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JUDICIAL RESTRAINING ORDERS AND THE MEDIA: DOES IT REALLY MATTER WHO IS GAGGED?

James M. Jennings II*

I. INTRODUCTION

Writing in *Bridges v. California*,¹ Justice Hugo Black observed forty years ago that "free speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them."² And yet, these constitutionally guaranteed rights have been in conflict since at least 1807.³ In *Nebraska Press Association v. Stuart*,⁴ Chief Justice Warren Burger wrote:

The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other. . . . But if the authors of these guarantees, fully aware of the potential conflicts between them, were unwilling or unable to resolve the issue by assigning to one priority over the other, it is not for us to rewrite the Constitution by undertaking what they declined to do.⁵

The judiciary in the United States has thus attempted to balance these two Bill of Rights guarantees. The sixth and fourteenth amendments to the Constitution provide that the guilt or innocence of a criminal defendant will be determined in an impartial proceeding, free from outside influences.⁶ The sixth amendment also guarantees to society the fair and public administration of justice. The media, likewise, play an integral role in the public's right to know about the conduct of court proceedings.⁷ But the perva-

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1. 314 U.S. 252 (1941).

2. *Id.* at 260.

3. One of the earliest comments on this conflict can be found in *United States v. Burr*, 25 F. Cas. 49 (C.C.D. Va. 1807) (No. 14692d).

4. 427 U.S. 539 (1976).

5. *Id.* at 561.

6. Justice Holmes, in *Patterson v. Colorado*, 205 U.S. 454 (1907), summarized the basic theory of American criminal jurisprudence as follows: "[C]onclusions [are] to be reached in a case . . . [based only on] evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Id.* at 462.

7. The clearest expression of the increasing importance of the media's role in this capac-

siveness of the media in the last half-century has made the constitutional guarantee of an impartial public trial, free from outside influences, difficult to satisfy⁸—at least in regard to news coverage of sensational crimes and the judicial proceedings arising from such crimes.⁹

The history of the conflict between first and sixth amendment rights is marked by the shifting importance of the two, depending on the particular case before the court. During the nineteenth and early twentieth centuries, state courts felt free to use their contempt power to punish newspapers and individuals for making public comments concerning pending cases.¹⁰ In 1925, however, the Supreme Court of the United States decided *Gitlow v. New York*¹¹ recognizing the applicability of the first amendment to the states through the fourteenth amendment.

Sixteen years later, the Court was called upon to determine the constitutionality of a state court's use of its contempt power to punish private individuals and members of the media for comments made about pending cases. In *Bridges v. California* a union leader had been held in contempt because of the publication of a telegram he had sent to the Secretary of Labor, in which he criticized the actions of a state court.¹² In the companion case of *Times-Mirror Co. v. California*,¹³ a newspaper publisher had been convicted of contempt for publishing an article labeling the defendants "gorillas" and arguing against the granting of probation.¹⁴

ity can be found in *Richmond Newspapers, Inc. v. Virginia*, 100 S. Ct. 2814 (1980), to be published at 448 U.S. 555. See also *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Phoenix Newspapers, Inc. v. Superior Court*, 101 Ariz. 257, 418 P.2d 594 (1966); *State ex rel. Dayton Newspapers, Inc. v. Phillips*, 46 Ohio St. 2d 457, 351 N.E.2d 127 (1976); *State ex rel. Superior Court v. Sperry*, 79 Wash. 2d 69, 483 P.2d 608, cert. denied sub nom. *McCrea v. Sperry*, 404 U.S. 939 (1971).

8. Writing in *Nebraska Press*, Chief Justice Burger observed that "[t]he speed of communication and the pervasiveness of the modern news media have exacerbated these [free press-fair trial] problems . . ." 427 U.S. at 548.

9. See, e.g., *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Irvin v. Dowd*, 366 U.S. 717 (1961); *People v. Manson*, 71 Cal. App. 3d 1, 139 Cal. Rptr. 275 (1977); *People v. Speck*, 41 Ill. 2d 177, 242 N.E.2d 208 (1968); *State v. Hauptmann*, — N.J.L. —, 180 A. 809, cert. denied, 296 U.S. 649 (1935).

10. See *Nelles & King, Contempt by Publication in the United States Since the Federal Contempt Statute*, 28 COLUM. L. REV. 525 (1928).

11. 268 U.S. 652 (1925).

12. 314 U.S. 252, 275-78 (1941).

13. 314 U.S. 252 (1941).

14. *Id.* at 271.

Both convictions had been affirmed by the California Supreme Court.¹⁵ In reversing the decisions, the United States Supreme Court held that the publications had not constituted a "clear and present danger" to the administration of justice.¹⁶ While recognizing the importance of the fair trial principle, Justice Black concluded that before a court could use its contempt power to punish for public comment on a pending case, "the substantive evil must be extremely serious and the degree of imminence extremely high."¹⁷ For two decades following *Bridges*, the Court consistently upheld the concept of first amendment supremacy in the area of public commentary on pending cases.¹⁸

However, in 1961, the Court was faced with a different aspect of the conflict between first and sixth amendment rights. In *Irvin v. Dowd*,¹⁹ adverse local publicity led the accused to request a change of venue. While the request was granted, the case was tried in a neighboring county equally infected with the prejudicial publicity, and the defendant's requests for additional changes in venue were denied.²⁰ The defendant was eventually convicted by what voir dire had shown to be a prejudiced jury.²¹ The Court held that the trial court's refusal to grant the further change of venue was reversible error.²²

Two years later, in *Rideau v. Louisiana*,²³ the Court reversed another conviction on the grounds that adverse publicity had denied the defendant due process. The Court held that the trial court's refusal to grant a change of venue out of an area which had been exposed to a televised confession was a denial of due process even without a showing that the adverse publicity had affected the

15. *Times-Mirror Co. v. Superior Court*, 15 Cal. 2d 99, 98 P.2d 1029 (1940); *Bridges v. Superior Court*, 14 Cal. 2d 464, 94 P.2d 983 (1939).

16. 314 U.S. at 278.

17. *Id.* at 263.

18. *See, e.g.*, *Wood v. Georgia*, 370 U.S. 375 (1962); *Craig v. Harney*, 331 U.S. 367 (1947); *Pennekamp v. Florida*, 328 U.S. 331 (1946). *Bridges* and the above cases dealt with nonjury trials. In *Wood v. Georgia*, the court stated: "Moreover, we need not pause here to consider the variant factors that would be present in a case involving a petit jury." 370 U.S. at 389. In 1950, however, the Court had refused to grant certiorari in a jury case in which a state court, using the clear and present danger test, had reversed the contempt citation. *See Baltimore Radio Show, Inc. v. State*, ___ Md. ___, 67 A.2d 497 (1949), *cert. denied*, 338 U.S. 912 (1950).

19. 366 U.S. 717 (1961).

20. *Id.* at 720.

21. *Id.* at 727.

22. *Id.* at 729.

23. 373 U.S. 723 (1963).

jury.²⁴

The decisions in *Irvin* and *Rideau* marked a shift in emphasis from first amendment rights towards those of the sixth amendment. This shift was completed in 1965, in *Estes v. Texas*²⁵ where the Court held that the prejudice inherent in the use of television in the courtroom was a denial of due process.²⁶ The Court wrote that "the atmosphere essential to the preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs."²⁷

In *Sheppard v. Maxwell*,²⁸ the Supreme Court suggested a number of procedural safeguards which could be employed by trial courts in an effort to insure the protection of the accused's right to a fair trial.²⁹ Support for the most stringent of these safeguards, the use of the restraining order, is found in dictum of the Court.³⁰ These orders, commonly referred to as "gag" orders, restrict either directly or indirectly what the media can report about judicial proceedings.

Originally gag orders were aimed at the media as the distributors of material which could be prejudicial in nature.³¹ In *Nebraska Press Association v. Stuart*, however, the Court looked at a series of cases dealing with prior restraints and concluded that "[t]he thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."³² Chief Justice Burger, writing for the majority, noted that if subsequent punishment "chills" speech, prior restraint freezes it—at least temporarily.³³

The Court in *Nebraska Press* adopted the clear and present danger test, as interpreted by Judge Learned Hand in *United*

24. *Id.* at 726.

25. 381 U.S. 532 (1965).

26. *Id.* at 544.

27. *Id.* at 540 (emphasis added).

28. 384 U.S. 333 (1966).

29. These safeguards included change of venue, continuance, voir dire and sequestration of the jury and the granting of a new trial. *Id.* at 363.

30. *Id.* at 361.

31. One of the first judicial gag orders may have been issued by Chief Justice Isaac Parker of the Supreme Judicial Court of Massachusetts in 1830. Justice Parker issued a ban on the publication of any of the "evidence" in the case of *Commonwealth v. Knapp*, 27 Mass. (1 Pick.) 477 (1830) (Knapp and others charged with murder). See J. LOFTON, *JUSTICE AND THE PRESS* 115 (1966).

32. 427 U.S. 539, 559 (1976).

33. *Id.*

States v. Dennis,³⁴ and applied it to gag orders against the media. The Court then established a three-pronged method by which trial courts could determine if this test were met. First, examine the nature and the extent of the harm threatened by unrestrained media coverage. Second, adjust the gravity of the harm posed by the probability that the consequences, such as prejudice, will in fact occur should speech remain unfettered. And third, consider whether less intrusive alternatives exist which would adequately protect the integrity of the trial process.³⁵

Some commentators believe that the Court's holding in *Nebraska Press* has established a standard so stringent as to preclude all restraints on the media, even when the alternative is to interfere with an individual's right to a fair trial.³⁶ In fact, direct gag orders on the media have been consistently overruled upon appeal since *Nebraska Press*.³⁷ While the decision seems to have erected a

34. 183 F.2d 201 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951). The test, as interpreted by Judge Learned Hand, determines whether the "gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." 183 F.2d at 212. By adopting Learned Hand's interpretation, Chief Justice Burger accepted the weakest interpretation of the clear and present danger test. The "gravity of the evil" standard permits the Court to use a sliding scale on which to judge a possible threat to the fair administration of justice. Under this standard the clearer, or the more grave, the perceived danger, the less present the danger need be. This scale is far closer to the "evil tendency" test than to the clear and present danger test outlined by Justices Holmes and Brandeis in *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes & Brandeis, JJ., dissenting). See D. GILLMOR & J. BARRON, *MASS COMMUNICATION LAW CASES AND COMMENT* 80-81 (3d ed. 1979); G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 1061-1068 (9th ed. 1975). It is the use of this limited interpretation of the clear and present danger test which raises questions as to the future course of the Court with regard to this doctrine.

35. 427 U.S. at 563-65. The third prong of this test requires that the least drastic means of achieving the desired end be employed (in this case a fair and impartial trial). See *Shelton v. Tucker*, 364 U.S. 479 (1960):

"In a series of decisions this Court has held that, *even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.* The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose."

Id. at 488 (emphasis added) (footnote omitted). See also *United States v. O'Brien*, 391 U.S. 367 (1968); *Schneider v. Smith*, 390 U.S. 17 (1968); *United States v. Robel*, 389 U.S. 258 (1967); *Talley v. California*, 362 U.S. 60 (1960).

36. See Goodale, *The Press Ungagged: The Practical Effect On Gag Order Litigation of Nebraska Press Association v. Stuart*, 29 STAN. L. REV. 497, 498 (1977); Prettyman, *Nebraska Press Association v. Stuart: Have We Seen the Last of Prior Restraints on the Reporting of Judicial Proceedings?*, 20 ST. LOUIS U.L.J. 654, 655 (1976).

37. See, e.g., *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977); *State ex rel. Miami Herald Publishing Co. v. McIntosh*, 340 So. 2d 904 (Fla. 1976); *Des Moines Register & Tribune Co. v. Osmundson*, 248 N.W.2d 493 (Iowa 1976); *State v. Rittiner*, 341 So. 2d 307 (La. 1977); *State v. Allen*, 73 N.J. 132, 373 A.2d 377 (1977); *New York Times Co. v. Starkey*,

significant barrier to the use of gag orders directed to the media, the Court did not consider the validity of such orders designed to silence non-media sources of prejudicial information. Since *Nebraska Press*, there has been an increase in the use of gag orders directed to the prosecution, defense counsel, defendant, witnesses, and trial participants generally, and in the enforcement of standing court rules for the discipline of counsel and law enforcement personnel.³⁸

This article will examine this new attempt on the part of the judiciary to insure a fair trial for the accused and will attempt to determine if the result of gagging trial participants is appreciably different than directly gagging the media. The article will also examine the various standards of controlling the gagging of trial participants used in the eleven circuits of the United States Courts of Appeals.

II. GAGGING EVERYONE BUT THE PRESS

A. *Legal Foundations.*

While the Court discussed the invalidity of the use of direct gag orders on the media in *Nebraska Press*,³⁹ it has never directly considered the constitutionality of such orders when imposed on the participants of judicial proceedings.⁴⁰ In dictum, however, the

51 A.D.2d 60, 380 N.Y.S.2d 239 (1976); *State ex rel. Dayton Newspapers, Inc. v. Phillips*, 46 Ohio St. 2d 457, 351 N.E.2d 127 (1976).

38. See, e.g., *Bernard v. Gulf Co.*, 619 F.2d 459 (5th Cir. 1980); *In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979); *Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979); *United States v. Garcia*, 456 F. Supp. 1354 (D.P.R. 1978); Central S.C. Chapter, Soc'y of Professional Journalists, *Sigma Delta Chi v. Martin*, 431 F. Supp. 1182 (D.S.C.), *aff'd*, 556 F.2d 706 (4th Cir.), *stay denied*, 431 U.S. 928 (1977), *cert. denied*, 434 U.S. 1022 (1978); *State ex rel. Angel v. Woodahl*, — Mont. —, 555 P.2d 501 (1976); *State v. Carter*, 143 N.J. Super. 405, 363 A.2d 366 (1976); *People v. Dupree*, — A.D.2d —, 388 N.Y.S.2d 203 (1976).

39. The Court characterized the use of such orders as a direct prior restraint on the media and held this to be "the most serious and the least tolerable infringement on First Amendment rights." 427 U.S. at 559 (emphasis added). See also note 35 *supra*.

40. The Court came close to addressing this question directly last term in *Gulf Oil Co. v. Bernard*, 49 U.S.L.W. 4604 (U.S. June 1, 1981) (No. 80-441). The Court, in affirming the Fifth Circuit, held that a sweeping gag order by a Texas District Court on all parties in a class action suit in the name of protection of the fair administration of justice abused the court's discretionary power under the Federal Rules of Civil Procedure. The Court indicated its future course in cases involving gag orders on trial participants:

Although we do not decide what standards are mandated by the First Amendment in this kind of case, we do observe that the order involved serious restraints on expression. This fact, at minimum, counsels caution on the part of a District Court in drafting such an order, and attention to whether the restraint is justified by a likelihood of serious abuses.

Court has suggested that this method of insuring the defendant a fair trial may indeed be constitutional.⁴¹ Several of the United States Courts of Appeals which have confronted this issue,⁴² however, have held that trial participants are entitled to first amendment protection within the context of the individual judicial proceeding.⁴³

It is generally acknowledged that a court has the power and authority to control the conduct of individuals appearing before it.⁴⁴ Further, courts have traditionally held that the sixth amendment rights of the defendant guarantee him a "fair trial but not a perfect one."⁴⁵ Recognizing these two concepts, the federal appeals courts have acknowledged that the use of gag orders on trial participants does restrict expression and thus involves the first

. . . *But the mere possibility of abuses does not justify routine adoption of a communications ban*

Id. at 4608 (emphasis added).

41. *See, e.g., Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 564 (1976) ("Professional studies have . . . [recommended] that trial courts in appropriate cases limit what the contending lawyers, the police, and witnesses may say to anyone."); *Sheppard v. Maxwell*, 384 U.S. 333, 361 (1966) ("[T]he trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, . . . or like statements concerning the merits of the case."). *See also* 2 ABA STANDARDS FOR CRIMINAL JUSTICE, Ch. 8 at 5 (1978) [hereinafter cited as STANDARDS] ("(a) A lawyer shall not release or authorize the release of information or opinion for dissemination by any means of public communication. . . . (b) [A] lawyer may be subject to disciplinary action with respect to extrajudicial statements . . .").

42. *See Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), *cert. denied sub nom. Cunningham v. Chicago Council of Lawyers*, 427 U.S. 912 (1976); *CBS, Inc. v. Young*, 522 F.2d 234 (6th Cir. 1975); *In re Oliver*, 452 F.2d 111 (7th Cir. 1971); *Chase v. Robson*, 435 F.2d 1059 (7th Cir. 1970); *United States v. Tijerina*, 412 F.2d 661 (10th Cir. 1969). *See also* note 37 *supra*.

43. *See Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), *cert. denied sub nom. Cunningham v. Chicago Council of Lawyers*, 427 U.S. 812 (1976); *In re Oliver*, 452 F.2d 111 (7th Cir. 1971). Each of these opinions held court rules prohibiting extrajudicial statements by lawyers to be a violation of the first amendment rights of the lawyers. *But see United States v. Tijerina*, 412 F.2d 661 (10th Cir. 1969) (gag order on trial participants did not violate first amendment because it was based on reasonable likelihood that comments could prevent impaneling of impartial jury and thus affect fairness of trial).

44. *See, e.g., First Wis. Mortgage Trust v. First Wis. Corp.*, 571 F.2d 390 (7th Cir. 1978); *In re Michaelson*, 511 F.2d 882 (9th Cir.), *cert. denied sub nom. Michaelson v. United States*, 421 U.S. 978 (1975); *Zarate v. Younglove*, 86 F.R.D. 80 (C.D. Cal. 1980). Courts also held, however, that in regulating the conduct of trial participants, a court may not infringe upon constitutionally protected rights. *See, e.g., Johnson v. Avery*, 393 U.S. 483 (1969); *Telos, Inc. v. Hawaiian Tel. Co.*, 397 F. Supp. 1314 (D. Hawaii 1975); *Staud v. Stewart*, 366 F. Supp. 1398 (E.D. Pa. 1973).

45. *See, e.g., Michigan v. Tucker*, 417 U.S. 433, 446 (1974); *Brown v. United States*, 411 U.S. 223, 231 (1973); *United States v. Liddy*, 509 F.2d 428, 442 (D.C. Cir. 1974) (quoting *Lutwak v. United States*, 344 U.S. 604, 619 (1953)).

amendment guarantees. The various circuits have differed, however, in the ways they have characterized these orders⁴⁶ and in the creation of constitutional standards by which to judge them.

At present courts use at least four identifiable standards—the free speech standard, the clear and present danger standard, the reasonable likelihood standard, and the authoritarian standard—to test the constitutionality of gag orders aimed at trial participants.⁴⁷ In addition, courts have recognized two procedural grounds—recognition of media interest and notice to the media—which allow the media to challenge the use of such orders in a third party action.⁴⁸

B. *Judicial Standards Governing Restraining Orders*

1. The Free Speech Standard

One of the four standards available to the trial judge in examining the constitutionality of gag orders aimed at trial participants prohibits restrictions on extrajudicial comments. During the Watergate trial of former White House aide Dwight Chapin, the District Court for the District of Columbia refused to grant a government petition requesting that all trial participants be prohibited from making extrajudicial statements. The court noted that while it had the authority to restrict comments by lawyers and witnesses, it could not prevent the defendant from speaking with the press “as he chooses” about the case.⁴⁹

In *United States v. Mandel*,⁵⁰ the district court reached a similar conclusion. In this case the government petitioned the court to

46. The courts have characterized gag orders imposed on trial participants in 3 ways:

- (1) a direct prior restraint on expression;
- (2) a valid use of the trial court's authority to protect the interest of a fair trial, and as such not a prior restraint on expression; and
- (3) a combination of the above.

See *Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979) (standing no-comment rules more a “subsequent punishment” than a prior restraint); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975) (standing no-comment rules similar to prior restraints because they were punishable by contempt but also different because they were subject to constitutional challenge), *cert. denied sub nom. Cunningham v. Chicago Council of Lawyers*, 427 U.S. 912 (1976); *CBS, Inc. v. Young*, 522 F.2d 234 (6th Cir. 1975) (direct prior restraint on expression); *Chase v. Robson*, 435 F.2d 1059 (7th Cir. 1970) (direct prior restraint on expression).

47. *Inaction Continues Gag Chaos*, 2 NEWS MEDIA & THE LAW 4 (Apr.-May 1978).

48. *Id.*

49. *United States v. Chapin*, 515 F.2d 1274 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 1015 (1975).

50. 408 F. Supp. 673 (D. Md. 1975).

impose a gag order on former Maryland Governor Marvin Mandel and his counsel four and a half months prior to the beginning of the trial to prevent the "deliberate manipulation of the media in an attempt to subvert potential jurors."⁵¹ The court acknowledged that both sides of the proceedings were entitled to a fair and impartial trial, but maintained that the government bore the responsibility for showing that the feared publicity would significantly prejudice the proceedings and that the use of the gag order was the least drastic means of insuring a fair trial.⁵² Holding that the government had been unable to make such a showing the court denied the petition.

The use of a standard such as that employed by the courts in *Mandel* and *Chapin* is rare. But, as is the case with the use of the authoritarian standard discussed below, the use of the free speech standard is available as a viable option to the trial judge.

2. The "Clear and Present Danger" or "Serious and Imminent Threat" Standard

Recognizing that the free speech standard may not sufficiently curb prejudicial publicity, and that the use of the authoritarian standard restricts "crucial source[s] of information and opinion,"⁵³ at least two federal circuits have adopted the "clear and present danger" or "serious and imminent threat" standard⁵⁴ in evaluating the constitutionality of gag orders issued to trial participants. The use of these standards allows for a case-by-case evaluation of the potential danger of prejudice to a fair trial and the administration of justice.

In *Chicago Council of Lawyers v. Bauer*,⁵⁵ the Seventh Circuit reviewed a lawyer's challenge to standing disciplinary rules⁵⁶ which prohibited lawyers from releasing information likely to interfere

51. *Id.* at 675.

52. *Id.* at 677.

53. *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 250 (7th Cir. 1975), *cert. denied sub nom. Cunningham v. Chicago Council of Lawyers*, 427 U.S. 912 (1976).

54. *Chase v. Robson*, 435 F.2d 1059, 1061 (7th Cir. 1970) was one of the earliest cases recognizing that a "serious and imminent threat to the administration of justice," or a "clear and present danger" of prejudice must exist for a gag order to withstand constitutional scrutiny.

55. 522 F.2d 242 (7th Cir. 1975), *cert. denied sub nom. Cunningham v. Chicago Council of Lawyers*, 427 U.S. 912 (1976).

56. The rules of United States District Court of the Northern District of Illinois embodied DR 7-107 of the ABA Code of Professional Responsibility.

with a fair trial or to prejudice the fair administration of justice. After finding the rules unconstitutionally vague and overbroad, the court concluded: "Only those comments that pose a 'serious and imminent threat' of interference with the fair administration of justice can be constitutionally proscribed."⁵⁷

The Seventh Circuit recognized that a fair trial was a prime concern but concluded that the "reasonableness" standard established by the district court rules were vague and inconsistent with the objective of "clearness, precision, and narrowness"⁵⁸ of the law. The court maintained that this standard provided a test whereby "even a trivial, totally innocuous statement could be a violation."⁵⁹ The court, recognizing the value of public discussion concerning court proceedings which could be lost through the enforcement of such tests, noted:

[L]awyers involved in investigations or trials often are in a position to act as a check on government by exposing abuses or urging action. It is not sufficient to argue that such comment can always be made later since immediate action might be necessary and it is only when the litigation is pending and current news that the public's attention can be commanded.⁶⁰

The Seventh Circuit, however, did not close the door on the use of standing rules to curb statements which met the presumption of a clear and present danger to a fair trial. Rather, it shifted the burden of proof from the court to the trial participant, requiring the participant who disregards such a rule to justify his actions.⁶¹

Breaking down the judicial proceeding into its basic components—pre-trial, trial and post trial—the court set out to evaluate the potential for prejudice in each stage. The Seventh Circuit held that there was a possibility for prejudice only on the part of the prosecutor during the investigative or pre-trial proceedings, reasoning that it is "imperative that we allow as much public discus-

57. 522 F.2d at 249. State courts have similarly held. *See, e.g., State ex rel. Angel v. Woodahl*, ___ Mont. ___, 555 P.2d 501 (1976); *Markfield v. Association of the Bar*, 49 A.D.2d 516, 370 N.Y.S.2d 82, *appeal dismissed*, 37 N.Y.2d 794, 337 N.E.2d 612, 375 N.Y.S.2d 106 (1975).

58. 522 F.2d at 249.

59. *Id.* at 251.

60. *Id.* at 250. *See also* Blasi, *The Checking Value in First Amendment Theory*, 1977 AMERICAN BAR FOUNDATION RESEARCH J. 523.

61. 522 F.2d at 251.

sion as feasible"⁶² by the defense counsel, to act as a check on the prosecution. With respect to the actual trial, the court held that any rule which prohibited extrajudicial comments relating to "other matters that are reasonably likely to interfere with a fair trial was unconstitutionally vague."⁶³ With regard to restrictions on post-trial comments, the court concluded that these comments could never pose a "serious and imminent threat" to the fair administration of justice given the amount of discretion available to the trial judge at this stage of the proceeding.⁶⁴

The clear and present danger test has also been used by the Sixth Circuit as a method of protecting the right of the media to gather information and to protect the public's right to know. In *CBS, Inc. v. Young*,⁶⁵ a suit brought by members of the media, the court overturned a gag order which prohibited extrajudicial comments by all parties in a civil action arising out of the confrontation between demonstrating students and members of the national guard at Kent State University.⁶⁶ In overturning the order, the court concluded that the order was overly broad:

We find the order to be an extreme example of a prior restraint upon freedom of speech and expression and one that cannot escape the proscriptions of the First Amendment, unless it is shown to have been required to obviate serious and imminent threats to the fairness and integrity of the trial.⁶⁷

The clear and present danger standard gained some support from the legal profession in 1978 when the ABA adopted the standard during a revision of its standards governing fair trial and free press. The new guidelines reject the use of restrictive orders enforced by contempt citations in favor of standing orders enforced by reprimand, suspension, or disbarment.⁶⁸ The guidelines specify

62. *Id.* at 253.

63. *Id.* at 255. (quoting DR 7-107(D) of the ABA Code of Professional Responsibility which was incorporated into the district court rules).

64. 522 F.2d at 257.

65. 522 F.2d 234 (6th Cir. 1975).

66. *Id.* at 236.

67. *Id.* at 240.

68. STANDARDS, *supra* note 41, ch. 8 at 6. The ABA rejected restrictive orders for two reasons. First, there is the difficulty of drafting such an order so as to anticipate all potential sources of prejudicial publicity and still avoid the pitfalls of overbreadth and vagueness. The second is the applicability in many jurisdictions of the collateral bar rule, the consequence of which is to deprive a person charged with violating a silence order of the right to contest its validity in a contempt or other disciplinary proceeding. *Id.* at 7-14.

that such restrictions may be justified only if the following four-part test is met:

- 1) Does the restriction advance a legitimate governmental interest?
- 2) Does the public comment pose an extremely serious threat to the governmental interest sought to be protected?
- 3) Does that threat appear likely to occur imminently?
- 4) Is the restriction on public comment necessary to secure the protection or advancement of the governmental interest in jeopardy?⁶⁹

While the use of the clear and present danger standard or its corollary, the serious and imminent threat standard, seem to be gaining some support from both the bench and the bar, they have not been universally accepted.⁷⁰ Opponents of these standards argue that there is no compelling point of law which sets these standards above others in this area. "The question may fairly be said to be open."⁷¹

3. The Authoritarian Standard

While there is little evidence of widespread support for the authoritarian standard on the federal level, the use of such absolute prohibitions on extrajudicial comments by trial participants, under threat of contempt citations, has been used successfully by the courts in at least three states.

In *Ohio ex rel. Leach v. Sawicki*⁷² a Common Pleas Court in Cuyahoga County, Ohio, issued an order prohibiting all extrajudicial statements by the parties involved in a kidnapping and extortion case, regardless of whether such statements were considered prejudicial. The defendant appealed the order to the Ohio Court of Appeals which directed that the order be lifted. The lower court complied, but issued a similar order the following day, reasoning that this was not a direct gag on the media and, therefore, was not

69. *Id.* at 3.

70. *See, e.g.,* *Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979); *Central S.C. Chapter, Soc'y of Professional Journalists, Sigma Delta Chi v. Martin*, 431 F. Supp. 1182 (D.S.C. 1977), *aff'd*, 556 F.2d 706 (4th Cir. 1978); *United States v. Tijerina*, 412 F.2d 661 (10th Cir. 1969).

71. *Younger v. Smith*, 30 Cal. App. 3d 138, 159, 106 Cal. Rptr. 225, 239 (1973).

72. No. 77-629 (C.P. Cuyahoga County, Ohio, June 3, 1977), *cert. denied*, 434 U.S. 1014 (1978).

subject to a showing of a "clear and present danger" to a fair trial in order to be held valid. In June 1977, the Ohio Supreme Court dismissed an appeal on the case without opinion. In January 1978, the United States Supreme Court refused to review the case.⁷³

A year earlier, the Fourth Circuit had considered *Central South Carolina Chapter, Society of Professional Journalists, Sigma Delta Chi v. United States District Court*,⁷⁴ a case stemming from a widely publicized criminal proceeding involving South Carolina Senator J. Ralph Gasque. On June 21, 1976, Judge Robert Martin, Jr. issued an order which read in part:

All participants in the trial, including lawyers, parties, witnesses, jurors and other officials shall avoid mingling with or being in the proximity of reporters, photographers and others in the entrances to and the hallways in the courthouse building, including the sidewalks adjacent thereto, both in entering and leaving the courtroom and the courthouse⁷⁵

Nine days later, the Central South Carolina Chapter of Sigma Delta Chi and other media organizations sought and obtained a stay of the order from the Fourth Circuit, and filed a petition for a writ of mandamus, seeking to have the order vacated.⁷⁶

In January 1977, the court vacated the stay and dismissed the suit, holding that the writ of mandamus was inappropriate in this case. The Fourth Circuit also noted that "[t]he order issued by the district court judge was a result of his judgment that it was necessary to protect the defendant's right to a fair trial."⁷⁷ Relying in part upon *Sheppard* and *Nebraska Press*, the court concluded that "the Society's right to relief from the order is *far from clear and indisputable*."⁷⁸

While the court cited both *Sheppard* and *Nebraska Press* as outlining standards for the use of gag orders in court proceedings,⁷⁹ it expressed no opinion concerning the validity of the order in this case.

73. 434 U.S. 1014 (1978).

74. 551 F.2d 559 (4th Cir. 1977) (hereinafter referred to as *Sigma Delta Chi I*).

75. *Id.* at 561 n.1.

76. *Id.* at 560-561.

77. *Id.* at 562.

78. *Id.* (emphasis added).

79. *Id.* at 562-563 n.3 (recognition of both the "clear and present danger" and "reasonable likelihood" standards).

We note only that it [the order] involved the exercise of judgment by the district court on a question not nearly conclusively settled in law, especially adversely to the opinion of the district court, that is, whether, rather than prohibiting the press from publishing information already obtained, *which the district court did not do, and which may only be done in extraordinary circumstances* not shown to be present here, it may indirectly prevent the press from obtaining information by regulating trial procedures and ordering the trial participants not to speak with members of the press.⁸⁰

In *Hamilton v. Municipal Court*,⁸¹ the California Court of Appeals upheld the validity of a district court order prohibiting extrajudicial comments by all trial participants in a case stemming from an anti-war demonstration held on the University of California at Berkeley campus. The order prohibited the release of any information or opinion concerning the trial to the media, "other than the date and place of trial, the names of the parties and counsel, the contents of the complaint, and the plea of the defendants."⁸² Further, the order specifically prohibited public statements or releases concerning the merits of the complaint, evidence or arguments to be presented, or trial strategy.⁸³

In *Hamilton*, as was the case in both *Sawicki* and *Sigma Delta Chi I*, the use of absolute prohibitions on extrajudicial statements by trial participants was upheld on appeal, without comment on the validity of the orders themselves. As noted earlier, the use of this authoritative standard for determining the constitutional validity of gag orders is rare, but its successful use in these cases allows it to stand as one possible alternative open to the bench.

4. The "Reasonable Likelihood" Standard

While the Seventh Circuit has considered the reasonable likelihood standard vague and subject to a great deal of judicial discretion,⁸⁴ the courts which have adopted this standard usually base their thinking on the dictum found in *Sheppard* and its endorsement of restraints on trial participants.⁸⁵ This standard empha-

80. *Id.* at 562 (emphasis in original).

81. 270 Cal. App. 2d 797, 76 Cal. Rptr. 168 (1969), cert. denied, 396 U.S. 985 (1969).

82. *Id.* at —, 76 Cal. Rptr. at 169.

83. *Id.* at —, 76 Cal. Rptr. at 170.

84. See notes 58-59 *supra* and accompanying text.

85. 384 U.S. 333, 362 (1966) (emphasis added):

Due process requires that the accused receive a trial by an impartial jury free from

sizes the importance of avoiding prejudicial publicity in an effort to guarantee a fair trial, the limited intrusion on first amendment interests⁸⁶ and the degree to which the individuals restrained are subject to judicial control.

In *Hirschkop v. Snead*,⁸⁷ the Fourth Circuit noted the split among the United States Courts of Appeals between the clear and present danger standard and the reasonable likelihood standard, and held that this was nothing more than a simple disagreement between friends.⁸⁸ *Hirschkop* involved a member of the Virginia State Bar who challenged a disciplinary rule adopted by the Supreme Court of Virginia which restricted a lawyer's comments about pending litigation as unconstitutionally vague and overbroad. The United States District Court for the Eastern District of Virginia rejected the claim that the rule was unconstitutionally vague and overbroad, holding that the rule was a reasonable time, place, and manner regulation.⁸⁹ The Fourth Circuit affirmed, holding that the rules designed to prevent prejudice to a criminal defendant arising from a lawyer's comments "would be meaningless if sanctions could be imposed only when the lawyer's published speech creates unremediable prejudice."⁹⁰

The Fourth Circuit rejected Hirschkop's contention that the first amendment precludes any rule limiting freedom of speech by lawyers. The court, noting that "freedom of speech is not absolute, and [that] courts must consider the 'special characteristics of the

outside influences. . . . Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming within the jurisdiction of the court should be permitted to frustrate [this] 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.*

86. The limited intrusion on first amendment interests does not restrain publication but places only a limited duration restraint on speech outside the courtroom. J. BARRON & C. DEINES, *HANDBOOK OF FREE SPEECH AND FREE PRESS* 557 (1979).

87. 594 F.2d 356 (4th Cir. 1979).

88. The court stated:

[W]e are not certain that any clear and present danger or serious and immediate harm test would be met, and we see no reason for injecting into the rules the uncertainties which the imposition of one or both of those standards would occasion. . . . To the extent that it was held in *Bauer*, however, that the reasonable likelihood test is constitutionally impermissible in a rule such as Virginia's *we simply disagree*.

Id. at 368-70 (emphasis added).

89. *Hirschkop v. Virginia State Bar Ass'n*, 421 F. Supp. 1137, 1157 (E.D. Va. 1976), *aff'd sub nom. Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979). The court maintained that "the proper place for counsel to advocate his informed opinion is in the courtroom on behalf of his client and not before the public at large." 421 F. Supp. at 1146.

90. 594 F.2d at 370.

. . . environment' in which speech is uttered,"⁹¹ went on to apply the two-step test outlined by Justice Powell in *Procunier v. Martinez*,⁹² for determining the constitutionality of governmental restrictions on speech. "First, the regulation . . . in question must further an important or substantial governmental interest unrelated to the suppression of expression. . . . Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved."⁹³ Quoting the Supreme Court's description in *Estes v. Texas*⁹⁴ of the sixth amendment right to a fair trial as "the most fundamental of all freedoms," the Fourth Circuit held that the first section of the test had been met.⁹⁵ Moving to the second section of the *Martinez* test, the court began a careful examination of the effects of rule 7-107⁹⁶ as applied to criminal, civil and administrative proceedings.

The court concluded, that while there existed room in the context of a jury trial for "technical violations" of the rule which ought not result in the imposition of sanctions or charges, such situations would be considered extraordinary, and thus the rule was constitutional.⁹⁷ Turning to the specific question of the first amendment rights of lawyers, the court stated:

Lawyers have First Amendment rights of free speech. They are not second class citizens. They are first class citizens with many privileges not enjoyed by other citizens. With privilege, however, goes responsibility, and codes of professional responsibility have traditionally recognized that a lawyer is subject to special disciplinary sanctions when he neglects his responsibility to his clients and to the public. He is equally subject to disciplinary sanctions when he violates his responsibilities to courts, to other litigants and to the public when he invokes extraneous influences to deprive judicial processes of fairness.⁹⁸

With regard to bench trials, disciplinary proceedings, civil actions

91. *Id.* at 363 (citations omitted).

92. 416 U.S. 396 (1974).

93. *Id.* at 413.

94. 381 U.S. 532 (1965).

95. 594 F.2d at 363-64 (quoting 381 U.S. at 540).

96. VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY, DISCIPLINARY RULES, DR 7-107 (1970).

97. 594 F.2d at 364-70.

98. *Id.* at 366.

and actions before administrative agencies, the court held rule 7-107 to be unconstitutionally vague and overly broad. Thus, except in the context of the jury trial (or the investigation and prior to the jury trial), rule 7-107 fails to pass the second part of the *Martinez* text.⁹⁹

It should be noted that the Fourth Circuit did hold that the section of the Virginia rules which "prohibit[ed] a lawyer . . . from making any statements about 'other matters that are reasonably likely to interfere with a fair trial'"¹⁰⁰ was so imprecise that "neither the speaker nor the disciplinarian . . . [was] instructed where to draw the line between what is permissible and what is forbidden."¹⁰¹ However, this holding did not sway the court from its belief that the proper standard for determining the constitutionality of gag orders on trial participants should be the reasonable likelihood standard. The court observed that "[w]ith the reasonable likelihood of interference qualification, the rules seem to be as definite as any set of rules may be. . . . But the injection of any other standard would make the prohibition, which is now clear and definite, to some extent unclear and gray."¹⁰²

The reasonable likelihood standard has also been employed in rejecting claims of the media that gag orders on trial participants infringe upon the constitutional protection accorded newsgathering.¹⁰³ In *Central South Carolina Chapter, Society of Professional Journalists, Sigma Delta Chi v. Martin*,¹⁰⁴ the United States District Court for South Carolina held, in an original complaint filed by the members of the media, that the previous gag order¹⁰⁵ was not the functional equivalent of a prior restraint. The court noted "the standard set out in *Sheppard* that extrajudicial statements of trial participants . . . may be proscribed if there is a reasonable

99. *Id.* at 371-74. See text accompanying note 93 *supra*.

100. 594 F.2d at 371 (quoting VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY, DISCIPLINARY RULES, DR 7-107(D)).

101. 594 F.2d at 371.

102. *Id.* at 368 (emphasis added).

103. For comments on the constitutional protection afforded newsgathering, see *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) ("[w]ithout some protection for seeking out the news, freedom of the press could be eviscerated."). See also *Richmond Newspapers, Inc. v. Virginia*, 100 S. Ct. 2814 (1980); *Zemel v. Rusk*, 381 U.S. 1 (1965).

104. 431 F. Supp. 1182 (D.S.C.), *aff'd*, 556 F.2d 706 (4th Cir. 1977) (hereinafter referred to as *Sigma Delta Chi II*).

105. *Central S.C. Chapter, Soc'y of Professional Journalists, Sigma Delta Chi v. United States District Court*, 551 F.2d 559 (4th Cir. 1977) (*Sigma Delta Chi I*). See notes 74-80 *supra* and accompanying text.

likelihood that prejudicial news prior to trial will jeopardize the defendant's right to a fair trial."¹⁰⁶ On appeal the Fourth Circuit acknowledged the media's right to file suit, recognizing that such an order could make it difficult for the press to "perform their reportorial functions."¹⁰⁷ But the circuit court allowed most of the order to stand, striking down only that portion which banned mingling on the sidewalks adjacent to the courthouse as being overly broad.¹⁰⁸ In an apparent contradiction to its previous ruling (*Sigma Delta Chi I*),¹⁰⁹ the court noted that a "mandamus is the proper remedy to request the relief prayed for here."¹¹⁰

It has been argued that the true value of the reasonable likelihood standard lies in its flexibility. The California Court of Appeals, for example, has noted:

[The reasonable likelihood standard] recognizes that the court is dealing with contingencies, rather than realities. It does not demand impossible feats of clairvoyant fact finding: for example, a finding that future publicity presents a clear and present danger to the administration of justice, when the court does not even know where the case will be tried! A "reasonable likelihood" test, on the other hand, permits the court to consider openly and frankly the many future variants which collectively may amount to a reasonable likelihood but, by their very contingent nature, can never amount to a clear and present danger—unless, of course the meaning of that term is to be so diluted as to make it indistinguishable from its rival criterion.¹¹¹

Yet, other courts have viewed this same flexibility as the major flaw within this standard.¹¹²

106. 431 F. Supp. at 1188 (footnote omitted). See notes 28-30 *supra* and accompanying text.

107. 556 F.2d at 708.

108. *Id.* The media appealed the decision to the United States Supreme Court seeking a stay of the order pending the filing of a writ of certiorari. The request for the stay was denied May 20, 1977. In August, 1977, the media petitioned for a writ of certiorari. The Court declined to review the case in January, 1978. *Id.* at 707, *cert. denied*, 434 U.S. 1022 (1978).

109. 551 F.2d 559, 562 (4th Cir. 1977) (*Sigma Delta Chi I*). See text accompanying note 77 *supra*.

110. 556 F.2d at 707.

111. *Younger v. Smith*, 30 Cal. App. 3d 138, 164, 106 Cal. Rptr. 225, 242 (1973).

112. See note 63 *supra* and accompanying text.

C. *Procedural Options: A Door Left Ajar*

1. Court Recognition of Media Interest

In several cases, the courts have acknowledged that the media have a right to appear and litigate gag orders aimed at trial participants on the grounds that such orders unduly restrict the first amendment right of the media to gather information by restricting the rights of trial participants to grant interviews to the press.¹¹³ Other courts, however, have held that the media have no standing to challenge such orders unless the individual directly affected by the order also contests the validity of the order.¹¹⁴ Thus, as is the case with the standards discussed above, the question of the right of the media to challenge gag orders directed at trial participants is subject, in large measure, to the disparate interpretation of the court controlling the proceeding.

2. Notice to the Media

In March 1978, the Florida District Court of Appeals held in *Florida v. Bannister*¹¹⁵ that gag orders restricting media coverage of a criminal proceeding were illegal unless accompanied by a notice to the media and an opportunity for the media representatives to have a court hearing.¹¹⁶ The case involved the kidnapping and rape of a 15-year-old Girl Scout. The trial judge issued two orders which, in effect, proscribed all extrajudicial comments by trial participants.¹¹⁷

The order was issued without notice to the media and was issued without a hearing on its validity. The *St. Petersburg Times*, *Tampa Tribune*, *Bradenton Herald* and station WFLA-TV challenged the order in the Florida District Court of Appeals on the grounds that the first amendment prohibits courts from conducting any portion of a trial in secret. Further, the media argued that the issuance of such orders without notice or hearing was a violation of due process as it precluded the possibility of the media to be heard.¹¹⁸ In finding for the media, the court of appeals noted that in future trials the judge "must conduct a hearing prior to

113. See, e.g., 556 F.2d 706 (4th Cir. 1977) (Sigma Delta Chi II); *CBS, Inc. v. Young*, 522 F.2d 234 (6th Cir. 1975).

114. See, e.g., 551 F.2d 559 (4th Cir. 1977) (Sigma Delta Chi I).

115. 3 MEDIA L. RPTER. (BNA) 1997 (Fla. Dist. Ct. App. 1978).

116. *Id.* at 1998.

117. *Id.*

118. *Notice Ordered For Gags*, 2 NEWS MEDIA & THE LAW 13 (July 1978).

commencement of the criminal trial at which *all interested parties* may present arguments concerning the needs and propriety of the restraints."¹¹⁹

Federal and state courts in Pennsylvania, New York, and Minnesota, as well as the ABA standards of fair trial and free press, have also advocated giving the media notice of a proposed gag order and an opportunity to be heard in some fashion prior to the enforcement of the order, or immediately afterwards.¹²⁰ Other courts, however, such as the United States Courts of Appeals for the Fourth and Sixth Circuits, have ignored the press's request for notice and a hearing without specifically ruling that notice was or was not required.¹²¹ At least two decisions on notice and hearing for media gag orders—one requiring notice and the other not requiring notice—have been appealed to the United States Supreme Court and in both cases the Court has denied certiorari.¹²²

III. CONCLUSION

In the six years since *Nebraska Press*, the Supreme Court has had more than a dozen opportunities to deal with the question of the constitutionality of gag orders aimed at trial participants. In each case, however, the Court has allowed the decisions of the lower courts to stand without comment on the constitutional validity of such orders.¹²³ In some of these cases the decision may be viewed as supporting the media, while other decisions may be seen as supporting the judiciary.¹²⁴ In either instance, the net result has been confusion and inconsistency within the judicial system. It has been argued that the Court has intentionally ignored this issue in hopes that its inaction will bring about a consensus in the lower courts.¹²⁵ This has not been the case. Indeed, "[t]he evidence so far indicates that the conflict among the lower courts on the gag order

119. 3 MEDIA L. RPTR. (BNA) at 1998 (emphasis added).

120. *Inaction Continues Gag Chaos*, 2 NEWS MEDIA & THE LAW 4 (Apr.-May 1978).

121. *Id.*

122. 556 F.2d 706 (4th Cir.) (Sigma Delta Chi II) (notice not required), *cert. denied*, 434 U.S. 1022 (1977); *United States v. Schiavo*, 504 F.2d 1 (3d Cir. 1974) (notice required), *cert. denied sub nom. Ditter v. Philadelphia Newspapers Inc.*, 419 U.S. 1096 (1975).

123. *See, e.g.*, *Gulf Oil Co. v. Bernard*, 49 U.S.L.W. 4604 (U.S. June 1, 1981) (No. 80-441); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), *cert. denied sub nom. Cunningham v. Chicago Council of Lawyers*, 427 U.S. 912 (1976); *United States v. Schiavo*, 504 F.2d 1 (3rd Cir. 1974), *cert. denied sub nom. Ditter v. Philadelphia Newspapers Inc.*, 419 U.S. 1022 (1975).

124. *See* note 122 *supra* and accompanying text.

125. *Inaction Continues Gag Chaos*, 2 NEWS MEDIA & THE LAW 4 (Apr.-May 1978).

question, if anything, is increasing, leaving the press and the bench in a state of complete confusion."¹²⁶

The realities of the situation are clear. There is a valid state interest in the preservation of a fair trial which must be maintained. The question becomes how can this goal be accomplished with a minimum encroachment on first amendment rights. Of the four standards detailed above, only the clear and present danger standard or its corollary, the serious and imminent threat standard, can be seen as posing the least possible interference with first and sixth amendment rights of both the trial participant and the media.

This conclusion is based on several points. First, the use of the authoritarian standard calling for absolute prohibition precludes any possibility of extrajudicial comments, no matter how trivial or innocuous. This appears to be overbreadth taken to its extreme. Second, the use of the free speech standard calling for an open proceeding, in its attempt to prevent interference with first amendment liberties, runs a substantial risk of seriously encroaching upon the sixth amendment guarantees of the accused. It is obvious that neither of these "all-or-nothing" approaches can adequately balance first and sixth amendment interests.

Third, by eliminating the two extremes one is left with a choice between the clear and present danger standard and the reasonable likelihood standard for determining the constitutionality of judicial gag orders. This appears to be the point at which the majority of the nation's judiciary has arrived. The Fifth, Sixth, Seventh and Ninth Circuits have held that the clear and present danger standard, or its corollary, is best suited to this problem, while the First, Second, Fourth and Tenth Circuits have chosen the reasonable likelihood standard. The other circuits have either not dealt directly with the problem or have indiscriminately applied both standards.

Looking at the standards, the argument raised by the Seventh Circuit in *Bauer* becomes clear. The reasonable likelihood standard suffers, by its very nature, from vagueness. That which is considered reasonable by one judge may be considered tyranny by another. In *Hirschkop v. Virginia State Bar Association*, the district court responded to this criticism noting, "[t]he use and meaning of

the word 'reasonable' is as familiar to a lawyer as is the meaning of the word 'faith' to a priest. Both are difficult to define but a lawyer knows what reasonable means just as a priest knows what faith means."¹²⁷ Unfortunately, lawyers are not the only trial participants who have been subjected to gag orders, and it would not be "reasonable" to assume that all trial participants (i.e. witnesses, defendants, law enforcement personnel, etc.) are as well versed in the law as the court's hypothetical lawyer.

The use of the clear and present danger standard as outlined by the ABA's fair trial and free press guidelines¹²⁸ appears to be the most workable solution to this question. This standard not only protects the governmental interests in a fair and impartial trial, but it recognizes the rights of freedom of expression (and indirectly, freedom of the press) as well. The addition of a fifth part to the ABA's recommended test would strengthen it even more, however. By adopting the least drastic means test as put forth in *Shelton v. Tucker*¹²⁹ into the ABA's guidelines, the standard would be complete. This addition would bring the standards by which gag orders on trial participants are judged in line with those governing the use of such orders directed at the media, and equal protection would thus be afforded to both classifications. For regardless of how diligent the Court is in preserving the right of the media to publish information in its possession, this right becomes meaningless if the media are denied access to the sources of that information.

At the present, however, confusion appears to reign on the subject of gagging trial participants, with a variety of standards being applied to similar situations across the nation. Thus, there appears to be little likelihood that this situation will improve significantly until such time as the Supreme Court decides to take affirmative action in this area.

127. 421 F. Supp. at 1148.

128. See notes 68-69 *supra* and accompanying text.

129. See note 35 *supra* and accompanying text.

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