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RECENT LIMITATIONS ON FREE SPEECH AND FREE PRESS

1. THE LOS ANGELES TIMES CASE: RIGHT OF PRESS TO COMMENT ON "PENDING CASES"*

A RECENT case in California involving the right of the public press to comment upon causes pending before the courts has re-opened the long-standing debate as to the proper limits of the stringent judicial power to punish summarily for contempt of court.[1] As long as the press, the chief

* In the Matter of The Times-Mirror Company *et al.*, 6 U. S. L. W. 16 (Sup. Ct. Los Angeles County, Aug. 18, 1938. Wilson, J.).

1. In the Matter of The Times-Mirror Co. *et al.*, 6 U. S. L. W. 16 (Sup. Ct., Los Angeles County, 1938). The Supreme Court of California granted The *Times'* petition for review, Oct. 4, 1938, *sub nom.* The Times-Mirror Co. *et al.* v. Superior Ct. of Cal., County of Los Angeles.

For a monumental discussion of contempt by publication, see Nelles and King, *Contempt by Publication in the United States* (1928) 28 COL. L. REV. 401, 525.

Summary punishment for constructive contempt of court refers to punishment at the sole discretion of the Court, as opposed to punishment after conviction by a jury. Generally, proceedings to punish for contempts committed out of the court's presence must be by way of notice and petition supported by affidavit, followed by a hearing at

link of the general public with trials involving controversial issues and public personages, confines itself solely to accurate descriptions, conflicts with the judiciary are comparatively rare.[2] But in addition to mere reporting, it is a salutary and time-honored function of the press to serve as a spur for the guidance of the judiciary as well as the public by commenting editorially upon court activities.[3] Abuse of this function is not uncommon; and when newspapers surcharge trials with outside tension and bias, or advocate a specific outcome, the courts have resisted such threats to impartiality within the courtroom[4] by a sweeping use of the drastic device of summary punishment for contempt. The result has been a clash of two fundamental doctrines: freedom of the press versus independence of the judiciary.[5]

The Los Angeles *Times,* a daily newspaper with a circulation of about two hundred thousand, was charged with contempt of court by a Committee of the Los Angeles Bar Association for publishing a series of seven editorials commenting upon cases technically still pending before a local court. The first editorial, published the day after a jury had convicted a group of sit-down strikers, heartily approved the verdict and vigorously condemned the as yet unsentenced defendants, their methods, their group, and their leaders.[6] The second excoriated the "weird California law" which enabled a certain defendant who had just been convicted of manslaughter to take advantage of the "contradictory but perfectly legal plea" of not guilty and not guilty by reason of insanity.[7] In the third editorial, published after a verdict con-

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which the defendant may present his defense. The Court, however, may act of its own motion, make the accusation itself, and have sole authority to determine and punish summarily at the conclusion of the hearing. See THOMAS, PROBLEMS OF CONTEMPT OF COURT (1934) 4, 7-11.

2. The publication of a true report of a case is not a contempt [*In re* Shortridge, 99 Cal. 526, 34 Pac. 227 (1893); *Ex parte* Foster, 44 Tex. Cr. 423, 71 S. W. 593 (1903)] even though the court forbids any publication whatever. McClatchy v. Superior Court, 119 Cal. 413, 51 Pac. 696 (1897); *Ex parte* Nelson, 251 Mo. 63, 157 S. W. 794 (1913).

3. SIEBERT, THE RIGHTS AND PRIVILEGES OF THE PRESS (1st ed. 1934) vii. See State v. American-News Co., 64 S. D. 385, 394, 266 N. W. 827, 832 (1936).

4. Obviously, impartiality within the courtroom is the end to which the safeguards of jury challenges, disqualification of judges, change of venue, the exclusion of irrelevant evidence and the contempt power are directed.

5. It is conceded that the constitutional guarantees of freedom of speech and press do not extend so far as to permit a publication actually to impede, embarrass or obstruct the proper conduct of court proceedings, or any of their branches. See 2 COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 885. See Frankfurter and Landis, *Power of Congress to Regulate Contempts* (1924) 37 HARV. L. REV. 1010.

6. *"Sit-Strikers Convicted* [22 sit-down strikers in Douglas Aircraft C. I. O. strike convicted]. For the first time since the present cycle of labor disturbances began, union lawlessness has been treated as exactly what it is, an offense against the public peace punishable like any other crime . . . Government may have broken down in other localities . . . But Los Angeles county stands firm; it has officers who can do their duty and juries which can function. So long as that is the case, daveheckism cannot . . . get control here, nor johnlewisism either." Los Angeles Times, December 21, 1937.

7. *"The Wright Verdict"* Los Angeles Times, Feb. 13, 1938.

victing a dethroned female political boss of bribe-seeking, but before the date set for passing upon a motion for a new trial, the *Times* attacked the boss-system generally, high-lighted the defendant's colorful career, and without mentioning specific instances, pointed out the broad extent of her despotism in its political heyday—issues which had not been implicated in the evidence and testimony at the trial.[8] The fourth indicated deep sympathy for Jackie Coogan, former child actor, in his unconcluded accounting action against his mother and stepfather, and deplored the "fantastic" consequences of the California statute giving a minor's entire earnings to his parents.[9] The fifth editorial was published following a jury verdict convicting two unionists of assault in the course of labor disturbances, but before the date set by the Court for passing upon defendants' application for probation. The *Times* violently opposed such clemency, and, referring to the trial judge by name, exhorted him to make "examples" of the defendants.[10]

At this point the Bar Association Committee filed its affidavit in the Superior Court, charging contempt. The *Times* replied with two editorials against the Committee, the first setting forth the exact sequence of events prior to each of the previous publications,[11] the second outlining at length

8. *"The Fall of an Ex-Queen.* Success in boss-ship, which is a denial of public rights, necessarily implies a kind of moral obliquity if not an actually illegal one. . . . For years [Mrs. Warner] enjoyed the unique distinction of being the country's only women boss—and did she enjoy it! In her heyday she had a finger in every political pie . . . became a power in the backstage councils of city and county affairs and . . . reached out to pull the strings on State and legislative offices as well. Those were the days when Mrs. Warner was 'Queen Helen' . . . When the inevitable turning of the political wheel brought new figures to the front . . . she found her grip slipping . . . The several cases which in recent years have brought her before the courts . . . seem all examples of an energetic effort to regain and reassert her one-time influence . . . That it should ultimately have landed her behind the bars as a convicted bribe seeker is not illogical . . ." Los Angeles Times, April 14, 1938.

9. *"Jackie's Millions."* Los Angeles Times, April 16, 1938.

10. *"Probation for Gorillas.* Two members of Dave Beck's wrecking crew, entertainment committee, goon squad or gorillas, having been convicted in Superior Court of assaulting non-union truck-drivers, have asked for probation. Sluggers for pay, like murderers for profit, are in a slightly different category from ordinary criminals . . . He who hires out his muscles for the creation of disorder and in aid of a racket is a deliberate foe of organized society . . . It will teach no lesson to other thugs to put these men on good behavior for a limited time . . . If Beck's thugs, however, are made to realize that they face San Quentin when they are caught, it will tend to make their disreputable profession unpopular. Judge A. A. Scott will make a serious mistake if he grants probation to Matthew Shannon and Kennan Holmes. This community needs the example of their assignment to the jutemill." Los Angeles Times, May 5, 1938.

11. *"A Black Committee Here?* In what appears to be an effort to set up a sort of local Black Committee of press censorship, a committee of the Los Angeles Bar Association has complained to the courts that *The Times* is 'in contempt' thereof because from time to time it comments editorially on matters of public interest or importance which are or have been the subjects of . . . litigation . . . In order that the public may be informed as to this extraordinary attack upon the right of free speech and a free press, these instances may be briefly described here."

the newspaper's views as to the facts and the law upon this alleged attempt at indirect censorship.[12] Both editorials were promptly added to the Bar Association's charges as a second proceeding in the same cause of action. Upon the show cause hearing in the Superior Court, demurrers to all of the counts were overruled except those based upon the second and fourth editorials. After entering a defense upon the other five, the *Times* was adjudged guilty of contempt.[13]

The view that summary punishment for constructive contempt was a common law power sacred and inherent in the judicial institution has been completely discredited;[14] yet the obvious convenience of such a power has im-

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The editorial then outlines the circumstances which provoked the five previous editorials "selected from the files of *The Times*," and remarks that in the case of the "Sit-Strikers Convicted" editorial, District Attorney Fitts of Los Angeles county had, at the same time, expressed similar views in a radio address and a public statement, and that Judge Ambrose, who presided over the trial of the sit-downers, had found neither Fitts' remarks nor *The Times* editorial contemptuous. Los Angeles Times, June 5, 1938. The contempt affidavit was filed June 3, 1938.

12. *"Curious Reasoning.* The extraordinary 'contempt of court' action brought in the name of the Los Angeles Bar Association against *The Times* is an attempt to reduce to such narrow limits the right and duty of newspapers to analyze public questions as practically to destroy their usefulness in that respect. The theory which the Bar Association's five-man Contempt Committee appears hastily to have embraced is that no case which is before the courts may be so analyzed or commented upon until the courts have said their last word upon it . . . The idea seems to be that such comment is calculated to sway the judge one way or the other . . . This notion is itself scarcely complimentary to the courts . . . Nearly every great public question is at some time or other the subject of litigation. Are we to be prohibited from discussing and analyzing such questions until after the Supreme Court has ruled thereon? Millions of words for and against the National Recovery and Agricultural Adjustment acts—the most important statutes in a generation—were published between the time of the first court attacks on them in 1933 and the time the Supreme Court finally invalidated them some two years later . . . Free discussion of public questions is one of our greatest safeguards; efforts to suppress it one of our gravest perils . . . The editorial columns of newspapers are natural leaders of public discussion. Though the views they express may at times be biased or erroneous, they are still the stimuli of thought and argument through which just public judgments are finally arrived at. Their privileges can be and sometimes are abused, but the principle for which they stand is not one lightly to be tampered with." Los Angeles Times, June 7, 1938.

13. In the Matter of The Times-Mirror Co. *et al.*, 6 U. S. L. W. 16 (Sup. Ct. Los Angeles County, 1938). The total amount in fines was $1050. The courts uniformly hold that each publication—each issue, comment or article—which attempts to interfere with the administration of justice, constitutes a separate contempt. Lindsley v. Superior Court, 76 Cal. App. 419, 245 Pac. 212 (1926); *In re* Shuler, 210 Cal. 377, 292 Pac. 481 (1930). Whether the statements made in the publication are true or false is immaterial to the question of influencing the Court. Patterson v. Colorado, 205 U. S. 454 (1907). The motive of the publisher is immaterial except in mitigation. *In re* San Francisco Chronicle, 1 Cal. (2d) 630, 36 P. (2d) 369 (1934).

14. Sir John Fox, in THE HISTORY OF CONTEMPT OF COURT (1927), conclusively proved that the modern doctrine involving the court's "inherent" power to punish summarily for contempts by publications out of court did not derive from the common law,

pelled the judiciary to cling to it. In England today, for example, the authority of courts over the press is still extensive:[15] newspapers may not editorialize in any fashion upon pending cases, and in certain types of suits even reporting the evidence presented at the trial is restricted by statute and rigorous English "custom."[16] Early in the history of the United States, the arbitrary manner in which many courts applied the summary power to out-of-court publications produced a wave of restrictive legislation, culminating in the Federal Statute enacted upon the heels of the Judge Peck impeachment trial in 1831.[17] But public awareness of the danger later gave way to apathy. During the last half-century the supposedly straight-jacketed judiciary has loosened its legislative bonds,[18] with the result that today judicial discretion sets its own

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but from a much publicized and avidly adopted error of Blackstone [4 B. COMM. 486]. Blackstone based his statements upon the published draft of an undelivered judgment by his friend Wilmot, J., in The King v. Almon. WILMOT, NOTES & OPINIONS OF JUDGMENTS 243, 255, 270. See Nelles & King, *supra* note 1 at 408. The first American opinion talking in terms of the "inherent" power was State v. Morrill, 16 Ark. 384 (1855).

15. See Goodhart, *Newspapers and Contempt of Court in English Law* (1935) 48 HARV. L. REV. 885. In England, comment concerning the prior appointment of a receiver is contempt. *In re* The Wm. Thomas Shipping Co., Ltd. (1930) 2 Ch. 368. The almost universal rule in the United States is *contra*. Nixon v. State, 207 Ind. 426, 193 N. E. 591, 97 A. L. R. 903 (1935). Concluding that the stringent and oft-used English rule, however harsh-seeming to American lawyers, meets with general approval, Goodhart remarks: "Fortunately there are no labour injunctions in England to embitter the feeling on this subject." *Id.* at 910.

16. See Goodhart, *supra* note 15 at 891. The Law of Libel Amendment Act, 1888, first gave the press the right to print "a fair and accurate report . . . of proceedings publicly heard . . . if published contemporaneously with such proceedings . . ." (51 & 52 Vict. c. 64 § 3).

In admitting the prevalence of English "custom," Prof. Goodhart says: "The English practice is for the judge to request the press not to report the evidence, particularly in blackmail cases, and this request is uniformly honored. This, however, is a matter of courtesy and not of right." *Id.* at 905. But *cf.* Rex v. Clement, 4 B. & Ald. 218 (K. B. 1821); Rex v. Ed. of Daily Mail [1921] 2 K. B. 733. Note, *e.g.*, the treatment given to the divorce proceeding of Mrs. Wallis Simpson, in March, 1937, when a "voluntary censorship" kept the British public ignorant of facts which headlined American newspapers. See also JUDICIAL PROCEEDINGS ACT 1926 16 & 17 Geo. V. c. 61, prohibiting publication of testimony and evidence in certain classes of cases, limited chiefly to indecent matter and sensational evidence in divorce trials.

17. Ultimately, thirty-six states, at one time or another, enacted statutes dealing with contempts by out of court publications. In each the summary power was restricted to contempts within the actual presence of the court. Pennsylvania (1809) and New York (1829) were the first two; the succeeding legislation was based largely upon their provisions. See Nelles & King, *supra* note 1, at 554.

18. The maneuver has been accomplished, Houdini-like, by one of two types of judicial pronouncement: (1) The restrictive statute is not prohibitive, but declaratory, and though summary punishment for a publication out of court is not expressly provided, the court's inherent power supplies ample authorization therefor; or (2) The statute is unconstitutional, insofar as it attempts to restrict the court's inherent power. The latter rationale has been given in California. See CAL. CODE CIV. PROC. (Deering, 1937) § 1209 Subd. 13: ". . . But no speech or publication reflecting upon or concerning any

limits in this field. In four states alone[19] have these statutes withstood the attacks of judicial undermining; only ten others have had no reported cases.[20] Courts in the remaining states have all surmounted the statutory obstacles.[21] The Federal Statute of 1831[22] is fairly typical both in phrasing and in subsequent repudiation. Although designed to restrict the summary power to acts committed "within the presence of the courts or so near thereto as to obstruct the administration of justice," its purpose was completely subverted in 1918, when the Supreme Court affirmed the summary punishment of the *Toledo News-Bee* for editorial comment concerning a cause pending in the federal courts.[23] The Court interpreted the limitation "or so near thereto as to obstruct" as referring to ultimate effect, not to physical proximity; hence the phrase did not negative but rather sanctioned the power to punish summarily out-of-court publications whenever they were found to "obstruct" the orderly administration of the court.[24] Mr. Justice Holmes, in a famous dissent, pointed out that the summary power is the most arbitrary device in our judicial bag of tricks, and expressed his abhorrent distrust of the principle whereby the same person is "accuser and sole judge in a matter which, if he be sensitive, may involve strong personal feeling."[25] He argued that both as a matter of policy and of statutory interpretation, summary action by judges against publications should be restricted to emergency situations where obstruction of justice is actually imminent and threatened; and that judicial action in cases of harmless publications only reflects upon the calibre and independence of the judge thus seeking refuge behind the skirts of the contempt power.[26]

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court or any officer thereof shall be treated or punished as a contempt of such court unless made in the immediate presence of such court while in session and in such a manner as to actually interfere with its proceedings." [Enacted in 1872, amended slightly to present form 1891, 1907]. The section was expressly declared unconstitutional in *In re* Shortridge, 99 Cal. 526, 34 Pac. 227 (1893) and *In re* Shuler, 210 Cal. 377, 292 Pac. 481 (1930).

19. New York, Pennsylvania, South Carolina and Kentucky. As to the present day treatment of explicit, constitutional provisions barring such summary contempts in Oklahoma, see State v. Owens, 125 Okla. 66, 256 Pac. 704 (1927).

20. Delaware, Iowa, Kansas, Maine, Minnesota, Mississippi, Nevada, Oregon, Wisconsin and Wyoming.

21. See Nelles & King, *supra* note 1, at 537.

22. 28 U. S. C. A. § 385 (1928).

23. Toledo Newspaper Co. v. United States, 247 U. S. 402 (1918).

24. The majority also held that to be in contempt the publications need not actually have been seen or read either by the judge or jury: ". . . not the influence upon the mind of the particular judge is the criterion, but the reasonable tendency of the acts done to influence or bring about the baleful result is the test." *Id.* at 421.

25. ". . . I should expect the power to be limited by the necessities of the case 'to insure order and decorum in their presence' as is stated in *Ex parte* Robinson, 19 Wall. 505." *Id.* at 423. Mr. Justice Brandeis concurred in the dissent.

26. "But a judge of the United States is expected to be a man of ordinary firmness of character . . ." *Id.* at 424.

Contempt by publication[27] has traditionally been divided into three classes, notwithstanding considerable overlapping. False, grossly inaccurate, or garbled reports of court proceedings compose the clearest type of contempt; hence these cases are least frequently appealed. Such statements are punishable whether the suit be already adjudicated, still pending, or yet to be tried, for the essence of the contempt is that the falsity of the report[28] misinforms the public as to the course of judicial decision on a controversial topic, and thus induces reliance on an erroneous interpretation of the law. A few jurisdictions recognize a second class of contempt by publication, and punish summarily for "scandalizing the court," *i.e.*, ridiculing particular courts, judges, counsel, parties, jurors or judicial officers or publishing matter calculated to bring the court into disrepute.[29] Again, the rule applies to all publications before, during, and after the trial, since the theory of the contempt is that apart from the particular suit, the resulting loss of prestige diminishes the general usefulness of the courts, and obstructs the proper conduct of their proceedings.

Most conflict, however, centers about the publication of matter which, regardless of whether it is false or scandalous, has "reasonable tendencies" to prejudice or obstruct the orderly administration of justice. Unlike the first two classes, this category is usually limited to the period of time during which a case is pending. The split in the Supreme Court in the *Toledo News-Bee* case epitomizes the two divergent approaches employed by the state courts in determining whether specific comment constitutes obstruction. The majority rule requires no more than a reasonable tendency to obstruct: in practically all the cases in these jurisdictions, the contemptuous matter ascribed to the court or its officers (including attorneys) bias,[30] political subservience,[31] falsehood,[32] corruption,[33] flagrant incompetence[34] or illegal

27. For a full list of American cases in which summary punishment has been administered, see Nelles & King, *supra* note 1, at 554, supplemented by cases *infra* note 50.

28. Publication of a decision purporting to be that of an appellate court before it is actually rendered has been held to be a contempt. *In re* San Francisco Chronicle, 1 Cal. (2d) 630, 36 P. (2d) 369 (1934); *In re* Philadelphia Inquirer, (Pa. Sup. Ct. 1938), N. Y. Sun, Oct. 6, 1938. For cases prior to 1928, see Nelles & King, *supra* note 1, at 554.

29. This is distinctly a minority rule, obtaining only in the following states: Arkansas, Georgia, Michigan, Missouri, North Carolina, Rhode Island, Vermont and Virginia. See cases cited in Nelles & King, *supra* note 1, at 554. Elsewhere, comment tending to bring the court into disrepute may expose the publication to a civil action for libel by the persons thus aggrieved, but is not ground for summary punishment. *In re* Egan, 24 S. D. 301, 123 N. W. 478 (1909).

30. Kilgallen v. State, 192 Ind. 531, 132 N. E. 682 (1922); *In re* Sturoc, 48 N. H. 428 (1869).

31. McDougall v. Sheridan, 23 Idaho 191, 128 Pac. 954 (1913); State v. Bee Pub. Co., 60 Neb. 282, 83 N. W. 204 (1900).

32. *Ex parte* Barry, 85 Cal. 603, 25 Pac. 256 (1890).

33. Beorde v. Comm., 134 Va. 625, 114 S. E. 731 (1922).

34. State v. Tugwell, 19 Wash. 238, 52 Pac. 1056 (1898).

methods.[35] Also within the rule are threats and intimidatory statements tending to influence the outcome of a case,[36] and, in one group of cases, published assertions of facts not admissible in evidence where the pending trial was before a jury.[37] The rule seems to include criticism of the prosecution in criminal actions[38] but not criticism of litigants in civil cases.[39] The minority and, it is suggested, the better view, applies to the third category the test of *actual* obstruction of the course of trial and, following Mr. Justice Holmes' arguments, refuses to permit a mere remote possibility of obstruction to be used to throttle the press.

Under either the majority or the minority rule, when a case is no longer pending extreme latitude is permitted to newspaper comments.[40] At that point, the press, as the sounding-board of public opinion, is thought to afford protection to the public by performing its traditional function of criticizing or praising in order to keep public officials from achieving, in the chilly eminence of isolation, a supreme and unquestioned rule. This view is accepted despite the realization that forthright newspaper comment after the final adjudication of a case may, by influencing the judge in future similar cases and by prejudicing future jurors, impair the impartiality of that court for future litigants.[41]

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35. People v. News-Times Pub. Co., 35 Colo. 253, 84 Pac. 912 (1905), *aff'd sub. nom.* Patterson v. Colorado, 205 U. S. 454 (1907).

36. State v. Shumaker, 200 Ind. 623, 157 N. E. 769 (1927).

37. State v. Howell, 80 Conn. 668, 69 Atl. 1057 (1908). A juror's perusal of a local newspaper account of the pending trial proceedings may be ground for a mistrial. United States v. Marrin, 159 Fed. 767 (E. D. Pa. 1909), *cert. denied*, 223 U. S. 719 (1911). See annotation in 86 A. L. R. 935 (1933).

38. U. S. v. Sullens, 36 F. (2d) 230 (S. D. Miss. 1929).

39. The rule does apply, however, where the newspaper is itself the defendant and is aiding its own case by attacking the plaintiff in its columns. See Goodhart, *supra* note 15, at 893.

40. "When a case is finished, courts are subject to the same criticism as other people, but the propriety and necessity of preventing interference with the course of justice by premature statement, argument, or intimidation hardly can be denied." Holmes, writing for the Court, in Patterson v. Colorado, 205 U. S. 454, 463 (1907).

No rule can be laid down expressing to a nicety when a cause is still pending and when it is finally adjudicated; but only nine cases in the reports hold that comment after a jury verdict but before sentence, motions, judgments, rehearing or appeal is contemptuous. Patterson v. Colorado, 205 U. S. 454 (1907); *In re* Mitchell, 196 Ala. 430, 71 So. 467 (1916); *In re* Nelson, 103 Mont. 43, 60 P. (2d) 365 (1936); *Ex parte* Barry, 85 Cal. 603, 25 Pac. 256 (1890); McDougall v. Sheridan, 23 Idaho 191, 128 Pac. 954 (1913) (rehearing pending); Territory v. Murray, 7 Mont. 251 (1887); State v. Faulds, 17 Mont. 140, 42 Pac. 285 (1895); State v. Tugwell, 19 Wash. 238, 52 Pac. 1056 (1898); State v. Owens, 125 Okla. 66, 256 Pac. 704 (1927); for a holding directly *contra* to the instant case, see State v. American News Co., 64 S. D. 385, 266 N. W. 827 (1936). A unique Indiana case punishes for contempt violent and unfair criticisms of past decision finally adjudicated, primarily on the ground that an unfair criticism is inherently a "false, grossly inaccurate or garbled report of a court proceeding." State v. Shumaker, 200 Ind. 623, 157 N. E. 769 (1927).

41. See State v. American News Co., 64 S. D. 385, 397, 266 N. W. 827, 833 (1936). *Cf.* Herald-Republican Pub. Co. v. Lewis, 42 Utah 188, 129 Pac. 624 (1913). (News-

The chief issue raised by the Los Angeles *Times* case, then, is to what extent newspaper comment should be tolerated before final adjudication. The answer to this problem will in turn depend on whether or not the course of trial is "obstructed" by publication at any prior stage in the proceedings. Rigid adherence to the "final adjudication" doctrine would obviously result in unpredictable delay as long as there was yet a possibility of appeal, a motion for a new trial or for a rehearing, or a determination of a probation application prior to sentence.[42] Yet if press comment is to perform its beneficial functions effectively, it must follow closely upon the acts which are being appraised. In a controversial case, courtroom activities are best suited and ripe for criticism soon after they occur, so that the live issue which they represent will get the benefit of spontaneous, immediate public reaction. The influential power of the press to startle the judiciary into publicity-coerced decisions has been absurdly magnified by the courts.[43] Most newspapers—the Los Angeles *Times* is an example rather than an exception—follow a consistent policy toward important issues and persons which is sufficiently well known to all literate members of the community to minimize the effect of that newspaper in a specific instance.[44] If a judge absorbs substantial press influence at all, it is rather from press policy established prior to the case being tried. Hence it seems expedient and entirely consonant with the principle of the independence of the judiciary to permit publication of any comment which does

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paper write-up of murder immediately upon its discovery made selection of unbiased jury difficult, but held not contempt. "Before a publication, innocently made in good faith . . ., may, as respects the . . . interfering with judicial action . . . be regarded as *per se* contemptuous, it must be of such a character as naturally and necessarily to produce such effect. That it merely tends or is calculated to do so is not enough.").

42. After twenty-two years of unceasing agitation, the Mooney Case in California is still not "finally adjudicated." Newspaper publicity is now, and has been for some years, Mooney's sole means of keeping his case before the public, and may well be the deciding factor in a gubernatorial pardon if final efforts in the courts fail. The Supreme Court has recently denied certiorari. 6 U. S. L. W. 119 (1938). The present governor refuses to consider the case until the courts are completely through with it. N. Y. Times, Oct. 16, 1938, sec. 4, p. 7.

43. A judge "is expected to be a man of ordinary firmness of character" and of sufficiently strong mental fortitude to resist suggestion in the form of newspaper comment. See *In re* MacKnight, 11 Mont. 126, 137, 27 Pac. 336, 339 (1891); *Ex parte* Biggers, 85 Fla. 322, 343, 95 So. 763, 769 (1923).

44. "For approximately fifty years, the Los Angeles *Times* has been the principal newspaper exponent in the United States of the open-shop system of industrial relations . . . In pursuance of this policy, *The Times* has long and consistently . . . resisted to the extent of its ability . . . attempts to establish . . . conditions inimical to that policy. By virtue of its deep convictions on the subject *and the many hundreds of editorial expressions thereof which it has published over the past half-century*, the *Times* has become thoroughly identified in the public mind with the open-shop policy . . . and [with] its opposition to everything hostile thereto . . . Throughout the period of sit-down strikes *The Times* commented upon them frequently and vigorously . . ." Appellant's Exhibit No. 9. Affidavit, upon order to show cause, of Harry Chandler, publisher of the Los Angeles *Times*. (Italics added).

not actually obstruct court proceedings. Nor should this criterion be questioned in jury cases merely because jurors are said to be more easily and imperceptibly influenced than judges, for there are far more efficient methods of safeguarding the jury verdict from newspaper bias. If the comment is published prior to the impanelling of the jury, counsel have adequate opportunity, through jury challenges, to keep partiality out of the jury-box. During the course of the trial, the jurors are instructed to refrain from reading the local press in relation to the unfinished case; disobedience of this order, if it is shown that a juror actually read any prejudicial matter, is ground for a mistrial.[45] And when, following a mistrial, or the granting of a new trial, a different jury is impanelled, the same protection of jury challenges obtains.

Yet a good number of cases punish contempt by publication during the pendency of a cause in which a jury is sitting. But whether or not the presence of a jury is considered controlling, no jury verdict could possibly have been influenced by the *Times* editorials because in the four cases tried before a jury,[46] the verdicts preceded publication. The only question, therefore, is the extent to which the judge might have been swayed during the proceedings. From a practical point of view, the very fact that a judge deems it necessary to punish a newspaper for contempt unmistakably indicates an awareness on his part that the objectionable material has actually been prejudicial. If the judge realizes that he has been influenced, he should disqualify himself; if he has not been influenced, a contempt order is superfluous. And when another judge of the same court sits in the contempt proceeding, as in the instant case for the first five editorials,[47] it appears presumptuous on his part to impose his own arbitrary standard of "influence" when the trial judge experienced no such fears.

Only a few states, however, have adopted Mr. Justice Holmes' test of actual obstruction.[48] New York, Pennsylvania, South Carolina and Kentucky have by statute gone to the further extreme of removing the contempt power altogether, so far as concerns out-of-court publications.[49] But the great majority have continued to apply the harsh rule which condemns any publication, regardless of whether it *actually* prejudiced a court proceeding, so long as it was reasonably calculated to do so. Even accepting this standard, an analysis of the contents of the *Times* editorials indicates that they do not

45. See note 37 *supra.*

46. The second editorial, expressing sympathy for Jackie Coogan, was published after the court, sitting without a jury, had appointed a receiver and had issued an injunction restraining the defendants from disbursing the assets in their hands. Coogan v. Bernstein *et al.* Superior Court, L. A. Cty. Civil Number 426945, Los Angeles *Times,* April 16, 1938.

47. The cases upon which the first five editorials commented were tried before various judges of the local courts; the contempt proceedings which formed the basis for the last two editorials were pending before Judge Wilson of the Superior Court, who was the judge punishing the latter two for contempt.

48. See note 41 *supra.*

49. See collection of statutes in Nelles & King, *supra* note 1, at 554.

belong in this category. It is significant that mere praise of a jury verdict in a pending suit has never yet been made the basis for contempt[50] in any reported case. Though the first editorial went further than praise by condemning the group to which the convicted defendants belonged, it was a general class condemnation, as prejudicial before or after the pendency of a case as during the actual trial of it; and readers of the Los Angeles *Times* were thoroughly familiar with the point of view expressed.[51] Since the third editorial, introducing "extraneous matter" into the case, was directed primarily at the petty political ambition which caused the defendant's rise and fall in the boss system, the judge, in merely passing upon a motion for a new trial, could hardly be prejudiced by the descriptive generalizations. In recommending a denial of probation for the two convicted union men, the fifth editorial ought not to be deemed objectionable in view of the well-established informality of probation proceedings in California, where hearsay and the opinions of outside persons qualified by observation to evaluate the defendants are used by the trial judge in determining his decision on the probation application.[52] There seems to be little reason for denying newspapers the same privilege to offer the results of their observations that any individuals have. The last two editorials are best described as polemic defenses of the principle

50. The dismissal of the charges based on the second and fourth editorials makes it unnecessary to consider them here, although the court's reason for differentiating them from the other five seems somewhat tenuous. Consult Nelles & King, *supra* note 1, appendix, and the following full list of contempt by publications cases since 1928: U. S. v. Sullens, 36 F. (2d) 230 (S. D. Miss. 1929) (Aspersion of political bias); Freeman v. State, 188 Ark. 1058, 69 S. W. (2d) 267 (1934) (Contempt purged by disclaiming intent to influence); Nixon v. State, 207 Ind. 426, 193 N. E. 591 (1935); *In re* Simmons, 248 Mich. 297, 226 N. W. 907 (1929) (Defendant's statement published by newspaper contradicting testimony in a pending case and impliedly charging that witness was a perjuror held contempt); State v. Lovell, 117 Neb. 710, 222 N. W. 625 (1929) (Disclosed purpose of influencing the court held contempt *per se*); *In re* Lee, 170 Md. 43, 183 Atl. 560 (1936) (Publications purporting to disclose judicial discussions held in chambers and secret conference held contempt); *In re* Times Pub. Co., 276 Mich. 349, 267 N. W. 858 (1936) (Publication of sealed and suppressed bill of complaint held not contempt); State v. American-News Co., 64 S. D. 385, 266 N. W. 827 (1936). (Most enlightened opinion among these recent cases, with facts nearly identical to the Los Angeles Times case, but opposite result). *In re* Megill, 114 N. J. Eq. 604, 169 Atl. 501 (1933) (Resolution, published with newspaper comments, excoriating excess cost of Chancery Court held contempt.)

51. See *supra* note 44.

52. Probation proceedings are not controlled by fixed legal rules. See People v. Jones, 87 Cal. App. 482, 497, 262 Pac. 361, 368 (1927); People v. Freithofer, 103 Cal. App. 165, 168, 284 Pac. 484, 485 (1930).

"The *Times* is aware of the custom of probation officers to send out numerous requests for expressions of such opinion from those believed to be qualified by observation or otherwise to give it. In one recent probation case, The *Times* was advised by a former presiding Los Angeles Superior Court judge that a criticism of probation, published subsequent to its granting, should have been made known while the matter was pending instead of afterwards." Affidavit, on show cause order, of Harry Chandler, publisher of Los Angeles *Times*.

of freedom of the press in the face of a threatened encroachment. Such dissertations upon a matter of public policy, especially when motivated by an attempt to resist indirect censorship, seem entirely justified in theory, and have some basis in authority.[53] Otherwise, all that would be necessary for the complete muzzling of an active partisan publication during the heat of a political campaign would be to prefer charges of contempt or libel against the paper for any previous statements which may have touched, however lightly, upon a politically implicated judge or case; and thereafter, irrespective of the outcome of that proceeding, the newspaper could make no comment upon the politics inspiring the scheme without incurring penalty from the summary power of the courts.[54]

The likelihood that a more self-restrained newspaper would have expressed its viewpoint less sensationally should not minimize the disturbing implications of the instant decision.[55] Together with other similar cases, it indicates that under the majority rule there are no limits to the scope of the summary power in constructive contempt beyond the fertile imagination of the judiciary. The extremes to which judicial whim can go are illustrated by holdings that a publication is contemptuous in printing an article written by a qualified member of the Bar, reviewing the facts and summarizing the propositions of law concerning a pending proceeding, with a legal conclusion as to the proper construction of the law.[56] Under such a rule, practically every law review in the country risks contempt whenever reference is made to a suit in which there may subsequently be an appeal, a rehearing, or any other further motions.

53. Another California case presents an extremely apt analogy. The *Sacramento-Bee*, during the course of a trial involving matters much in the public eye, published an article purporting to be an account of the testimony of one of the witnesses. The presiding judge of the trial, on the following day, attacked from the bench both the article and the newspaper, branding the article a falsehood and a fabrication. The *Sacramento-Bee* rejoined editorially, backed up its version of the facts, called the judge by name "a prejudiced and vindictive czar upon the bench," and accused him of deliberate hypocrisy. The Supreme Court of California held that the editorial did *not* constitute a contempt because it had been provoked by the judge's prior attack from the bench. McClatchy v. Superior Court, 119 Cal. 413, 51 Pac. 696 (1897).

The reasons given for holding these two editorials in contempt were: (1) Expression of opinion upon the merits of an untried proceeding; and (2) attacking officers of the court—the Bar Association Committee.

54. "The civil cases in which questions of contempt frequently arise are libel cases where the newspaper is itself the defendant. Here the courts are faced with an obvious dilemma. If they permit the newspaper to continue its attacks against the plaintiff, the fairness of the trial may be interfered with . . . On the other hand, if such attacks are prohibited by the court as soon as a writ for libel has been served, then the plaintiff is able to purchase, for the sum of a few shillings (being the cost of the writ), immunity from further attack, however justified that attack may be." Goodhart, *supra* note 15, at 893 [citing Rex v. Blumenfeld, 28 T. L. R. 308 (K. B. D. 1912)].

55. Compare Near v. Minnesota, 283 U. S. 697 (1931).

56. *In re* Sturoc, 48 N. H. 428 (1869) (though ancient, frequently cited today); see *In re* Megill, 114 N. J. Eq. 604, 606, 169 Atl. 501, 503 (1933).

One method of resolving this conflict may lie in persistent efforts to whittle away the present harsh doctrine by persuading the courts to remove specific situations from the scope of the rule.[57] Broadly, these exceptions would include two types of cases: publications not actually obstructive but merely defamatory,[58] whose possible tendency to influence the judiciary might better be punished by civil action for libel brought by the individual judge contemned; and, in line with Mr. Justice Holmes' dissent in the *Toledo News-Bee* case, those which are not obstructive in fact, but merely by implication and construction.[59]

But the more practical solution probably lies in regulatory legislation substituting trial by jury for the discretionary summary power of the court in contempt-by-publication cases.[60] True, past legislative attempts at a complete nullification of the courts' contempt power in this field have usually been either disregarded or directly invalidated by the courts as prohibitory statutes attempting to invade an inherent, "super-statutory" power of the Court.[61] Yet more reasonableness has been shown toward purely regulatory legislation limiting the extent and amount of punishment.[62] A similar indulgence might be extended to regulatory statutes governing the methods of determining whether a particular publication constituted contempt. Such legislation ought

57. Comment concerning court's previous appointment of a receiver has been held not contemptuous. Nixon v. State, 207 Ind. 426, 193 N. E. 591, 97 A. L. R. 903 (1935).

58. Compare Dale v. State, 198 Ind. 110, 150 N. E. 781 (1926) with Stuart v. People, 4 Ill. 395 (1842). [*Contra:* People v. Wilson, 64 Ill. 195 (1872)].

59. Extraordinary powers given to courts to punish for contempts should not be used except to prevent actual, direct obstruction of or interference with the administration of justice. State *ex rel.* McGregor v. Peacock, 113 Fla. 816, 152 So. 616 (1934). So held, even where the proceedings contemned were to invoke disqualification of the judge. See Nixon v. State, 207 Ind. 426, 193 N. E. 591 (1935); Sauer v. Andrews, 115 Cal. App. 272, 1 P. (2d) 997 (1931).

"We believe that any publication, to be punishable as contempt, should be embarrassing or obstructive . . . and obstructive in fact rather than in theory or by possibility." State v. American News Co., 64 S. D. 385, 266 N. W. 827 (1936). Newspaper articles consisting wholly of abstract statements concerning motives which should actuate grand juries and judges, and the evils flowing from impure and interested motives, *held* not contemptuous. *Ex parte* Pease, 123 Tex. Cr. Rep. 43, 57 S. W. (2d) 575 (1933).

60. For a statute providing trial by jury for contempts by publication, see PA. STAT. ANN. (Purdon, 1930) tit. 1808-9 §17-2044. See note 63, *infra*. See also, N. Y. JUDICIARY LAW §750-755, (Publications not classifiable as false reports of proceedings cannot be punished for contempt.) See also OKLA. CONST. § 13437, providing for jury trial in all constructive contempt cases upon demand of accused. OKLA. STAT. (Harlow) 1931 § 1958. *Cf.* State v. Owens, 125 Okla. 66, 256 Pac. 704 (1927).

61. Bradley v. State, 111 Ga. 168, 36 S. E. 630 (1900); McDougall v. Sheridan, 23 Idaho 191, 128 Pac. 954 (1913); Pac. Livestock Co. v. Ellison Co., 46 Nev. 351, 213 Pac. 700 (1923).

62. The Legislature may enact regulatory statutes limiting the extent and amount of punishment in contempt cases. *Ex parte* Garner, 179 Cal. 409, 177 Pac. 162 (1918); State v. Cameron, 140 Wash. 101, 248 Pac. 408, 54 A. L. R. 318 (1926); see Nelles & King, *supra* note 1 at 554.

to take one of two forms: it might reserve to the Court the power to cite for contempt but substitute trial by jury for summary punishment; *or* it might follow the Pennsylvania practice of making obstruction an indictable offense to be prosecuted by the district attorney.[63] Either of these two procedures would place a degree of restraint upon both newspapers and judges alike, and tend to combine impartiality within the court room with a timely appraisal of judicial acts by the press.

ROBERT E. HERMAN†

2. VICE-CHANCELLOR BERRY AND FREEDOM OF SPEECH AS A "QUALIFIED" RIGHT*

THE consistency of some New Jersey judges in enjoining labor activity is surpassed only by the ingenuity of the theories upon which their decisions are based.[1] Rare originality in this respect is achieved by a recent opinion from the pen of Vice-Chancellor Berry. A furniture manufacturer sought an injunction to restrain an outside union from organizing his shop. He alleged that there was no dispute between himself and his employees, but that to line up his workers, unionists had picketed retail stores selling his furniture and had distributed circulars exhorting the public to boycott the product because of the dispute between manufacturer and union. The court might have enjoined these activities in accordance with the peculiar New Jersey doctrine that picketing is lawful only as a concomitant of a strike.[2]

63. See PA. STAT. ANN. (Purdon, 1930) tit. 1808-9, § 17-2044, 2045.

"No publication out of court, respecting the conduct of the judges, officers of the court, jurors, witnesses, parties or any of them, of, in or concerning any cause depending in such court, shall be construed into a contempt of the said court, so as to render the author, printer [or] publisher liable to attachment and summary punishment for the same.

"If any such publication shall improperly tend to bias the minds of the public, or of the court, the officers, jurors [or] witnesses . . . on a question pending before the court . . . any person . . . aggrieved thereby [may] proceed against the . . . publisher . . . by indictment, or he may bring an action at law against them . . . " Upheld in Corum v. Conroy, 69 Pitts. (Legal Journal) 373 (1920 Pa.); Snyder's case, 301 Pa. 276, 152 Atl. 33 (1930).

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*Mitnick v. Furniture Workers' Union, 200 Atl. 553 (N. J. Ch. 1938).

1. For a collection of New Jersey labor cases, see (1935) 1 N. J. L. REV. 186. See also (1937) 6 I. J. A. BULL. 34, and further references cited there.

2. Mode Novelty Co. v. Taylor, 122 N. J. Eq. 593 (Ch. 1937). But *cf.* Exchange Bakery & Restaurant v. Rifkin, 245 N. Y. 260, 157 N. E. 130 (1927). From the New Jersey Act of 1926, which forbade injunctions against what amounted to peaceful picketing in cases "growing out of a dispute concerning terms or conditions of employment," the court derived the proposition that picketing was illegal where there was no such dispute. The construction of "dispute" to mean "strike" readily produced the

Or resort might have been had to the discredited arguments that the union's actions constituted an indirect attempt to achieve unlawful coercion of the employees by pressure on the employer,[3] or that the "secondary boycott" amounted to duress against the employer through a party neutral to the conflict.[4] Instead, the court advanced a theory more unique.[5] It predicated its issuance of an injunction upon a division of constitutional rights into two categories: absolute and qualified. Within the former group were placed those which "preceded government, are inherent in the very nature of man himself, were not given, but declared, by the Constitution, and are inalienable;" to the second group were relegated rights "created and granted by the Constitution," to be regarded as privileges. From this dichotomy was conjured up the proposition that any qualified right is subject to forfeiture in the event of a clash with any absolute right. By postulating that a proprietor's expectancy of continued patronage is a property right, *i.e.*, an absolute right, while freedom of speech (of which picketing and circularizing are but phases) is a mere qualified right, the court reached the conclusion that neither picketing nor circularizing might be countenanced.[6]

This approach is not entirely devoid of merit. It does at least strip the cloak of legal verbiage from previous labor injunctions and declares openly what unfriendly critics[7] have long suspected: that some New Jersey courts are not averse to suppressing civil liberties when the property rights of employers are threatened. Some basis for this conclusion may be derived from the successive decisions of Vice-Chancellor Berry. In his earliest labor injunction,[8] he perceived in the constant parading of a single picket a sinister

formula that picketing unaccompanied by a strike was enjoinable. A refinement of this technique appeared in the declaration that the employer's replacement of all strikers legally terminated the strike; picketing then automatically became an illegal activity and was enjoinable. *Cf.* Quinlivan v. Dail-Overland Co., 274 Fed. 56 (1921).

3. *Cf.* Lauf v. Shinner, 82 F. (2d) 68 (C. C. A. 7th, 1936), overruled in 303 U. S. 323 (1937).

4. Fink & Son v. Butchers Union, No. 422, 84 N. J. Eq. 638, 95 Atl. 182 (1915); Parker Paint & Wall Paper Co. v. Local Union, No. 813, 87 W. Va. 631, 105 S. E. 911 (1921). But see Hellerstein, *Secondary Boycotts in Labor Disputes* (1938) 47 YALE L. J. 341, 349 *et seq.*

5. The court was apparently troubled by the fact that some of the circulars had been posted on telephone poles and similar convenient spots in the vicinity of the retail shops, and others had been distributed as far away as a block from the stores. To justify an injunction, especially in view of Lovell v. Griffin [303 U. S. 444 (1938)] a theory unrelated to specific forms of labor activity had to be devised. It is not clear from the opinion whether the injunction would also apply to advertisements in newspapers.

6. Mitnick v. Furniture Workers' Union, 200 Atl. 553, 555 (N. J. Ch. 1938). As authority for his important discovery, the Vice-Chancellor cited only 50 C. J. 400, which is a paragraph defining the word "privilege."

7. See *e.g.*, 46 NEW REPUBLIC 286, 315 (1926); 122 NATION 515, 123 *id.* 679 (1926); Kirchwey, *New Jersey under "The Terror,"* 122 *id.* 470 (1926); 139 *id.* 355 (1934).

8. Gevas v. Greek Restaurant Workers Club, 99 N. J. Eq. 770, 134 Atl. 309 (Ch. 1926).

quality that amounted to unlawful intimidation.[9] When by 1933 the judicial trend had rendered this conception rather unacceptable,[10] the convictions of the learned Vice-Chancellor appeared in a new doctrinal garb: picketing, even if in peaceful furtherance of lawful ends, amounted to a private nuisance.[11] At the same time, he declared that personal and property rights were both subject to infringement by peaceful picketing.[12] His ultimate creed was presaged in his next opinion, where personal and property rights, though treated on a parity, were placed in antithetical positions.[13] Not until the *Mitnick* case,[14] however, did the new theory emerge fullblown. There, paying only perfunctory respects to more hackneyed techniques, the court asserted unequivocally the supremacy of the property right.[15]

But for the fact that a few years of repose in the reports might vest it with the dignity of an authority, the decision would hardly deserve serious attention. Not only is it historically inaccurate and contradictory of the state constitution; it is analytically specious as well. The fathers of the Constitutions, both federal and state, regarded themselves not as creators of the right of free speech, but as protectors of the existing right from abridgment or interference.[16] Nor does the characterization of any rights as absolute find

9. "A single sentinel, constantly parading in front of a place of employment for any extended length of time, may be just as effective in striking terror to the souls of the employees, bound there by their duty, as was the swinging pendulum in Poe's famous story, 'The Pit and the Pendulum,' to the victim chained in its ultimate path." Gevas v. Greek Restaurant Workers Club, 99 N. J. Eq. 770, 783, 134 Atl. 309, 314 (Ch. 1926).

10. See Hellerstein, *Secondary Boycotts in Labor Disputes* (1938) 47 YALE L. J. 341; Simpson, *Fifty Years of American Equity* (1936) 50 HARV. L. REV. 171; Comments (1938) 47 YALE L. J. 1136; (1937) 46 YALE L. J. 1064; (1936) 35 MICH. L. REV. 340.

11. In a 1907 case a predecessor said of picketing, in referring to its interference with the natural flow of labor to the employer, "In its mildest form it is a nuisance." George Jonas Glass Co. v. Glass Bottle Blowers' Association, 72 N. J. Eq. 653, 663, 66 Atl. 953, 957 (Ch. 1907). In Elkind & Sons, Inc. v. Retail Clerks Association, 114 N. J. Eq. 586, 169 Atl. 494 (Ch. 1933) Berry, V. C., salvaged this sentence and inflated it into the theory that picketing could be enjoined as a private nuisance because it molested people using the sidewalk near the picketed store.

12. Elkind & Sons, Inc. v. Retail Clerks Association, 114 N. J. Eq. 586, 169 Atl. 494 (Ch. 1933); J. Lichtman & Sons v. Leather Workers Industrial Union, 114 N. J. Eq. 596, 169 Atl. 498 (Ch. 1933).

13. "We are a capitalistic nation whose wealth has been built up upon the concept of property and individual right therein . . . Under our basic law property rights are entitled to the same protection as personal rights." International Ticket Co. v. Wendrich, 122 N. J. Eq. 222, 229, 193 Atl. 808, 812 (Ch. 1937), *aff'd*, 123 N. J. Eq. 172, 196 Atl. 474 (1938).

14. Mitnick v. Furniture Workers' Union, 200 Atl. 553 (N. J. Ch. 1938).

15. The court discussed briefly the absence of a labor dispute and reaffirmed the principle that picketing was a concomitant of a strike. See note 2, *supra*.

16. "Congress shall make no law . . . abridging the freedom of speech or of the press," U. S. CONST. AMENDMENTS Art. I. Under the well settled view, this wording indicates that the above provision undertook to give no rights, but recognized the rights as something already known, understood and existing. Similar passages in state con-

reliable historical or present-day support, for it is axiomatic that even such sacred constitutional guaranties as that protecting "life, liberty and property" are qualified by other provisions of the Constitution itself, as well as by the requirements of the state police power. Furthermore, there is no basis for attempting to discriminate between two rights which emerge from the same constitutional phrase. Under an interpretation broad enough to place business expectancy within the property rights protected by the guaranty of "life, liberty and property," freedom of speech would seem to be a phase of equally sacred liberty.[17] The court's construction of the right of free speech, furthermore, results in complete negation of that section of the state constitution protecting it.[18] The constitutional declaration that the right of free speech is subject to assumption of responsibility for all utterances necessarily presupposes that the utterances may be voiced. To confuse subsequently imposed liability with injunctive restraint is to overlook the fundamental distinction which gives this section meaning.[19]

Further analysis of the court's reasoning reveals even more basic weaknesses. Purporting to establish an unvarying rule, the court nevertheless employs completely interchangeable concepts. From the days of the earliest competition and restraint of trade cases, the right to do business, which the court regards as a property right, has been considered a liberty.[20] Under this view the clash is not between a property right and a liberty, but between two liberties; hence the rule suggested is inconclusive. The modern tendency, on the other hand, is to view labor weapons as property rights of unions;[21] then, depending upon whether "the right to do business" is regarded as a property or a liberty, the court's rule leads either to a stalemate or to a conclusion contrary to that of the principal case.[22]

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stitutions are patterned after this, in both idea and attitude. See COOLEY, CONST. LAW (4th ed. 1931) 343.

17. "It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the 14th Amendment from invasion by state action." Near v. Minnesota, 283 U. S. 697, 707 (1931); see De Jonge v. Oregon, 299 U. S. 353, 364 (1936). A state court impairing free speech by an injunction may be said to be violating the 14th Amendment.

18. "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right." N. J. CONST. Art. I, § 5.

19. The court pursues this line of argument in Marx & H. Jeans Clothing Co. v. Watson, 168 Mo. 133, 67 S. W. 391 (1902). That freedom from previous restraint is the essence of this liberty is declared in Near v. Minnesota, 283 U. S. 697 (1931).

20. See OPPENHEIM, CASES ON TRADE REGULATIONS (1936) 10 *et seq.*; 4 BL. COMM. 159; see Nordenfelt v. Maxim Nordenfelt Guns & Amm. Co., A. C. 535, 565 (1894); Allgeyer v. Louisiana, 165 U. S. 578, 589 (1897); Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co., 227 Fed. 46, 48 (C. C. A. 2d, 1915). So jealously was this liberty guarded in the interests of society that it could not even be contracted away. *Cf.* Mitchel v. Reynolds, 1 P. Wms. 181, 24 Eng. Repr. 347 (1711).

21. See cases cited in (1937) 47 YALE L. J. 136, 137 notes 10–12.

22. Compare the court's language in *Ex parte* Lyons, 81 P. (2d) 190 (Cal. 1938). A Butchers' Union picketed a butcher shop in an attempt to make it remain closed on

Even making the assumption that the court's theory is a valid one, there is an obvious failure to provide for quantitative evaluation of the conflicting rights. No criterion is supplied for determining how great a measure of qualified rights must be sacrificed to avoid an infinitesimal injury to an absolute right. Nor would it be fair, in view of its sweeping basis, to conclude that the court intended to restrict the rule to labor cases alone, for that would imply a suspicion that the rule was not the result of an unbiased consideration of the issues. Its logical extension, then, might enable butchers to enjoin vegetarians from expounding their theory on the ground that its publication would curtail meat sales, thereby injuring the very property right protected in the principal case. Since the court neglects all consideration of whether absolute rights may be justifiably invaded,[23] literal acceptance of its theory would require virtual abolition not merely of picketing but of anything else the court chose to call a qualified right.

Any attempt to criticize the position of the learned Vice-Chancellor by merely pointing out the cracks and fissures in an otherwise rough-hewn piece of granite must necessarily savor of an excursion into idealistic conceptualism. Regardless of whether the present opinion is to be considered merely an interesting exhibition of myopia or an example of purposive judicial legerdemain, it cannot be denied that the Vice-Chancellor has posed the issue in the same fashion as an enthusiastically left-wing realist might pose it—in terms of preserving the *status quo industrialis*. With more time, the subtle niceties and sophistications can be further developed and a camouflage of words can be constructed to obscure successfully, as the Vice-Chancellor has attempted unsuccessfully, a struggle going on beneath the judicial process in which freedom of speech is a weapon to be used by, or forbidden to, the

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Sundays. Here, too, the court reasoned through the conflict of personal rights with property rights but arrived at an opposite conclusion through the adoption of a less doctrinaire approach. Its broad view of picketing itself is reflected in its words:

> "We cannot see how the right to peacefully picket, under the guaranty of free speech, could be confined to cases in which there exists a dispute between an employer and organized labor over hours or conditions of employment . . . " *Id.*, at p. 193.

Contrast with the attitude taken by the principal case the California court's evaluation of property rights and personal rights:

> "The courts have always been zealous to protect the rights of persons to acquire, own and enjoy property. They have been more zealous, if possible, to protect the personal right of free speech, and perhaps justly so, for free discussion contains the germ of progress which keeps flowing the blood stream of the Republic." *Id.*, at p. 192,

and,

> "In a republic it is necessary that the rights of freedom of speech and freedom of the press be zealously guarded by the courts. History teaches us that when those rights are suspended, the right to possess and enjoy private property rapidly vanishes." *Id.*, at p. 197.

23. See Vegelahn v. Guntner, 167 Mass. 92, 102, 44 N. E. 1077, 1079 (1896).

enemy. In the meantime, those who think that even the judiciary should be careful in handling the Constitution must find comfort by whistling in the dark of the Vice-Chancellor's court.

3. Employer Freedom of Speech Under The Wagner Act*

In denying full enforcement to an order of the National Labor Relations Board, the Circuit Court of Appeals for the Ninth Circuit recently declared that an employer is deprived of freedom of speech when under the National Labor Relations Act[1] he is prevented from making a casual statement unfavorable to unionization, in the absence of threats or acts of coercion.[2] The statement in question—a remark by the superintendent of an Oregon bus company that an employee would find it to his advantage not to belong to a union[3]—had been found by the Board to constitute an unlawful interference with employee self-organization, on the ground that it was part of considerable anti-union activity in which the Board had found the company engaged.[4] The court, expressly rejecting the findings of the Board as not being supported by the weight of the evidence, held that the company was not engaged in unlawful anti-union activity and that the remark of its superintendent was harmless.[5] Accepting the facts of the case as the court, and not the Board, found them, it appears that the decision means no more than that a general expression of opinion by an employer on the subject of unionization, only

*National Labor Relations Board v. Union Pacific Stages, Inc., No. 8489, 3 L. R. R. index p. 126 (C. C. A. 9th, 1938).

1. 49 Stat. 449 (1935), 29 U. S. C. § 151 (Supp. 1937). Section 8(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees" in the exercise of their right to self-organization.

2. N. L. R. B. v. Union Pacific Stages, No. 8489, 3 L. R. R. index p. 126 (C. C. A. 9th, 1938). The court enforced that part of the order which required the company to make public disavowal of threatening statements found to have been made by several of its local superintendents.

3. As quoted by the court from the reply brief of the National Labor Relations Board, the superintendent had said that if he had a son he would advise him against joining a union, because he thought that if a young man worked diligently and tried to advance the interests of his employer, he would get further than if he depended on a union for assistance. N. L. R. B. v. Union Pacific Stages, No. 8489, 3 L. R. R. index p. 126, 139 (C. C. A. 9th, 1938).

4. *In re* Union Pacific Stages, Inc., 2 N. L. R. B. 471 (1936). The Board found the company guilty of an unfair labor practice in discriminating in regard to the hire and tenure of employment of its employees, and in discharging other employees, because of their union affiliations.

5. The court said, "It is difficult to think that Congress intended to forbid an employer from expressing a general opinion that an employee would find it more to his advantage not to belong to a union. Had Congress attempted so to do, it would be in violation of the First Amendment." N. L. R. B. v. Union Pacific Stages Inc., No. 8489 3 L. R. R. index p. 126, 139 (C. C. A. 9th, 1938).

mildly anti-union in character and unaccompanied by threats or acts of coercion, is protected by the First Amendment against interference by the Board.

The principal case is significant as the first in which an order of the N. L. R. B. was denied enforcement to avoid a violation of the provisions of the First Amendment;[6] but it only partially answers the currently controversial question as to the extent to which the National Labor Relations Board may restrain statements by employers with regard to unionization without infringing the freedom of speech guaranty.[7] The controversy has raged over a number of decisions in which the Board has held that certain statements by employers interfere with employee self-organization,[8] and has consequently in effect prohibited their repetition.

In part, criticism of the Board has apparently been based on a misunderstanding of the effect of its decrees, arising out of the erroneous belief that the Board places blanket prohibitions on future anti-union statements by employers.[9] In order fairly to appraise the Board's decisions, an understanding of the operation and scope of its orders is the first prerequisite. The National Labor Relations Act authorizes the Board, upon complaint of unfair labor practices by an employer, to hold hearings, at which the employer may present evidence, to make findings of fact, and upon these to issue an appropriate restraining order. Since the Board must petition a circuit court of appeals for the enforcement of such order,[10] the order is not *per se* a punishment of the employer's conduct; it merely lays the foundation for future punishment by the court, should the latter, after enforcing it, find that repetition of the same conduct by the employer constituted under the circumstances

6. But *cf.* N. L. R. B. v. Associated Press, 301 U. S. 103, 133 (1937), in which four justices dissented on the ground that an order of the Board requiring a newspaper to reinstate an employee discharged for union activities violated freedom of the press.

7. For a colorful account of the varying attitudes toward the National Labor Relations Board at the present time, see (Oct. 1938) 18 FORTUNE 52-53; see also notes 14 and 17, *infra*.

8. *In re* Pennsylvania Greyhound Lines, 1 N. L. R. B. 1 (1935), *order enforced* N. L. R. B. v. Pennsylvania Greyhound Lines, 58 Sup. Ct. 571 (1938) (advocacy of company unions); *In re* Remington Rand, Inc., 2 N. L. R. B. 626 (1937), *order enforced* N. L. R. B. v. Remington Rand, Inc., 94 F. (2d) 862 (C. C. A. 2d, 1938), *cert. denied*, 58 Sup. Ct. 1046 (1938) (attempt to persuade striking employees to return to work by importing speakers to denounce unionization as unpatriotic); *In re* A. S. Abell Co., C-270, 5 N. L. R. B. No. 88 (Feb. 25, 1938), *order enforced* N. L. R. B. v. A. S. Abell Co., 97 F. (2d) 951 (C. C. A. 4th, 1938) (remarks made by superintendent of newspaper pressroom tending to discourage unionization); *In re* Mansfield Mills, Inc., 3 N. L. R. B. 901 (1937) (distribution of leaflets containing statements attacking unionization); *In re* Mock-Judson-Voehringer Co., C-541, 8 N. L. R. B. No. 16 (July 7, 1938) (distribution of pamphlets attacking the C. I. O.). See cases cited *infra* notes 13, 17, 41.

9. See (July 16, 1938) BUSINESS WEEK 21-22; (Oct. 1938) 18 FORTUNE 52; N. Y. Times, July 8, 1938, p. 16, col. 1-2, cited *infra* note 13.

10. National Labor Relations Act, § 10, 49 STAT. 453, 454 (1935), 29 U. S. C. § 160 (Supp. 1937).

a further violation of the provisions of the order and hence contempt of court.[11] Conceivably the circumstances surrounding the later conduct might be so changed as to warrant the court in holding that no violation of the Board's decree had occurred. Thus the exact repetition by an employer of certain statements, previously held illegal by the Board as constituting part of general unfair labor practices, might not incur punishment at the hands of the court on the ground that different surrounding circumstances deprived the statements of their prior stamp of illegality.

Outstanding among those misinterpreted cases which have aroused widespread, if not unanimous,[12] criticism was that of the Muskin Shoe Company. That company in July, 1937, distributed to its employees on company time and company property copies of a pamphlet entitled "Communism's Iron Grip on the C. I. O."[13] It contained for the most part excerpts from a speech attacking the C. I. O. made in Congress by Representative Clare E. Hoffman of Michigan. In a decision following charges filed by the United Shoe Workers of America, the N. L. R. B. held that the act of the company in circulating this speech was an unfair labor practice and so in effect restrained its further dissemination among the employees under similar circumstances. Although aroused by the fact that the speech was a public one made by a public official the critics[14] of the decision appeared to ignore that the circulation of Representative Hoffman's speech took place against a general background of anti-union activities.[15] That the company was already putting considerable pressure and even coercion on its employees to deter them from

11. *Cf.* N. L. R. B. v. Remington Rand, Inc., 97 F. (2d) 195 (C. C. A. 2d, 1938) (motion by Board to punish employer for contempt for failure to comply with a decree of the court enforcing a prior order of the Board denied).

12. The American Civil Liberties Union found no deprivation of freedom of speech in this case. REPORT TO THE BOARD OF DIRECTORS OF A. C. L. U. BY THE SUB-COMMITTEE ON CIVIL RIGHTS IN LABOR RELATIONS, p. 2, September 9, 1938. See also (1938) 95 NEW REPUBLIC 348. But see note 17, *infra*.

13. *In re* Muskin Shoe Co., C-432, 8 N. L. R. B. No. 1 (July 5, 1938). It should be noted that the N. L. R. B. did not enjoin the company from circulating Representative Hoffman's speech generally, but only among its employees.

14. Representative Hoffman wrote a letter to the Board challenging its right to suppress the circulation of his speech. N. Y. Times, July 25, 1938, p. 1, col. 5; see (1938) 2 L. R. R. index p. 705; see (Oct. 1938) 18 FORTUNE 52, 53. The N. Y. Times commented editorially on the Board's action in this case: "The state of affairs which has now been reached is utterly preposterous . . . The National Labor Relations Board has ruled, in effect, that the right of free speech must be sacrificed in order to promote the organization of trade unions." N. Y. Times, July 8, 1938, p. 16, col. 1-2. Counsel to the American Federation of Labor considers the holding of the Board in this case a violation of freedom of speech. Communication by Joseph A. Padway to YALE LAW JOURNAL, September 21, 1938.

15. The company shut down the plant and invited the employees to a meeting where prominent local citizens denounced unionization and warned the employees not to join. Thereafter several employees were discharged for union activities. *In re* Muskin Shoe Co., C-432, 8 N. L. R. B. No. 1 (July 5, 1938).

joining the union would seem to be undeniable; so that when the speech reached the employees it did not represent to them solely the personal opinion of Representative Hoffman. Few could fail to appreciate that it represented the attitude of the company as well, backed by a clear threat of enforcement. The Board condemned not the speech alone, but the employer's entire course of conduct, of which the distribution of the speech was an integral part.[16]

This case, however, does not reflect the ultimate extent to which the Board has gone in restraining anti-union speech by employers. In an earlier order, since sought to be withdrawn, it expressly enjoined the Ford Motor Company from circulating among its employees *any* "statements or propaganda disparaging or criticizing labor organizations."[17] The company had distributed among its workers considerable anti-union literature, including statements by Henry Ford denouncing unionization generally.[18] The distribution of these statements occurred at a time when the company was actively combatting unionization within the River Rouge plant. Pressure had been placed on employees to prevent their joining the union; a group of company police had prevented union organizers, not without violence, from entering company property; a company union had been launched and the employees given to understand they were expected to join; and finally a number of employees had been discharged for union activities.[19] In view of the attending circumstances of violence and coercion by the company which surrounded the circulation of the statements, the Board's order does not seem inordinately severe. It can, however, be approved only insofar as it prohibits the circulation of further anti-union statements by the company made under circumstances similar to those under which the statements were previously found unfair. It cannot be approved if it purports to lay the foundation for the punishment of all anti-union statements by the company in the future, regardless of the circumstances.

Prior to the principal case, the courts had found no conflict between the orders of the Board and the freedom of speech guaranty.[20] Moreover, the

16. See N. Y. Times, July 12, 1938, p. 18, col. 5 (communication by Nathan Witt, secretary to the National Labor Relations Board).

17. *In re* Ford Motor Co., C-199, 4 N. L. R. B. No. 81 (Dec. 22, 1937). The Board has withdrawn, pursuant to court permission, the enforcement petition which it filed in this case with the Circuit Court of Appeals for the Sixth Circuit; and further proceedings by the Board have been stayed pending disposition by the Supreme Court of the Ford Company's petition for certiorari. (1938) 2 L. R. R. index p. 455; 3 L. R. R. index p. 115. The Board's order in this case has been criticized, even by groups usually considered favorable to labor, on the ground that it was too general and did not distinguish sufficiently between threatening statements and mere expressions of opinion. (1938) 29 CIVIL LIBERTIES QUARTERLY 3; N. Y. Times, June 5, 1938, p. 14, col. 2 (letter by A. G. Hayes, counsel to the American Civil Liberties Union, to J. Warren Madden, chairman of the National Labor Relations Board).

18. *In re* Ford Motor Co., C-199, 4 N. L. R. B. No. 81, pp. 27-30 (Dec. 22, 1937).

19. *Id.*, at 34 *et seq.*

20. A number of orders finding certain speech illegal have been upheld. See cases cited in note 33, *infra*.

limitation which the instant case places on the Board's power to restrain employer speech is relatively slight.[21] It represents only the extreme limit beyond which the Board cannot go; and to a very considerable extent the scope of the Board's power is still left undefined.[22] But some indication of its boundaries may be sought in the extent to which the courts themselves have been willing to infringe upon the right of free speech.

There is an analogy between a decision by a court of law holding that certain language is slanderous and a decision by the Board finding that certain statements by an employer constitute an unfair labor practice. In one case, the court directly punishes language which it has found did injury to another;[23] in the other, the Board by its order lays the foundation for future punishment by a court, should the order of the Board not be obeyed. In both cases, the offending party is put on notice that a repetition by him in the future of similar language under similar circumstances will probably incur punishment at the hands of a court.

There is a further analogy between an order of the Board in effect enjoining the repetition of certain anti-union statements by an employer and decrees issued by courts of equity which, protecting property interests, incidentally place restraints upon freedom of speech. Thus an employer may be enjoined from circulating false statements about a competitor;[24] from making misleading representations to the latter's customers;[25] and from threatening his employees.[26] The members of a labor union and others cooperating with

21. This statement is based, however, on the continued assumption that the court's findings of fact were correct.

22. Section 10(a) of the National Labor Relations Act gives the Board the exclusive power to prevent any employer from engaging in any unfair labor practice under Section 8. 49 STAT. 453 (1935), 29 U. S. C. § 160(a) (Supp. 1937). Insofar as every statement made tends to influence to some extent the person who hears it, the Board is enabled to put almost any interpretation on the word "interfere" in Section 8(1).

23. Injury is the minimum requirement necessary to maintain an action for slander. ODGERS, LIBEL AND SLANDER (6th ed. 1929) 35–36; TOWNSHEND, SLANDER AND LIBEL (4th ed. 1890) § 59.

24. Chamber of Commerce of Minneapolis v. Federal Trade Commission, 13 F. (2d) 673 (C. C. A. 8th, 1926); see NIMS, THE LAW OF UNFAIR COMPETITION AND TRADEMARKS (3d ed. 1929) 698, 699. Equity will restrain an employee who threatens to divulge confidential information of his employer. See McLain, *Injunctive Relief against Employees Using Confidential Information* (1935) 23 KY. L. J. 248.

25. Emack v. Kane, 34 Fed. 46 (C. C. D. Ill., 1888); see Pound, *Equitable Relief Against Defamation and Injuries to Personality* (1916) 29 HARV. L. REV. 640, 666. Most of the N. R. A. codes treated disparagement and malicious attacks upon competitors as an unfair labor practice which could be restrained at the suit of the United States or forbidden by the Federal Trade Commission. See HANDLER, CASES AND OTHER MATERIALS ON TRADE REGULATION (1937) 913. The Federal Trade Commission has regularly enjoined such practices. *In re* New Science Institute, 15 F. T. C. D. 323 (1931); *In re* Western Bottle Mfg. Co., 17 F. T. C. D. 153 (1932).

26. Standard Oil Co. v. Doyle, 118 Ky. 662, 82 S. W. 271 (1904).

them have been restrained from threatening other workers with violence,[27] from persuading them to leave their jobs,[28] and from advocating the advisability of a general strike.[29] They have even been prohibited from publicly announcing that they do not patronize certain stores, when their object in so doing is to effectuate a so-called secondary boycott.[30]

Whether at law or at equity, the speech punished or restrained is speech which in every case is calculated to injure some interest,[31] and the presence of this element of injury in the spoken words is that which deprives them of the protection of the First Amendment and at the same time empowers the courts to prohibit them.[32] Since this same characteristic attaches to threatening language when used by employers, it is now well established that the National Labor Relations Board may in effect restrain statements by employers which, expressly or impliedly, are designed to injure the right of employees to participate unmolested in union activities.[33] The courts them-

27. Kolley v. Robinson, 187 Fed. 415 (C. C. A. 8th, 1911); Atchison, T. & S. F. Ry. Co. v. Gee, 139 Fed. 582 (S. D. Ia., 1905).

28. Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229 (1917); see FRANKFURTER AND GREENE, THE LABOR INJUNCTION (1930) 37-38.

29. *In re* Debs, 158 U. S. 564 (1895); Union Pac. R. Co. v. Ruef, 120 Fed. 102 (D. Neb. 1902). The degree of restraint placed upon free speech in the case of the labor injunction has often been extreme. Striking miners have been forbidden "from giving any message regarding the strike," "from issuing any further strike orders," "from issuing any instructions" and "from issuing any messages of encouragement or exhortation." Decree quoted in FRANKFURTER AND GREENE, THE LABOR INJUNCTION (1930) 100.

30. Gompers v. Bucks Stove and Range Co., 221 U. S. 418 (1911); Lawlor v. Loewe, 235 U. S. 522 (1915). In the Gompers case, *supra* at 439, the Court held expressly that a labor union could not employ the right of free speech to accomplish an illegal purpose. *Cf.* Mitnick v. Furniture Workers Union, 200 Atl. 553 (Ch. N. J. 1938), (1938) 48 YALE L. J. 67. But *cf.* Senn v. Tile Layers Protective Union, 301 U. S. 468 (1937); *Ex parte* Lyons, 81 P. (2d) 190 (Cal. App. 1938).

It should be noted, of course, that since the passage of the Norris-LaGuardia Act in many of the cases cited above an injunction could no longer be granted. 47 STAT. 70 (1932), 29 U. S. C. § 101 *et seq.* (Supp. 1937). However, the cases remain as precedents for the restraint of free speech.

31. See NIMS, THE LAW OF UNFAIR COMPETITION AND TRADEMARKS (3d ed. 1929) 697-698. The American courts usually refuse to impose any previous restraint at all upon free speech where no injury to property interests is threatened, on the ground that equity will not secure interests of personality alone. Brandreth v. Lance, 8 Paige 24 (N. Y. Ch. 1839); see POUND, EQUITABLE RELIEF AGAINST INJURIES TO PERSONALITY (1916) 29 HARV. L. REV. 640. In the Brandreth case, *supra*, the court based its refusal to issue an injunction partly on the ground that to enjoin a slander would violate freedom of speech. A federal court, however, has expressly stated that in this regard the Constitution presents no barrier. Chamber of Commerce of Minneapolis v. Federal Trade Commission, 13 F. (2d) 673, 686 (C. C. A. 8th, 1926).

32. Schenck v. United States, 249 U. S. 47 (1919); Gitlow v. State of N. Y., 268 U. S. 652 (1925).

33. N. L. R. B. v. Jones & Laughlin Steel Corp., 301 U. S. 1 (1937); Associated Press v. N. L. R. B., 301 U. S. 103 (1937); N. L. R. B. v. Mackay Radio & Telegraph

selves, however, have punished or restrained only those words which carry with them some threat of injury, so that it seems unlikely that they will permit the Board to go further.[34] Instead, it may be maintained with a considerable degree of assurance that they will restrict the Board to the prohibition of only those statements by employers which threaten the security of the worker in his job.[35] Expressions of opinion, unaccompanied by such threats, will not be punished, with the result that the employer will not be deprived of his natural interest to discuss unionization nor the public of its interest to hear him. This solution should not imperil the primary objective of the National Labor Relations Act that an employer shall not use his superior economic position to interfere in his employees' union affairs.[36]

Thus Mr. Chief Justice Hughes, construing Section 2(3) of the Railway Labor Act of 1926 which provided that negotiating representatives shall be designated by employers and employees "without interference, influence or coercion" by either party,[37] concluded that the use of the word "influence" in the act was not to be taken "as interdicting the normal relations and innocent communications which are a part of all friendly intercourse, albeit between employer and employee."[38] The Wisconsin Supreme Court, in a recent de-

Co., 58 Sup. Ct. 904 (1938); N. L. R. B. v. Pennsylvania Greyhound Lines, 58 Sup. Ct. 571 (1938); N. L. R. B. v. Carlisle Lumber Co., 94 F. (2d) 138 (C. C. A. 9th, 1937) *cert. denied,* 58 Sup. Ct. 1045 (1938); N. L. R. B. v. Remington Rand, Inc., 94 F. (2d) 862 (C. C. A. 2d, 1938) *cert. denied,* 58 Sup. Ct. 1046 (1938). See Comment (1937) 37 COL. L. REV. 816.

34. See cases cited in notes 38 and 39, *infra.* Congress, in setting up a statutory right in employees to self-organization, can give that right no greater protection against speech than the courts can give to other rights which they have established.

35. Theoretically an employer should be privileged to attempt, by the use of reason and argument, to persuade his employees not to join a union; but in practice such persuasion can probably never be divorced from some hint of coercion. See note 38, *infra.*

36. National Labor Relations Act § 1, 49 STAT. 449 (1935), 29 U. S. C. § 151 (Supp. 1937); see also Brown, *Free Speech with Reservations* (1938) 95 NEW REPUBLIC 278; (Oct. 1938) 18 FORTUNE 123. The executive council of the American Federation of Labor recently proposed an amendment to the National Labor Relations Act designed to permit an employer to express his preference as between two competing unions in his plant. (1938) 2 L. R. R. index p. 815. *Cf.* amendments to state constitutions proposed by National Lawyers Guild (1938) 6 U. S. L. WEEK 75.

37. 44 STAT. 578 (1926), 45 U. S. C. § 152(3) (Supp. 1937).

38. Texas & N. O. R. R. v. Brotherhood of Railway & Steamship Clerks, 281 U. S. 548, 568 (1930). There is the view that no statement by an employer with regard to unionization can be treated as a "mere opinion"; that under modern industrial conditions such a statement is never an appeal to the employee's reason but to his fear and necessity. (1938) 2 L. R. R. index p. 707 (address by Edwin S. Smith, member of National Labor Relations Board); (1938) 7 I. J. A. BULL. 25, 36. The National Labor Relations Board has said "It is obvious that employees dependent upon the will of the management for the means of their livelihood must regard the opinions of one [of the company's officers] with gravity . . . It can make no difference that these opinions are called 'personal'; employees can as ill afford the 'personal' as the 'official' hostility of their employers." *In re* William Randolph Hearst, *et al.,* 2 N. L. R. B. 530, 542–543 (1937).

cision involving the Wisconsin Labor Relations Act, drew the distinction between an expression of opinion by an employer and the use of the spoken word to coerce the will of employees as constituting "the dividing line between what an employer may do and what he may not do."[39]

Having established this distinction, however, the gravest difficulty for both the Board and the courts then appears to be that of determining whether a given statement by an employer at a given time is a mere expression of opinion or whether it implies a threat as well.[40] In making the decision, the intent of the speaker would serve as an admirable gauge of its nature, but intent is usually difficult to establish. A more practicable test—and one which the Board has already used—is to weigh the statement in relation to its general background.[41] Time, place, the emotional state of the speaker, his medium of expression and the probable effect of his words on those who hear them become the important criteria. Thus an employer who expressed anti-union sentiments in an address before the American Chamber of Commerce in Paris might be held not to have violated the Wagner Act, while the delivery of the self-same address before his employees assembled in Detroit would be found a clear violation.

Applying this general test to the facts of the principal case, as they were found by the Board, the apparently harmless remark of the bus company's superintendent *could,* under the circumstances, have been an implied threat to unionization.[42] The Board found that the company had been discriminating in the selection of employees on the basis of their affiliation with labor organizations and that it had discharged several employees for union activities.[43] Against such a background the most innocent-sounding statement might have deeper implications, and the Board concluded that it did. That there was some evidence to support the Board's finding would seem to be undeniable. Section 10(f) of the National Labor Relations Act provides that "the findings of the Board as to the facts, if supported by evidence, shall . . . be

39. Wisconsin Labor Relations Board v. Fred Rueping Leather Co., 279 N. W. 673, 683 (Wis. 1938).

40. The Wisconsin Supreme Court recognized this problem when it said, "It may, of course, be difficult to determine in a particular case on which side of the line the activities of a particular employer fall, but this must be left to the trier of fact if there is room for conflicting inferences." Wisconsin Labor Relations Board v. Fred Rueping Leather Co., 297 N.W. 673, 683 (Wis. 1938).

41. This test is obviously not one which can be reduced to a scientific formula. It is, of course, more useful when the element of threat in a given statement is implied rather than express. See *In re* Ansin Shoe Mfg. Co., 1 N.L.R.B. 929 (1936) (declaration by company's president that plant would have to be moved unless labor conditions were "satisfactory"); *In re* Nat'l Motor Bearing Co., C-221, 5 N.L.R.B. No. 66 (Feb. 18, 1938) (circulation of photostatic copies of a public record of registration showing that a union organizer in the plant was registered as a communist); *In re* Muskin Shoe Co., C-432, 8 N.L.R.B. No. 1 (July 5, 1938) cited *supra* note 13.

42. *In re* Union Pacific Stages, Inc., 2 N.L.R.B. 471, 477-484 (1936).

43. *Ibid.*

conclusive."[44] The wisdom of the court in rejecting so completely the positive findings of an expert administrative body, versed in the technique of labor tactics, is open to question.[45]

It will be long before any complete demarcation of the limits to which the Board may go in restraining employer freedom of speech is settled. Speculation conjures up a number of situations which may arise to cause difficulty. For example, an employer might own stock in a local newspaper and thus be able to induce it to conduct an anti-union campaign on his behalf, while he remained silent in the background. To punish the employer would be difficult, although conceivably there might be such conduct on his part as to warrant the finding of a violation of the Wagner Act; to attempt to enjoin the newspaper would be to run afoul of the right of freedom of the press.[46] Again, the case might arise of an employer vigorously backing a candidate for public office, running on an anti-union ticket. The Board clearly could not restrain the statements of a candidate for public office; and the employer would seem to have an excellent defense in the proposition that he was only exercising a privilege of citizenship in expressing an honest preference for one of several candidates.

Situations such as these reflect the almost insoluble nature of the problem which faces the Board. In order fully to protect the right of the worker to organize, it will inevitably invade to some extent the realm of freedom of speech and thus invite the justifiable charge that it is violating the First Amendment. On the other hand, if it permits employers to express any anti-union opinion which might in any way deter employee self-organization, it will draw the charge from other quarters that it is failing to carry out the spirit and even the letter of the statute which it is authorized to administer. The passage of time should ease somewhat the critical nature of this problem. While today almost any statement may have a powerful deterrent effect on employee self-organization, because of the still unsettled state of union affairs, eventually when labor is stronger a clear threat might be required to constitute the prohibited interference. Until such time, however, the Board will administer the Act most wisely by treating neither side too well.

44. 49 STAT. 454 (1935), 29 U. S. C. § 160(e) (Supp. 1936). But compare the treatment of the similar provision of the Federal Trade Commission Act in American Tobacco Co. v. F. T. C., 9 F. (2d) 570 (C. C. A. 2d, 1925).

45. See Landis, *Administrative Policies and the Courts* (1938) 47 YALE L. J. 519, 530–531; Fuchs, *Concepts and Policies in Anglo-American Administrative Law Theory* (1938) 47 YALE L. J. 538, 563–565.

46. *Cf.* Near v. State of Minn. *ex rel.* Olson, 283 U. S. 697 (1931); Grosjean v. Am. Press Co., 297 U. S. 233 (1936). These cases seem to indicate that the courts are less ready to permit restraints upon freedom of the press than upon freedom of speech.