directed.*

*Id.* at 176 (emphasis added).

78. *But see* Healey v. James, 408 U.S. 169, 181-82 (1972); *Police Dept. v. Mosley*, 408 U.S. 92, 95-96 (1972); *Schacht v. United States*, 398 U.S. 58, 63 (1970);

79. 243 A.2d 225 (N.J. 1968).

80. *Id.* at 226.

81. The letter is set out in full in *State v. Kavanaugh*, 243 A.2d 225, 226 (1968).

82. Less than two months before the hearing, the trial judge had forbidden in explicit terms any public disclosure of the alleged results of polygraph tests. The occasion was the filing of a motion in February, 1968 concerning the admissibility at

strict court where the judge determined that he should not resolve the question presented until the petitioners had sought appellate review by the appropriate state courts.<sup>83</sup> He did, however, intimate that he found unimpressive the argument that Bailey was simply exercising his first amendment rights. He stated that this "right is not so unrestricted that the exercise of it can be permitted to interfere with the fair and impartial administration of justice, particularly in a case to be tried by a jury."<sup>84</sup> Relying on Canon 20, Judge Shaw expressed disapproval of "any statements made by counsel out of court for publication, . . . during the course of a judicial proceeding . . . ."<sup>85</sup>

The petitioners then took their case to the New Jersey Supreme Court, which, in a scathing *per curiam* denouncing Bailey's "gross ethical impropriety," sustained the order of suspension, noting *inter alia*, that "of even greater moment than the interest of the immediate parties is the interest of the public in the integrity of the judicial process."<sup>86</sup> The court found that Mr. Bailey's conduct invaded that interest and trenched upon the state's right to a fair trial.<sup>87</sup>

When the case returned to the federal district court, Judge Shaw agreed with the decision of the New Jersey Supreme Court and denied the request for relief. The Court of Appeals for the Third Circuit affirmed, and the Supreme Court denied *certiorari*.<sup>88</sup> Once again

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trial of polygraph tests. Having been filed with the clerk of the court, the motion became available to the press. Attached was an affidavit asserting that Mr. Bailey's clients had been given such tests. Of course, the oblique intimation was that they passed. The press carried the story, and as a result, the trial judge, on February 28, 1968, warned all counsel that any further reference to the polygraph before a ruling of its reliability would be conduct "prosecuted as contempt of court." *Id.* at 229; *cf.* *United States v. Tijerina*, 412 F.2d 661 (10th Cir.), *cert. denied*, 396 U.S. 990 (1969); *Hamilton v. Municipal Court*, 76 Cal. Rptr. 168, *cert. denied*, 396 U.S. 985 (1969); N.D. ILL. R. 107(c) [hereinafter cited as Local Rule 1.07].

83. *Matzner v. Brown*, 288 F. Supp. 608, 612 (D.N.J. 1968).

84. *Id.* at 611.

85. *Id.* at 611.

86. *State v. Kavanaugh*, 243 A.2d 225, 231 (N.J. 1968).

87. The court reasoned that:

Mr. Bailey was free to write to anyone in the world. What he could not do was to write with the intent, or with a reckless disregard of the high probability, that his letter would enter the public domain if the letter would violate the ethical concepts stated in Canon 20 and expounded in *State v. Van Duyn*, [citation omitted].

The ban on statements by the prosecutor and his aides applies as well to defense counsel. The right of the State to a fair trial cannot be impeded or diluted by out-of-court assertions by him to news media on the subject of his client's innocence. The courtroom is the place to settle the issue and comments before or during the trial which have the capacity to influence potential or actual jurors to the possible prejudice of the State are impermissible.

*State v. Kavanaugh*, 243 A.2d 225, 232 (N.J. 1968).

88. *Matzner v. Brown*, 410 F.2d 1376 (3d Cir. 1969), *cert. denied*, 396 U.S. 1015 (1970).

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there was expressed the view that clear and present danger is not a relevant consideration in cases where extrajudicial statements are made by counsel of record in pending litigation. Rather, such behavior is viewed by these courts as unethical conduct *simpliciter*.<sup>89</sup>

## THE EMERGENCE OF THE "REASONABLE LIKELIHOOD" TEST

While almost all courts have recognized the weakness of the danger formula when applied in the context of extrajudicial comments by counsel in pending litigation, they have not been unanimous in their choice of substitutes. Some courts have regarded such conduct as misconduct *simpliciter*; others have resorted to what has come to be known as the "reasonable likelihood test."

While the seeds of the test may have been planted by Mr. Justice Frankfurter's dissent in *Sawyer*,<sup>90</sup> its first explicit enunciation came in *Tijerina v. United States*.<sup>91</sup> There, the district court entered an order prohibiting the defendants, their counsel, the prosecutors and potential witnesses from making public statements regarding the jury, the merits of the case, or the evidence. The defendants violated the court's order and were held in contempt. In affirming the contempt citations, the circuit court expressly rejected the contention that the order was invalid because it was not based on a clear and present danger. The court quite properly recognized the impact of *Sheppard v. Maxwell* and held that the "reasonable likelihood" test—not clear and present danger—was the appropriate test in the context of extrajudicial statements by parties in on-going proceedings.<sup>92</sup>

In the wake of *Tijerina* came the California Court of Appeals decision in *Younger v. Smith*.<sup>93</sup> Like *Tijerina*, *Younger* involved review of a contempt citation issued against the district attorney of Los Angeles County. *Younger* had violated an order of the trial judge which prohibited out of court statements relating to the nature, substance or effect of any testimony already given.<sup>94</sup>

In the court of appeals, two other cases were consolidated with *Younger*. They arose out of the entry of an order in an unrelated

89. See also *State v. Nielsen*, 136 N.W.2d 355, 359 (Neb. 1965). Subsequently, the New Jersey Supreme Court unanimously held that Mr. Bailey could not appear *pro hac vice* in any case in the New Jersey State courts for one year. *In re Bailey*, 273 A.2d 563, 566 (N.J. 1971).

90. *In re Sawyer*, 360 U.S. 622 (1959).

91. 412 F.2d 661, 666-67 (10th Cir.), *cert. denied*, 396 U.S. 990 (1969).

92. *Id.* at 666.

93. 106 Cal. Rptr. 225 (1973).

94. *Id.* at 229.

murder case barring "the publication of any matters with respect to the present case except as occur in open court."<sup>95</sup> The order was directed not only against the prosecution and defense but also against "all agencies of the public media."<sup>96</sup> In separate actions, both the Times Mirror Company and the district attorney of Los Angeles County sought relief in the court of appeals.

The salient argument raised by the latter's petition for a writ of prohibition centered around the clear and present danger test's application to the problem of "gag" orders against counsel of record. Relying on *Tijerina*, the respondent-trial judge argued that the Constitution merely required a "reasonable likelihood" that public dissemination of the proscribed utterances will interfere with a fair trial or the due administration of justice. In an extensive and incisive opinion, the court reversed the contempt citation against Younger, granted the relief sought by Times Mirror, and denied the relief sought by the district attorney. The court noted that the danger test "never has been the universal solvent of First Amendment problems,"<sup>97</sup> and that the insensitive invocation of delusively simplistic formulas has never provided adequate solutions for the complex problems presented in first amendment litigation.<sup>98</sup> It concluded with a recognition that the "reasonable likelihood" test is a more realistic and meaningful measure of the constitutionality of restraints on extrajudicial comments.<sup>99</sup>

#### CHASE V. ROBSON: A MISAPPLICATION OF THE DANGER FORMULA

This apparent consistency of authority is marred by the decision of the United States Court of Appeals for the Seventh Circuit in *Chase v. Robson*.<sup>100</sup> *Chase* involved an order barring defendants, their counsel, and counsel for the government from making statements to the press about the merits of the case, the evidence, and similar relevant matters.<sup>101</sup> The fifteen defendants sought a writ of mandamus from the court of appeals. In a *per curiam* opinion, the laconism of which masked the complexity and importance of the issues, the Court of Appeals for the Seventh Circuit held that before a trial court can

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95. *Id.* at 231-32.

96. *Id.* at 231.

97. *Id.* at 240.

98. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171-72 (1956) (Frankfurter, J., concurring).

99. *Younger v. Smith*, 106 Cal. Rptr. 225, 242 (Ct. App. 1973).

100. 435 F.2d 1059 (7th Cir. 1970).

101. *Id.* at 1060.

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limit defendants' and their attorneys' freedom of speech, "the record must contain sufficient specific findings by the trial court establishing that defendants' and their attorneys' conduct is a 'serious and imminent threat to the administration of justice.'"102

The prior activities of the defendants and their counsel were held insufficient to support "the proposition that the defendants' future first amendment utterances, if any, would interfere with the fair administration of the trial."<sup>103</sup> It concluded that the district court had no authority to act as it did "in the absence of a clear showing that an exercise of those first amendment rights will interfere with the rights of the government and the defendants for a fair trial . . ."<sup>104</sup> Mr. Justice Holmes long ago observed that "[o]ne may criticize even what one reveres."<sup>105</sup> It is in that spirit that the following examination of the *Chase* decision is undertaken.

It has been rightly said that "[t]he validity and moral authority of a conclusion largely depend on the mode by which it was reached."<sup>106</sup> Measured against this standard, *Chase* does not fare well. The *only* authorities cited by the court in support of its conclusion were *Craig v. Harney*<sup>107</sup> and *Wood v. Georgia*,<sup>108</sup> neither of which involved a protective order imposed on participants in a pending criminal case—a precedential limitation stressed by the Supreme Court in *Wood*:

*First, it is important to emphasize that this case does not represent a situation where an individual is on trial: there was no "judicial proceeding pending" in the sense that prejudice might result to one litigant or the other by ill-considered misconduct aimed at influencing the outcome of a trial or grand jury proceeding . . . . Moreover, we need not pause here to consider the variant factors that would be present in a case involving a petit jury. Neither Bridges, Pennekamp nor Harney involved a trial by jury. In Bridges it was noted that "trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper" [citation omitted] and of course the limitations on a free speech assume a different proportion when*

102. *Id.* at 1061. The Court of Appeals of Maryland has concluded that a hearing is not required before a court can invoke a protective order. *In re Kinlein*, 292 A.2d 749, 757 (Md. Ct. App. 1972).

103. *Chase v. Robson*, 435 F.2d 1059, 1061 (7th Cir. 1970).

104. *Id.* at 1061.

105. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 473 (1897).

106. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171 (1951) (Frankfurter, J., concurring). See also *Darr v. Burford*, 339 U.S. 200, 225-26 (1950) (Frankfurter, J., dissenting).

107. 331 U.S. 367 (1947).

108. 370 U.S. 375 (1962).

*expression is directed toward a trial as compared to a grand jury investigation.*<sup>109</sup>

Although this passage from *Wood* was pointed out to the court,<sup>110</sup> the opinion treated the problem by ignoring it.<sup>111</sup> Overshadowing the opinion's mishandling of precedent, however, is its internal inconsistency.

The capacity of an utterance to interfere with the fair administration of justice is manifestly an intrinsic function of the statement itself, wholly unrelated to any prior conduct of the speaker. That is, a statement is prejudicial, *vel non*, not because the speaker has done something in the past but rather because its content is of a particular nature.<sup>112</sup> Yet, the plain language of *Chase* inexplicably posits some

109. *Id.* at 389-90 (emphasis added; see *People v. Goss*, 141 N.E.2d 385, 388 (Ill. 1957)).

110. Brief for Respondent at 22, *Chase v. Robson*, 435 F.2d 1059 (7th Cir. 1970).

111. The late Karl Llewellyn has branded such a "technique" as "flatly illegitimate." K. Llewellyn, *THE COMMON LAW TRADITION: DECIDING APPEALS* 86 (1960). It is not suggested that the court's "mishandling" of precedent was intentional. It seems more likely that the procedural posture in which the case came to the court demanded too rapid a decision in light of the complexity of the issues. Mr. Justice Frankfurter's "reservation" in *Kinsella v. Krueger*, 351 U.S. 470 (1956) puts the problem in proper perspective:

[T]he judgments of this Court are collective judgments. They are neither solo performances nor debates between two sides, each of which has its mind quickly made up and then closed. The judgments of this Court presuppose full consideration and reconsideration by all of the reasoned views of each. Without adequate study there cannot be adequate reflection. Without adequate reflection there cannot be adequate deliberation and discussion. And without these, there cannot be that full interchange of minds which is indispensable to wise decision and its persuasive formulation.

*Id.* at 485. See also Hart, *The Supreme Court 1958 Term Forward: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959).

Notwithstanding the fact that Mr. Cole was one of the government counsel in *Chase*, it would be disingenuous not to acknowledge that the court received little assistance from either the government or the defendants. Yet, the history of mutual dependence between bench and bar characterizes Anglo-American jurisprudence. ["Shall I ask what a court would be, unaided? The law is made by the Bar, even more than by the Bench." O.W. HOLMES, *The Law*, in *COLLECTED SPEECHES* 16 (1931).] This interdependence imposes on members of the bar the responsibility of thoroughly and fully presenting their views to a court, for "[a] judge rarely performs his functions adequately unless the case before him is adequately presented." Brandeis, *The Living Law*, 10 ILL. L. REV. 461, 470 (1916). See also *Adamson v. California*, 332 U.S. 46, 59 (1947) (Frankfurter, J., concurring); K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 30-31 (1960).

We do not mean to suggest that a court is helpless unless it is assisted by counsel. On the contrary, frequently "the contentions of counsel cannot be counted upon to present the issues in their full dimension." Hart, *The Supreme Court 1958 Term Forward: The Time Chart of the Justices*, 13 HARV. L. REV. 84, 99 (1959). What we do suggest is that in view of the ever expanding dockets which necessarily limit the amount of time a judge can devote to any given matter, without the initial assistance of counsel, the court's job is made infinitely more difficult.

112. *But see Frazier v. Cupp*, 394 U.S. 731, 736-37 (1969). (Prosecutor's mental state not controlling in determining whether certain remarks are prejudicial).

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sort of unexplained causal nexus between past conduct and the capacity of an utterance to prejudice a fair trial.

The opinion either ignored or failed to realize that it is precisely because certain kinds of extrajudicial comments are gravid with prejudice when made in the context of pending litigation that they can be prospectively proscribed.<sup>113</sup> It is folly to suggest that a district judge cannot prohibit the participants in a trial from making statements about the guilt or innocence of a defendant, the witnesses in the case, the evidence and other matters of this kind until he has a basis for ascertaining that they are going to be made. The simple fact is that counsel have no right to make such statements with reference to pending litigation because, by virtue of their intrinsic nature and the circumstances under which made, they constitute a very real, substantial and imminent threat to the administration of justice. And it is a pernicious doctrine which requires a district judge to stay his hand "until the *putsch* is about to be executed . . . ."<sup>114</sup>

But the singular failing in the opinion is its mechanistic application of the danger formula "without regard to the context of its application" or "the considerations that gave [it] birth . . . ."<sup>115</sup> As noted earlier, Holmes considered that the interest which the first amendment was designed to protect presupposed that the dominant opinion prevailing at any given time may be wrong and the most effective way to correct it is freedom of criticism and protest.<sup>116</sup> For him, "the best test of truth is the power of the thought to get itself accepted *in the competition of the market* . . . ."<sup>117</sup> It was "[o]nly the emergency that makes it immediately dangerous to leave the correction of evil counsels to time . . . ."<sup>118</sup> that justified punishment of expressions of opinion and exhortations. "If there be [sufficient] time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence."<sup>119</sup> "*That at any rate is the theory of our Constitu-*

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113. Local Rule 1.07 and the rules of the Kaufman and Reardon Committees prescribe only those utterances which experience has demonstrated are prejudicial. See ABA DISCIPLINARY RULE 1.07 (1970); Will, *Free Press v. Fair Trial*, 12 DEPAUL L. REV. 197, 198 n.5 (1962).

114. *Dennis v. United States*, 341 U.S. 494, 509 (1951).

115. *American Communications Ass'n v. Douds*, 339 U.S. 382, 394 (1950).

116. See pp. 352-53, *supra*.

117. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (emphasis added).

118. *Id.* at 630.

119. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, Holmes, JJ., concurring).



tion."<sup>120</sup>

But "the theory of our Constitution" with reference to criminal trials rests on entirely different presuppositions. "The very word 'trial' connotes decisions on the evidence and arguments properly advanced in open court. Trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper."<sup>121</sup> The theory of our system, as applied to criminal litigation abhors "the competition of the market" as Mr. Justice Holmes himself acknowledged over half a century ago in his opinion in *Patterson v. Colorado*.<sup>122</sup> That opinion expressed what *Sheppard v. Maxwell* itself described as "[t]he undeviating rule of the Supreme Court . . . ."<sup>123</sup>

A publication likely to reach the eyes of a jury, declaring a witness in a pending cause a perjurer, would be none the less a contempt that it was true. It would tend to obstruct the administration of justice, because even a correct conclusion is not to be reached or helped in that way, if our system of trials is to be maintained. The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.<sup>124</sup>

Finally, the opinion was in error in suggesting that the "reasonable

120. *Abrams v. United States*, 250 U.S. 616, 630-31 (Holmes, J., dissenting).

121. *Bridges v. California*, 314 U.S. 252, 271 (1941); *accord*, *Wood v. Georgia*, 370 U.S. 375, 390 (1962).

122. 205 U.S. 454 (1907).

123. *Sheppard v. Maxwell*, 384 U.S. 333, 351 (1966).

124. *Patterson v. Colorado*, 205 U.S. 454, 462 (1907). *See also* *Turner v. Louisiana*, 379 U.S. 466, 472 (1965). It cannot be argued that *Schenck* sapped *Patterson's* precedential capacity. Quite apart from the fact that the two opinions are mutually consistent, Mr. Justice Holmes never so much as indicated that *Patterson* was either wrongly decided or *sub-silentio* overruled. *See* *Craig v. Harney*, 331 U.S. 367, 388 (1947) (Frankfurter, J., dissenting).

Moreover, *Patterson* has been cited approvingly and relied on in numerous occasions following *Schenck* and *Bridges*. *See, e.g.*, *Parker v. Gladden*, 385 U.S. 363, 364 (1966); *Estes v. Texas*, 381 U.S. 532, 551 (1965). In *Sheppard v. Maxwell*, 384 U.S. 333 (1966) the Court itself quoted from *Patterson* in the same breath that it cited *Pennekamp*, *Bridges* and *Harney*. *Id.* at 351. *See also*, *United States v. McKinney*, 429 F.2d 1019, 1022 (5th Cir. 1970); *Silverthorne v. United States*, 400 F.2d 627, 637 (9th Cir. 1968); *People v. Goss*, 141 N.E.2d 385, 390 (Ill. 1957).

In the last analysis, it seems as though *Chase* fell prey to what Mr. Justice Cardozo once described as the "tyranny of labels:"

A fertile source of perversion in constitutional theory is the tyranny of labels. Out of the vague precepts of the Fourteenth Amendment a court frames a rule which is general in form, although it has been wrought under the pressure of particular situations. Forthwith another situation is placed under the rule *because it is fitted to the words, though related faintly, if at all, to the reasons that brought the rule into existence.*

*Snyder v. Massachusetts*, 291 U.S. 97, 114 (1934) (emphasis added).

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likelihood" test of *Tijerina* was a "lesser standard"<sup>125</sup> than clear and present danger, for the Supreme Court has never "fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present."<sup>126</sup> Nor has the Court ever indicated that the clear and present danger test precludes proscription of speech which, because of its "nature" and the "circumstances"<sup>127</sup> in which it is uttered, is *reasonably likely* to bring about a substantial evil. Actually, the opinions point in an opposite direction.<sup>128</sup>

Obviously the contamination of actual or prospective jurors in a criminal case is as grave and serious an evil as can be envisaged. Moreover, bitter experience attests to the devitalizing capacity possessed by lawyers' extrajudicial comments to news media about the merits of a case. Thus, since all that is required under the danger test is that speech must be shown "likely" to produce an extremely serious "evil that rises . . . above public inconvenience, annoyance or unrest,"<sup>129</sup> it obviously follows that a rule which requires a showing of "reasonable likelihood" of prejudice to "actual or imminent" litigation satisfies clear and present danger even in its pristine form.

Moreover, we believe the reasonable likelihood test best accords with the principles articulated in the prejudicial publicity cases. Those cases require that a defendant merely show a "reasonable likelihood" of prejudice to obtain reversal.<sup>130</sup> If in order to safeguard the right of a fair trial, convictions are to be reversed on a showing that publicity likely or probably affected the outcome, attempts by rule to forestall such prejudice must be judged by the same standard. This ineluctably follows once it is realized that any other rule would leave reversals of convictions as the only effective curatives. Yet in *Shep-*

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125. *Chase v. Robson*, 435 F.2d 1059, 1061 (7th Cir. 1970).

126. *Bridges v. California*, 314 U.S. 252, 261 (1941).

127. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

128. In sum, the Supreme Court has looked to the "extent [that] the substantive evil of unfair administration of justice was a likely consequence, and whether the degree of likelihood was sufficient to justify summary punishment." *Bridges v. California*, 314 U.S. 252, 271 (1941). It has noted that the first amendment does not permit a state to outlaw the willful advocacy of the violation of law except where such advocacy is "likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Thus, freedom of speech is protected "unless shown *likely* to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest . . ." *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963), *quoting* *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

129. *Id.* at 237.

130. *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966); *cf.* *Estes v. Texas*, 381 U.S. 532, 542 (1965).

*pard*, the Court emphasized that remedial measures rather than reversals are what will prevent the problem of prejudice.<sup>131</sup>

THERE IS NO REQUIREMENT FOR A PRIOR SHOWING OF CLEAR  
AND PRESENT DANGER

Nothing in *Bridges v. California*,<sup>132</sup> *Pennekamp v. Florida*,<sup>133</sup> *Craig v. Harney*,<sup>134</sup> or *Wood v. Georgia*,<sup>135</sup> is contrary to the principles enunciated earlier. In *Bridges* the petitioner was found guilty of contempt of court for publishing in newspapers comments pertaining to a matter which was awaiting decision by a judge. At the outset, the Court noted that the legislature of California had not previously determined what action should be taken by courts with regard to publications outside of the courtroom which commented upon a pending case. It realized that in the absence of such appraisal that "it must necessarily [find] as an original question that the specified publications involved created, such likelihood of bringing about the substantive evil as to deprive [them] of the constitutional protection."<sup>136</sup> However, it also acknowledged that "such a 'declaration of . . . policy would weigh heavily in any challenge of the law as infringing constitutional limitations.'<sup>137</sup>

What is most significant about *Bridges* is its recognition that where the legislative branch of the government, after due deliberation, has found a sufficiently grave and imminent danger to warrant proscription of a particular kind of utterance, review of a conviction for violating that statutory proscription will differ greatly from review of a contempt conviction, based as it is on a common law concept of the most general and undefined nature.<sup>138</sup> As will be seen, the implications of this statement to the problem of restrictions on lawyers' comments are extraordinary.

In *Craig v. Harney*,<sup>139</sup> the Court was careful to point out that neither *Bridges*, *Pennekamp* nor *Craig* itself raised "questions con-

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131. *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966).  
 132. 314 U.S. 252 (1941).  
 133. 328 U.S. 331 (1946).  
 134. 331 U.S. 367 (1947).  
 135. 370 U.S. 375 (1962).  
 136. *Bridges v. California*, 314 U.S. 252, 260-61 (1941); cf. *Cox v. Louisiana*, 379 U.S. 536, 563-64 (1965). See also *State v. Evjue*, 33 N.W.2d 305 (Wis. 1948).  
 137. *Bridges v. California*, 314 U.S. 252, 260 (1941).  
 138. *Id.* at 260-61. See also *Chicago Counsel of Lawyers v. Bauer*, 371 F. Supp. 689 (N.D. Ill. 1974).  
 139. 331 U.S. 367 (1947).

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cerning the full reach of the power of the state to protect the administration of justice by its courts."<sup>140</sup> The Court's most recent attempt to define the limitations upon the contempt power when it is employed to punish out of court publications relating to a pending case was in *Wood v. Georgia*.<sup>141</sup> There a county sheriff issued a press release condemning the action of a local judge who had instructed a regularly empaneled grand jury, in the midst of a local political campaign, to conduct an investigation into the voting patterns and habits of Negro voters in Bibb County, Georgia. These statements were made by petitioner in his capacity as a private citizen and not as sheriff of the county during a generalized investigation.<sup>142</sup>

The Court took preliminary pains to point out that the judgment of conviction under consideration was identical to that presented in *Bridges* in that neither came to the Court strengthened by prior legislative deliberation. With this preface, the holding was that

when the grand jury is performing its investigatory function into a general problem area, *without specific regard to indicting a particular individual*, society's interest is best served by a thorough and extensive investigation, and a greater degree of disinterestedness and impartiality is assured by allowing free expression of contrary opinion.<sup>143</sup>

The Court vividly perceived that the problem differed *toto coelo* from that which would be presented by a situation involving comments made during pending litigation since "limitations on free speech assume a different proportion when expression is directed toward a trial as compared to a grand jury investigation."<sup>144</sup>

Far from undermining the constitutional base of the Reardon and Kaufman Committees' rules, *Bridges*, *Wood*, *Craig*, and *Pennekamp* compel a finding of facial constitutionality. *First*, each of those cases was concerned with defining the permissible limits upon the scope of the contempt power, "which is 'based on common law concepts of the most general and undefined nature.'"<sup>145</sup> None dealt with the violation of a narrowly drawn rule, regulation, or statute which seeks to accommodate conflicting constitutional interests.

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140. *Id.* at 373.

141. 370 U.S. 375 (1962).

142. *Id.* at 382.

143. *Id.* at 388-92. Where an investigation ceased to be generalized and is directed against a particular individual, a different question would be presented. *See Doss v. Lindsley*, 53 F. Supp. 427, 433 (E.D. Ill. 1944), *aff'd*, 148 F.2d 22 (7th Cir. 1945).

144. *Wood v. Georgia*, 370 U.S. 375, 389-90 (1962).

145. *Cox v. Louisiana*, 379 U.S. 536, 559, 564 (1965).

Indeed, in both *Bridges* and *Wood*, the Court strove to demonstrate that the problems inherent in reviewing convictions in cases of contempt for publication differed drastically from those which would be present had the judgment been based upon the violation of a statute, where prior legislative deliberation provided direction. And the Court expressly stated in *Wood* that it did not there, nor had it ever, "found it necessary to determine the full power of the State to protect the administration of justice by use of the contempt power."<sup>146</sup>

The Kaufman and Reardon Committees' rules rest upon findings stemming from vast quasi-legislative investigation. They are supported by countless judicial precedents attesting to the miasmatic effects which result from prejudicial publicity stemming from the unregulated conduct of counsel for both the prosecution and defense. These rules do indeed come encased in the armour wrought by prior legislative deliberation.<sup>147</sup>

In *Cox v. Louisiana*,<sup>148</sup> the Supreme Court reviewed a conviction for violation of a Louisiana statute proscribing picketing or parading near courthouses. Speaking in purposeful generalities, the Court acknowledged that "a State may adopt safeguards necessary and appropriate to assure that the administration of justice at all stages is free from outside control and influence."<sup>149</sup> The argument that the absence of the clear and present danger test of *Bridges* and *Pennekamp* rendered the statute facially unconstitutional was rejected as inapplicable since the statute under review was narrowly drawn, and designed to punish specific conduct which the legislature had found to be inherently inimical to the administration of justice.<sup>150</sup>

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146. *Wood v. Georgia*, 370 U.S. 375, 385 n.8 (1962).

147. *Cf. Katzenbach v. Morgan*, 384 U.S. 641, 667 (1966) (Harlan, J., dissenting).

148. 379 U.S. 536 (1965).

149. *Id.* at 562.

150. Mr. Justice Goldberg replied:

Both these cases dealt with the power of a judge to sentence for contempt persons who published or caused to be published writings commenting on judicial proceedings. . . . Here we deal not with the contempt power—a power which is 'based on a common law concept of the most general and undefined nature . . . .' Rather, we are reviewing a statute narrowly drawn to punish specific conduct that infringes a substantial state interest in protecting the judicial process.

Even assuming the applicability of a general clear and present danger test, it is one thing to conclude that the mere publication of a newspaper editorial or a telegram to a Secretary of Labor, however critical of a court, presents no clear and present danger to the administration of justice and quite another thing to conclude that crowds, such as this, demonstrating before a courthouse may not be prohibited by a legislative determination based on experience that such conduct inherently threatens the judicial process. We, therefore, reject the clear and present danger argument of appellant.

*Id.* at 563-66.

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Second, the Kaufman and Reardon Committees were dealing with the conduct of lawyers in pending *jury* cases and not that of newspapers or private citizens in cases involving a judicial officer.<sup>151</sup> The

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151. Although most objections to the Rules focus directly on the first amendment, a frequently heard variant is the argument that they do not pertain solely to jury trials. While such a rule would be consonant with constitutional strictures it appears that Local Rule 1.07(d) and the corresponding rules of the Kaufman and Reardon Committees upon which they are based apply only to jury trials.

The wording of the proposed rules demonstrates a preoccupation that actual and prospective jurors not be exposed to statements by the attorneys involved in the case. Section (a), which states the general principle, and the succeeding sections all refer to *dissemination by means of public communication*. The emphasis on public communication is surely misplaced if the rules were intended to apply to bench trials, for there are numerous other avenues by which a judge is inevitably exposed to that information at which the rule is expressly directed. For example, information concerning a defendant's prior criminal record would normally come to the trial judge's attention at arraignment if there were any discussion concerning bond. Information relating to any statement or confession made by the defendant would come to the trial judge's attention at any suppression hearing which might be held.

Similarly, the results of any examination or test would, of course, come to the trial judge's attention during pretrial procedures, as would the possibility of a plea. The references to such matters in section (c) demonstrate clearly that the rules are concerned solely (except for section e) with the danger of influencing juries. But, of course, sections b and c, dealing with pretrial stages, before it is known whether a jury will be waived, must be phrased to cover all criminal cases.

When a case reaches trial, however, it is known whether there will be a jury, and the rule may be more specific. Accordingly, the language of section (d) of the rules leaves no room for doubt concerning its application. That section states that "during the trial of any criminal matter, *including the period of selection of the jury*, no lawyer associated with the prosecution or defense shall give or authorize any extra-judicial statement or interview . . ." (emphasis added). The inclusion of the emphasized language, without any qualifications for cases in which no jury would be selected demonstrates unmistakably that the authors of the rule conceived that it should apply only to jury trials.

The concern of the Court in *Sheppard* and of the Reardon and Kaufman Committees was with exposure of *jurors* to extra-judicial statements of counsel. The Kaufman Committee in its report to the Chief Justice of the United States found that the "crux of the problem" lay:

in applying simultaneously to the administration of criminal justice in the federal courts two constitutional limitations—the right of the news media to publish on the one hand, and the right of the individual accused of the crime to a fair trial by an *impartial jury* on the other.

REPORT OF THE COMMITTEE ON THE OPERATION OF A JURY SYSTEM ON THE "FREE PRESS—FAIR TRIAL" ISSUE, 45 F.R.D. 391, 393 (1969) (emphasis added).

That Committee began its analysis with the language of the sixth amendment which provides for the right of speedy and public trial "by an impartial jury . . ." The Committee noted that the claim "that a jury trial has been distorted because of inflammatory newspaper accounts," had repeatedly been considered by the Supreme Court. *Id.* at 394, quoting *Irvin v. Dowd*, 366 U.S. 717, 730 (1961) (Frankfurter, J., concurring). Finally, the Committee stated, the Court laid down the mandate that district courts must take steps to "insulate the jury" from the effects of publicity so that the accused can "receive a trial by an *impartial jury* free from outside influences." *Id.* at 396, quoting *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966) (emphasis added).

Unlike section (d) of the Local Rule, section (e) is concerned with the influence which extra-judicial statements may have upon the trial judge. This section is directed

first amendment may demand that the latter speak out even during the pendency of such cases; it surely makes no such requirement on lawyers associated with the case.

THE IMPACT OF RESTRICTIONS ON EXTRAJUDICIAL COMMENTS  
ON LIBERTY OF EXPRESSION

The final, but perhaps most important, point to be made concerns the substantiality of the impact on freedom of expression which would result from imposition of the Kaufman and Reardon rules. Where legislation is challenged on first amendment grounds, the threshold inquiry is the effect of the restrictions on liberty of expression. Such was the initial inquiry in *Bridges*, where the Court began its discussion by considering "how much, as a practical matter, [the judgments] would affect liberty of expression."<sup>152</sup> The Court found that an affirmation of the judgment of contempt would allow restrictions on the most important topics of discussion at a time when public interest was at its height. While forcefully intimating that the judgments would be sustained if their effect on liberty of expression would be insignificant, the Court found that under the facts of the case, such a decision would necessarily result in "*an endless series of moratoria on public discussion*,"<sup>153</sup> and would "close all channels of public expres-

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at the public dissemination of matters during the period after the completion of trial and before sentencing, if there is a reasonable likelihood that such dissemination will affect the imposition of sentence. Significantly, the object of concern in such cases differs from that of the other sections of the rule, which are directed at threats to the integrity of the jury. Realization of the harm which section (e) is designed to counter may be less likely than that which the prior sections were designed to counter. However, we believe that the Kaufman Committee was correct in including this regulation of post-trial, pre-sentencing statements because judges, although trained in objectivity, are still fallible. Cf. *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971). Moreover, the sentencing process unlike the trial itself is virtually immune from appellate review so that there is no effective means by which a defendant would press a claim that he was prejudiced by post-trial publicity. *Gore v. United States*, 357 U.S. 386, 393 (1958); *Blockburger v. United States*, 284 U.S. 299, 304-05 (1932); *Smith v. United States*, 407 F.2d 356, 359 (8th Cir. 1969); *Virgin Islands v. Turner*, 409 F.2d 102, 104 (3d Cir. 1968); *United States v. Pruitt*, 341 F.2d 700, 703-704 (4th Cir. 1965). In any event, if immunity from appellate review was not the reason why the Kaufman Committee included a limitation on post-trial statements, it is a reason and it is enough if this Court is "able to perceive a basis upon which the [district court] might resolve the conflict as it did." See *Branzburg v. Hayes*, 408 U.S. 665, 700 (1972); cf. *Katzenbach v. Morgan*, 384 U.S. 641, 653 (1966).

A very substantial argument can be made, however, that the no comment rules were intended to apply to bench trials. See *Bloom v. Illinois*, 391 U.S. 194, 202 (1968); *Cox v. Louisiana*, 379 U.S. 536, 558 (1965); *Sacher v. United States*, 343 U.S. 1, 12 (1952); cf. *In re Murchison*, 349 U.S. 133, 136 (1955); *United States v. Hamrick*, 293 F.2d 468, 469 (4th Cir. 1961).

152. *Bridges v. California*, 314 U.S. 252, 268 (1941).

153. *Id.* at 269 (emphasis added).

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sion to *all* matters which touch upon pending cases."<sup>154</sup> The Court concluded that an affirmance of the judgments would "*result in a curtailment of expression that cannot be dismissed as insignificant.*"<sup>155</sup>

It is apparent from even the briefest survey of the problem that the public's "right to know"<sup>156</sup> is not substantially impaired by the temporally brief restrictions imposed on a participating lawyer.<sup>157</sup> Periodicals of all kinds, television, radio, and private citizens can comment on the proceedings; only one voice is stilled, and then only in relation to comments about the case made for public dissemination,<sup>158</sup> and only for the period during which the proceedings are in progress. Thus, the Committees' rules do *not* result in an "endless series of moratoria on public discussions";<sup>159</sup> nor do they "close the door of permissible public comment."<sup>160</sup> When we weigh the claimed right of free speech against the danger of the coercion and intimidation of actual or potential jurors,<sup>161</sup> only those who find in the Constitution

154. *Id.* at 271 (emphasis added).

155. *Id.* at 270 (emphasis added). In *Pennekamp*, the contempt convictions of certain newspaper officials who had published two editorials and a cartoon, critical of action taken by a judge, was reversed. The Court's concern with the practical effect on liberty of expression that would result were it to sustain the judgment in the case before it is evidence by the opinion's final statement that, "to close the door on permissible public comment" to newspapers, would be disastrous, for "[w]hen that door is closed, it closes *all* doors behind it." *Pennekamp v. Florida*, 328 U.S. 331, 350 (1946).

In *Branzburg v. Hayes*, 408 U.S. 665 (1972), it was argued that if a reporter is compelled to respond to a grand jury subpoena without a prior showing of necessity, "confidential sources . . . will be measurably deterred from furnishing publishable information, all to the detriment of the free flow of information protected by the First Amendment." *Id.* at 680. In refusing to find that the first amendment interest asserted by the newsman was outweighed by the general obligation of all citizens to appear before a grand jury, the Court emphasized the insubstantiality on the free flow of information that would result from its judgment. *Id.* at 691; see *State v. Evjue*, 33 N.W.2d 305, 312 (Wis. 1948). See also *United States v. Robel*, 389 U.S. 258, 268, 271 (1967); *American Communication Ass'n v. Douds*, 339 U.S. 382, 397 (1950); *Schuster v. Bowen*, 347 F. Supp. 319 (D. Nev. 1972).

While *Babcock* was decided under the National Labor Relations Act rather than the first amendment, its vivifying principles apply here *pari passu*. This is because section 7 accords to unions a right to use private property which is even broader than that accorded private citizens by the first amendment. See *Central Hardware Co. v. NLRB*, 407 U.S. 530, 548-49 (1972) (Marshall, J., dissenting). Moreover, in *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), the Court noted that the "restraints on picketing and trespassing approved by the Pennsylvania courts here *substantially* hinder the communication of the ideas which petitioners seek to express . . ." *Id.* at 323 (emphasis added); cf. *Williams v. Eaton*, 468 F.2d 1079, 1084 (10th Cir. 1972). See also *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972).

156. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

157. See *Chicago Counsel of Lawyers v. Bauer*, 371 F. Supp. 689 (N.D. Ill. 1974).

158. Private communications are not, of course, affected. In *re Sawyer*, 260 F.2d 189, 199 (9th Cir. 1958); *State v. Kavanaugh*, 243 A.2d 225, 232 (N.J. 1968); *Local Rule 1.07(d)*.

159. *Bridges v. California*, 314 U.S. 252, 269 (1941).

160. *Pennekamp v. Florida*, 328 U.S. 331, 350 (1946).

161. See *Bridges v. California*, 314 U.S. 252 (1941).



a "single supreme simplicity"<sup>162</sup> capable of solving the all of life's intractable problems, can suggest that the restraints imposed are unreasonable or that they have a substantial effect on freedom of expression.

Liberty is an attractive theme; but it does not press strongly for recognition when pleaded in utter disregard for the rights of others.<sup>163</sup> One kind of liberty may cancel and destroy another, and restrictions, vexatious if viewed alone, may be necessary in the long run to establish the equality of position in which true liberty begins.<sup>164</sup> In short, the "free speech" people would do well to keep before them the Supreme Court's admonition that the first amendment does not embrace the "right to frustrate and defeat the discharge of those governmental duties upon the performance of which the freedom of all . . . depends."<sup>165</sup>

There are, perhaps, a small number of "free speech" people who will concede, at least *arguendo*, that balancing is a legitimate endeavor. They nonetheless insist that the Readon and Kaufman Committees have struck an unfair balance and have relegated lawyers to "second class" citizens.<sup>166</sup> Such an argument proceeds on the unarticulated assumption that the parameters of constitutional rights are the same, *semper ubique et ab omnibus*. However, the whole history of constitutional adjudication demonstrates that "rights must be judged in the context and not *in vacuo*."<sup>167</sup> Or, as Mr. Justice Holmes compendiously phrased it in the very case in which clear and present danger was born, "[t]he character of every act depends upon the circumstances in which it was done."<sup>168</sup>

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162. Toynbee, *Two Kinds of Extremism*, London Observer, Feb. 8, 1959, at 20, col. 5-6, quoted in P. FREUND, *Mr. Justice Frankfurter*, in FELIX FRANKFURTER: A TRIBUTE 158 (W. Mendelson ed. 1964).

163. In its *amicus* brief in *In re Oliver*, 470 F.2d 15 (7th Cir. 1972), the Chicago Counsel of Lawyers argued that before a participating lawyer's comments can be regulated, a court should give thought to using the "less drastic" alternative of sequestration. At bottom, this is but a selfish assertion that the rights of twelve citizens to travel, to associate, to speak, to work and to enjoy the manifold liberties secured to them by the Constitution must be subordinated to a lawyer's "right" to comment on pending cases. *Id.* at 17-18.

164. *Coopage v. Kansas*, 236 U.S. 1, 27 (1915) (Holmes, J., dissenting).

165. *Branzburg v. Hayes*, 409 U.S. 665, 692 (1972), quoting *Toledo Newspaper Co. v. United States*, 247 U.S. 402, 419 (1918).

166. The Canons of Judicial Ethics preclude judges from making public comments. Yet, it has never been suggested that anyone considers them "second class citizens." See *Younger v. Smith*, 106 Cal. Rptr. 225, 237 n.27 (Ct. App. 1973).

167. *Bridges v. California*, 314 U.S. 252, 303 (1941) (Frankfurter, J., dissenting).

168. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

## CONCLUSION

To the founders of our Republic, repression of thought and speech were vivid and portentous evils. Indeed, the mad and melancholy record of man's upward movement from savage isolation to organic social life attested to the awful truth that those societies which had found it expedient to stifle criticism and persecute the expression of "unorthodox" opinion had suffered first, ennui, and then, total decay.<sup>169</sup> Sensitive to the disquieting reminders of history,<sup>170</sup> they fashioned the first amendment primarily to assure the unfettered interchange of ideas for the bringing about of political change.<sup>171</sup>

While no one can deny that freedom of speech must be nurtured if a democratic society is fairly to aspire to continued vitality, it is likewise beyond dispute that that privilege, like all others, is not irrecusable; it has its seasons.<sup>172</sup> "It is a relative right that may be modified in its interplay with the rights of others . . ." <sup>173</sup> And the "fact that dissemination of information and opinion on questions of public concern is ordinarily a legitimate, protected and indeed cherished activity does not mean, however, that one may in all respects carry on that activity exempt from sanctions designed to safeguard the legitimate interests of others."<sup>174</sup> On the contrary, allowing even

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169. See H. LASKI, *A GRAMMAR OF POLITICS* 120-21 (3d ed. 1934).

170. Cf. *West Virginia State Bd. of Education v. Barnette*, 319 U.S. 624, 640-41 (1943).

171. *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Police Dept. v. Mosley*, 408 U.S. 92 (1972); *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972); *United States v. United States District Court for E.D. of Mich.*, 407 U.S. 297, 313 (1972); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271-72 (1971); *Greenbelt Cooperative Publishing Ass'n Inc. v. Bresler*, 398 U.S. 6, 11 (1970); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969); *Watts v. United States*, 394 U.S. 705, 708 (1969); *Pickering v. Board of Education*, 391 U.S. 563, 573 (1968); *Time Inc. v. Hill*, 385 U.S. 374, 388 (1967); *Bond v. Floyd*, 385 U.S. 116, 135 (1966); *Mills v. Alabama*, 384 U.S. 214, 218 (1966); *Rosenblatt v. Baer*, 383 U.S. 75, 85-86 (1966); *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964); *Edwards v. South Carolina*, 372 U.S. 229, 237-38 (1963); *NAACP v. Button*, 371 U.S. 415, 429 (1963); *Thornhill v. Alabama*, 310 U.S. 88, 101 (1940). See also MEIKELJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 75 (1960). Of course, the first amendment

does not protect speech and assembly only to the extent it can be characterized as political. 'Great secular causes, with small ones are guarded. The grievances for redress . . . are not solely religious or political ones. And the rights of free speech . . . are not confined to any field of human interest.'

*United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 223 (1967).

172. *United Pub. Workers v. Mitchell*, 330 U.S. 75, 95 (1947); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942).

173. *In re George F. Nord Building Corp.*, 129 F.2d 173 (7th Cir.), cert. denied, 317 U.S. 670 (1942).

174. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 150 (1967); see *Healey v. James*,

the broadest scope to the language and purpose of the first amendment would not warrant treating its principles as a promise that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. That concept of constitutional law has been vigorously and forthrightly rejected time and time again.<sup>175</sup>

Rather, time and setting determine the parameters of first amendment freedoms. Differences in the characteristics of news media justify differences in the first amendment standards applied to them;<sup>176</sup> the nature of one's "employment may properly [justify and] encompass limitations upon speech that would not survive constitutional scrutiny if directed against a private citizen . . . ."<sup>177</sup> Likewise, one's status may justify the imposition of regulations which would be unconstitutional if applied in other settings. For example, it has been held that requiring grand jurors to take an oath of secrecy does not

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408 U.S. 169 (1972); *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Rowan v. Post Office*, 397 U.S. 728 (1970); *Waltz v. Tax Comm'n*, 397 U.S. 664 (1970); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 387 (1969); *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 507 (1969); *Breard v. Alexandria*, 341 U.S. 622, 642 (1951); *Dennis v. United States*, 341 U.S. 494 (1951); *American Federation of Labor v. American Sash & Door Co.*, 335 U.S. 538, 546 (1949) (Frankfurter, J., concurring); *Marsh v. Alabama*, 326 U.S. 501, 506 (1946); *Prince v. Massachusetts*, 321 U.S. 158, 177 (1944) (separate opinion of Jackson, J.); *Baines v. City of Danville*, 337 F.2d 579, 586 (4th Cir. 1964), *cert. denied*, 381 U.S. 939 (1965); *United States v. Peace Information Center*, 97 F. Supp. 255, 262 (D.D.C. 1951); *Anderson v. Sills*, 265 A.2d 678 (N.J. 1970); *cf. Gillette v. United States*, 401 U.S. 437, 461 (1971) (Douglas, J., dissenting); *Stein v. Oshinsky*, 348 F.2d 999 (2d Cir.), *cert. denied*, 382 U.S. 957 (1965); *NLRB v. Luxuray, Inc.*, 123 F.2d 106, 108 (2d Cir. 1941); *Abbot v. Thetford*, 354 F. Supp. 1280, 1286 (M.D. Ala. 1973).

175. *E.g.*, *Lloyd Corp. v. Tanner*, 407 U.S. 551, 568 (1972).

It is a *non-sequitur* to say that First Amendment rights may not be regulated because they hold a preferred position in the hierarchy of the constitutional guarantees of the incidents of freedom. This Court has never so held and indeed has definitely indicated to the contrary. It has indicated approval of reasonable non-discriminatory regulation by governmental authority that preserves peace, order and tranquility without deprivation of the First Amendment guarantees of free speech . . . .

There is no basis for saying that freedom and order are not compatible. That would be a decision of desperation. Regulation and suppression are not the same, either in purpose or result, and courts of justice can tell the difference.

*Poulos v. New Hampshire*, 345 U.S. 395, 405, 408 (1953). *See also Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Rowan v. Post Office*, 397 U.S. 728 (1970); *Food Employees v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 319 (1968); *Adderley v. Florida*, 385 U.S. 36, 49 (1966) (Douglas, J., dissenting); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952); *Breard v. Alexandria*, 341 U.S. 622, 642 (1951); *Kovacs v. Cooper*, 336 U.S. 77 (1949); *Prince v. Massachusetts*, 321 U.S. 158, 169 (1944).

176. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969). *See also Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502-03 (1952).

177. *Goldwasser v. Brown*, 417 F.2d 1169, 1176 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970); *cf. Healey v. James*, 408 U.S. 169, 180 (1972).

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violate their first amendment rights.<sup>178</sup> Nor is it unconstitutional to impose restrictions on prisoners<sup>179</sup> or servicemen<sup>180</sup> which would not pass constitutional muster if applied to private citizens.<sup>181</sup>

The dramatic differences between children and adults justify restrictions which would be otherwise unconstitutional. Thus, limitations on movies which drive-in theatres can show may be imposed because of children's accessibility to the surrounding area;<sup>182</sup> and direct restrictions may be placed on the press in reporting juvenile proceedings<sup>183</sup> which would be patently unconstitutional in the setting of a routine criminal case.<sup>184</sup>

Notwithstanding the law's proper solicitude for the right of association guaranteed by the first amendment,<sup>185</sup> it is clear that the extent of that right depends on the status of the individual asserting it. Therefore, while a private citizen's associational rights may not normally be infringed, a probationer may validly be restrained from associating with "known homosexuals"<sup>186</sup> or with members of Students for a Democratic Society.<sup>187</sup> Likewise, a probationer's right to travel,<sup>188</sup> to speak,<sup>189</sup> and to engage in gainful employment<sup>190</sup> are markedly different from that enjoyed by other citizens.

While the Constitution guarantees citizens the right to bear arms, it is not an unconstitutional abridgment of that right to prohibit convicted felons from receiving or possessing firearms.<sup>191</sup> While freedom of speech and religion may be the hallmarks of a vibrant society,

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178. *Goodman v. United States*, 108 F.2d 516, 520 (9th Cir. 1939).

179. *Brooks v. Wainwright*, 428 F.2d 652 (5th Cir. 1970); *Diehl v. Wainwright*, 419 F.2d 1309 (5th Cir. 1970).

180. *Dash v. Commanding General*, 307 F. Supp. 849, 852 (D.S.C. 1969), *adopted in full and aff'd*, 429 F.2d 427 (4th Cir. 1970).

181. One's status may even determine whether state libel laws can be properly applied. *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966).

182. *Chemline Inc. v. City of Grand Prairie*, 364 F.2d 721, 724 (5th Cir. 1966). *But see Cinecom Theatres Midwest States Inc. v. City of Fort Wayne*, 473 F.2d 1297 (7th Cir. 1973). *See also Rabe v. Washington*, 405 U.S. 313 (1972).

183. *Government v. Brodhurst*, 285 F. Supp. 831 (D.V.I. 1968); *Johnson v. Simpson*, 433 S.W.2d 644 (Ky. 1968); *cf. In re Gault*, 387 U.S. 1, 25 (1967).

184. *Sun Co. v. Superior Court*, 105 Cal. Rptr. 873 (4th Dist. App. 1973).

185. *Healey v. James*, 408 U.S. 169, 181 (1972).

186. *United States v. Kohlberg*, 472 F.2d 1189 (9th Cir. 1973).

187. *United States v. Smith*, 414 F.2d 630 (5th Cir. 1969), *rev'd on other grounds*, *Schacht v. United States*, 398 U.S. 58 (1970).

188. *See In re Mannino*, 92 Cal. Rptr. 880, 885 (1st Dist. Ct. App. 1971).

189. *Porth v. Templar*, 453 F.2d 330 (10th Cir. 1971).

190. *Whaley v. United States*, 324 F.2d 356, 359 (9th Cir. 1963), *cert. denied*, 376 U.S. 911 (1964).

191. *United States v. Bass*, 404 U.S. 336, 351 (1971).

they cannot be exercised in a courtroom<sup>192</sup> or in a school<sup>193</sup> to the same extent as on a street or in a place of worship. Equally, the nature of a given organization may justify imposition of regulations which would encounter difficulties if applied elsewhere.<sup>194</sup> And finally, even a lawyer's past associations and employment may justify prohibitions on future conduct.<sup>195</sup>

In cases dealing with the free speech rights of public employees, it has been rightly said:

it is the nature of the employment that defines the extent to which the otherwise protected publications of employees may be constrained. . . . The less likely it is that the public will attach special importance to the statements made by someone in a particular position, the weaker is the argument that the state needs special restriction[s] . . . .<sup>196</sup>

The concept that the relationship between the speaker and the audience helps to locate the parameters of the first amendment has long been recognized by the Supreme Court. In *NLRB v. Federbush Co.*,<sup>197</sup> Learned Hand said:

[w]ords are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used, of which the relation between the speaker and the hearer is perhaps the most important part.<sup>198</sup>

192. *In re Portland Elec. Co.*, 97 F. Supp. 903, 909 (D. Ore. 1947); *cf. In re Sawyer*, 360 U.S. 622 (1959).

193. *Stein v. Oshinsky*, 348 F.2d 999 (2d Cir.), *cert. denied*, 382 U.S. 957 (1965).

194. *Communist Party v. SACB*, 367 U.S. 1, 101 (1961).

195. *United States v. Nasser*, 476 F.2d 1111 (7th Cir. 1973) (concerning a federal conflict of interest statute which precluded a lawyer from being involved in a proceeding if, while he was a government employee, he was in any way involved with the proceeding); *cf. United States v. Marchetti*, 466 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972) (secrecy agreement executed by government employee not violative of first amendment).

196. *Donovan v. Reinbold*, 433 F.2d 738, 742-43 (9th Cir. 1970). *See also Goldasser v. Brown*, 417 F.2d 1169, 1177 (D.C. Cir. 1969) (where the court stressed the "uniqueness" of appellant's position in its disposition of the case); *accord, Meehan v. Macy*, 392 F.2d 822, 834 (D.C. Cir. 1968).

197. 121 F.2d 954 (2d Cir. 1941).

198. *Id.* at 957. The Supreme Court has acknowledged the fact that the relationship between a speaker and his audience may well restrict the freedom of speech which would be enjoyed in other settings:

Any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting. Thus, an employer's rights cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in Sec. 7 and protected by Sec. 8(a)(1) and the proviso to Sec. 8(c). And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of

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A lawyer in a pending criminal case occupies a unique position. His official character as an officer of the court carries beyond question great weight with a jury.<sup>199</sup> Moreover, it is because counsel of record may be most familiar with the case that he may not express his opinions. It takes no master of psychology to know that the extent to which an audience is susceptible to a speaker's views depends in large measure on the extent to which they believe him to be familiar with his subject matter.<sup>200</sup> The law has long recognized these principles as illustrated by the Canons of Ethics proscription of in-court expressions by counsel of record of his private opinions about guilt or innocence.<sup>201</sup>

Comments by lawyers relating to pending cases, whether true or false, tend to obstruct the administration of justice, because, as noted earlier,<sup>202</sup> even a correct conclusion is not to be reached by reliance on out-of-court information. "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."<sup>203</sup>

To suggest that the first amendment is not violated by the Canons of Ethics which bar a lawyer from expressing his opinions in the courtroom, but that it is violated by a rule which prohibits expression of opinion for public dissemination,<sup>204</sup> is casuistry at its worst.<sup>205</sup>

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the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear. Stating these obvious principles is but another way of recognizing that what is basically at stake is the establishment of a nonpermanent, limited relationship between the employer, his economically dependent employee and his union agent, not the election of legislators or the enactment of legislation whereby that relationship is ultimately defined and where the independent voter may be freer to listen more objectively and employers as a class freer to talk (citation omitted).

NLRB v. Gissel Packing Co., 395 U.S. 575, 617-18 (1969). References are to the National Labor Relations Act 29 U.S.C. § 141 (1970).

199. Cf. Parker v. Gladden, 385 U.S. 363, 365 (1966).

200. That a jury is less likely to be influenced by opinions of the press than by opinions of counsel has been recognized by an eminent district judge. In a speech delivered to the Mississippi State Bar Association in 1969, Judge Hubert Will of the United States District Court for the Northern District of Illinois, sagely observed that "all Americans grow up with a kind of slowly developing, built in, press-wise compensator." Will, *A Free Press and A Fair Trial*, 40 Miss. L.J. 495, 501 (1969).

201. ABA DISCIPLINARY RULE 7-106(C)(4).

202. See p. 369, *supra*.

203. Patterson v. Colorado, 205 U.S. 454, 462 (1907).

204. Local Rule 1.07(d) and the Kaufman and Reardon Committees' Rules prescribe the release of information or opinion for public communication.

It is obvious that the phrase "for dissemination" means for the *purpose* of dissemination. It cannot be argued that this is an insufficient statement of the intent requirement. Cf. Dennis v. United States, 341 U.S. 494, 499-500 (1951); Frohwerk v. United

If we close with some general propositions, it is not because we are unmindful of Holmes' caution that "general propositions do not decide concrete cases."<sup>206</sup> Rather, "[w]hether they do or not . . . depends on the strength of the conviction with which . . . they are held."<sup>207</sup> No principle has commanded more passionate and undeviating loyalty by American courts than the notion that "justice, though due the accused, is due the accuser also."<sup>208</sup> Indeed, from the atmosphere and emanations of countless opinions, there emerges with unmistakable clarity a recognition and reaffirmation of the oft-forgotten truth that in criminal prosecutions there are also rights of public justice which are no less dear and which are entitled to no less protection than a defendant's right to a fair trial.<sup>209</sup> If those "rights"

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States, 249 U.S. 204, 209 (1919); *United States v. Hill*, 248 U.S. 420, 422 (1919); *Champion v. Ames*, 188 U.S. 321, 323-24 (1903); *Masson v. Slayton*, 320 F. Supp. 669, 671 (N.D. Ga. 1970). Thus a rule banning statements made for public dissemination bans only statements made with the intent that they be publicly disseminated.

Significantly, the Kaufman Committee, which drafted the recommended rule upon which Local Rule 1.07(d) is modeled, later decided to eliminate the intent requirement of the rule. In its Supplemental Report, the Committee replaced the phrase "for dissemination by any" with the phrase "which a reasonable person would expect to be disseminated by" [means of public communication]. SUPPLEMENTAL REPORT OF THE COMMITTEE ON THE OPERATION OF THE JURY SYSTEM ON THE "FREE PRESS—FAIR TRIAL" ISSUE, 51 F.R.D. 135, 137 (1970). The Committee made this change because of the belief that "an objective standard of conduct is preferable to one which appears to refer to subjective intent." *Id.* at 138. Thus, the Committee clearly stated its understanding that its original, proposed rule, containing the identical wording of Local Rule 1.07(d), required a finding of intent. This subsequent expression by the Committee is "entitled to great weight" in construing the rule. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-81 (1969). ABA DISCIPLINARY RULE 7-107 also embodies this change.

205. In the related context of *United States v. Largo*, 346 F.2d 253 (7th Cir. 1965), Judge Swygert made manifest the contradictions inherent in such a thesis:

[T]he fact that the statements were exposed to a juror by appearance in a newspaper article rather than by another form of extrajudicial communication is unimportant. If the Government's attorney or the agent had made the same statements as were contained in the newspaper article in the corridor of the courthouse and within the presence and hearing of juror Archer, it could hardly be said that the effect would have been less pernicious.

*Id.* at 357 (Swygert, J., dissenting); *cf.* *Parker v. Gladden*, 385 U.S. 363 (1966).

206. *Lochner v. New York*, 198 U.S. 45 (1905).

207. *Harris v. United States*, 331 U.S. 145, 157 (1947) (Frankfurter, J., dissenting).

208. *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934).

209. *See Wardius v. Oregon*, 412 U.S. 470, 93 S. Ct. 2208, 37 L. Ed. 2d 82, (1973); *Williams v. Florida*, 399 U.S. 78, 82 (1970); *North Carolina v. Pearce*, 395 U.S. 711, 721 n.18 (1969); *Sheppard v. Maxwell*, 384 U.S. 333, 361 (1966); *United States v. Ewell*, 383 U.S. 116, 120 (1966); *Stein v. New York*, 346 U.S. 156, 197 (1953); *Sacher v. United States*, 343 U.S. 1, 8, 24 (1952); *Wade v. Hunter*, 336 U.S. 684, 689 (1949); *United States v. Wood*, 299 U.S. 123, 149 (1936); *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934); *Beaves v. Lambert*, 198 U.S. 77, 87 (1905); *Reagan v. United States*, 157 U.S. 301, 310-11 (1895); *Mattox v. United States*, 156 U.S. 237, 243 (1895); *Thompson v. United States*, 155 U.S. 271, 274 (1894). Even civil proceedings between "private" litigants are affected with a public interest. *New York*

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are to be preserved, it is imperative that restrictions on counsel's liberty of expression have bilateral application.<sup>210</sup>

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Central R.R. v. Johnson, 279 U.S. 310, 318 (1929). See also United States v. Bohle, 445 F.2d 54 (7th Cir. 1971); Chase v. Robson, 435 F.2d 1059 (7th Cir. 1970); United States v. Cartano, 420 F.2d 362, 365 (1st Cir.), cert. denied, 397 U.S. 1054 (1970); United States v. Tijerina, 412 F.2d 661, 666 (10th Cir.), cert. denied, 396 U.S. 990 (1969); Matzner v. Davenport, 228 F. Supp. 636, 639 (D.N.J. 1968); Matzner v. Brown, 288 F. Supp. 608, 611-12 (D.N.J. 1968), aff'd, 410 F.2d 1376 (3d Cir. 1969), cert. denied, 396 U.S. 1015 (1970); State v. Kavanaugh, 243 A.2d 225, 231 (N.J. 1968); Johnson v. Simpson, 433 S.W.2d 644, 645 (Ky. 1968); Sun Oil Co. v. Superior Court, 105 Cal. Rptr. 873, 878 (1973). Chicago Counsel of Lawyers v. Bauer, 371 F. Supp. 689 (N.D. Ill. 1974).

210. Typical of the arguments levelled against the rules barring comments by defense counsel is that found in the appendix to the *amicus* brief of the Chicago Counsel of Lawyers in *In re Oliver*, 470 F.2d 15 (7th Cir. 1972). The Counsel found Local Rule 1.07(d) objectionable because it "sweeps across the whole range of extra-judicial statements, precluding those which . . . may even assist a criminal defendant as well as those which are prejudicial." This argument overlooks the fact that the government as well as a defendant is entitled to a fair trial.