UIC Law Review

Volume 20 | Issue 3 Article 10

Spring 1987

# Kemner v. Monsanto Company: The Illinois Supreme Court Confronts the Free Speech/Fair Trial Controversy, 20 J. Marshall L. Rev. 581 (1987)

Thomas K, Pfister

# *KEMNER v. MONSANTO COMPANY:** THE ILLINOIS SUPREME COURT CONFRONTS THE FREE SPEECH/FAIR TRIAL CONTROVERSY

Freedom of speech[1] and a litigant's right to a fair trial[2] by an impartial jury are two long-standing tenets of American jurisprudence.[3] Generally, these two liberties coexist in harmony. When one litigant's out-of-court comments conflict with the other litigant's right to a fair trial, however, it becomes necessary to balance the competing interests.[4] In a matter of first impression, the Illinois Supreme Court in *Kemner v. Monsanto Company*,[5] resolved such a

---

* 112 Ill. 2d 223, 492 N.E.2d 1327 (1986).

1. "Freedom of speech and the press are essential to the enlightenment of a free people and in restraining those who wield power." Bridges v. State of California, 314 U.S. 252, 284 (1941) (Frankfurter, J., dissenting). For an analysis of the origins of freedom of speech and press, see Bogen, *The Origins of Freedom of Speech and Press*, 42 MD. L. REV. 429 (1983).

2. "The administration of justice by an impartial judiciary has been basic to our conception of freedom ever since the Magna Carta. Its assurance is everyone's concern, and it is protected by the liberty guaranteed by the [f]ourteenth [a]mendment." *Bridges*, 314 U.S. at 282. Also, "[a] fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases." Estes v. State of Texas, 381 U.S. 532 (1965) (quoting Offutt v. United States, 348 U.S. 11, 14 (1954)), *reh'g denied*, 382 U.S. 875 (1965).

3. The United States Constitution provides: "Congress shall make no law . . . abridging the freedom of speech. . . ." U.S. CONST. amend. I. Also, "[i]n suits at common law . . . the right of trial by jury shall be preserved. . . ." U.S. CONST. amend. VII.

The right of freedom of speech is made applicable to the states through the due process clause of the fourteenth amendment. *See* Fiske v. Kansas, 274 U.S. 380 (1927); Near v. Minnesota, 283 U.S. 687 (1931). The seventh amendment guarantee of the right to trial by jury, however, has been held not applicable to the states. Fay v. New York, 332 U.S. 261 (1947). *See also* Alexander v. Virginia, 413 U.S. 836 (1973), *reh'g denied*, 414 U.S. 881 (1973). Nonetheless, the Illinois Constitution provides for the right of free speech as well as the right to a jury in civil cases in that "[a]ll persons may speak, write and publish freely, being responsible for the abuse of that liberty." ILL. CONST. art. I, § 4. Furthermore "[t]he right to trial by jury as heretofore enjoyed shall remain inviolate." ILL. CONST. art. I, § 13.

4. *See* Wood v. Georgia, 370 U.S. 375 (1962). (Harlan, J., dissenting). In *Wood*, a Georgia trial court found a sheriff in contempt of court for his out-of-court statements. In reversing the trial court's decision, the Supreme Court stated that "the right to free speech is not absolute; when the right of free speech conflicts with the right to an impartial judicial proceeding, an accommodation must be made to preserve the essence of both." *Id.* at 395. *See also* Note, *A Constitutional Assessment of Court Rules Restricting Lawyer Comment on Pending Litigation*, 65 CORNELL L. REV. 1106, 1120 (1980) (discussion of the factors to be considered in a balancing approach between an attorney's right to free speech and a litigant's right to a fair trial).

5. The *Kemner* trial has been described as the "longest jury trial in the nation's history." *Trial lasts 385 days with more to come*, Chi. Sun-Times, Mar. 23, 1986, at 66. *See also In Illinois: The Longest Jury Trial Drones On*, Time, Mar. 23, 1987, at

conflict in favor of a civil litigant's right of free speech. The *Kemner* decision establishes important precedent for the State of Illinois.[6] The decision limits trial court judges from imposing unnecessary restraints on the speech of litigants in civil actions.[7]

The *Kemner* litigation resulted from a January 10, 1979, tank car derailment which spilled chemicals manufactured by Monsanto Company.[8] The chemicals allegedly contained Dioxin.[9] As a result of the chemical spill, the Kemner family and twenty-one named plaintiffs filed suit against Monsanto and others, seeking recovery for personal injuries and property damage.[10] After trail began,[11] the National Institute of Occupational Safety and Health (NIOSH) held a news conference unrelated to the Kemner litigation and disclosed that the first illness possibly linked to dioxin exposure had occurred.[12] In response to this disclosure, Monsanto sent a letter to

---

1.

6. The only other previous Illinois decision dealing with the Free Speech/Fair Trial controversy is Cooper v. Rockford Newspapers, 34 Ill. App. 3d 645, 339 N.E.2d 477 (1975). In *Cooper*, the appellate court overturned a trial court order which granted the plaintiff a temporary injunction prohibiting the defendant from writing editorials about a pending libel suit. In reaching its holding, the appellate court stated that the circumstances of the case did not support a finding that a "clear and present danger" to the administration of justice or that a "reasonable likelihood" of a threat to the fair administration of justice existed. *Id.*

7. In *Kemner*, the supreme court held that freedom of speech could only be abridged in certain unusual instances. *Kemner*, 112 Ill. 2d at 231, 492 N.E.2d at 1336.

8. The tank car contained a cargo of a liquid chemical substance called orthochlorophenol crude. The liquid chemical leaked from the tank car at the site of the derailment. *Kemner*, 112 Ill. 2d at 225, 492 N.E.2d at 1329.

9. In their complaint, Kemner described dioxin as "one of the most highly poisonous and toxic substances known to man," and which could cause "serious, severe, permanent and disabling injuries to human bodies, organs and nervous systems." Kemner v. Norfolk & Western Ry. Co., 133 Ill. App. 3d 597, 479 N.E.2d 322 (1985), *rev'd*, 112 Ill. 2d 223, 492 N.E.2d 1327 (1986).

10. The 22 actions were initially filed on or about June 5, 1979 in Boone County, Missouri against: the Norfolk and Western Railway Company (Norfolk); the operator of the tank car, under a negligence theory; Monsanto, the manufacturer of the orthochlorophenol, under negligence, willful and wanton misconduct, and products liability theories; G.A.T.X. Corporation and General American Transportation Corporation (G.A.T.X.), the manufacturer of the tank car, under a products liability theory; Dresser Industries (Dresser), the manufacturer of the coupling mechanism, under a products liability theory. *Id.*

On October 29, 1980, the plaintiffs took a voluntary non-suit and thereafter refiled in the Circuit Court of St. Clair County. *Id.* Certain newspaper articles published in Belleville, Illinois, and Columbia, Missouri, stated that the move was "designed to gain a more favorable jury than the plaintiffs' attorney thought would be available in Boone County." Defendant-Appellant's brief at 6, *Kemner v. Monsanto Company*, 112 Ill. 2d 223, 492 N.E.2d 1327 (1986) (Nos. 61691 and 61749) (quoting unnamed newspaper article).

11. Prior to trial, Monsanto twice motioned to dismiss the plaintiff's cause of action on grounds of *forum non conveniens*. *Kemner*, 112 Ill. 2d at 225-26, 492 N.E.2d 1329-30. The circuit court denied these motions and consolidated the 22 separate actions for trial. *See id.* at 224-27, 492 N.E.2d at 1328-31 (summary of cause no. 61691).

12. *Kemner*, 112 Ill. 2d at 227, 492 N.E.2d at 1331. The NIOSH doctors learned

fourteen media organizations.[13] In this letter, Monsanto alleged that the NIOSH report was inaccurate.[14] The letter also stated that Monsanto was involved in litigation in a local county, and advised that it merely wished to "sensitize the media of the need to be careful, responsible, and accurate in the way dioxin subjects are reported in the future."[15] A local newspaper printed a story discussing Monsanto's reaction to the NIOSH report.[16]

Pursuant to a motion of Kemner,[17] the circuit court then issued a ten-day temporary restraining order that prohibited Monsanto from making any statements directed to the media which mentioned the litigation.[18] At the expiration of the temporary restraining order,

---

of the illness while conducting a health screening of 200 truckers who worked at three St. Louis truck terminals where dioxin-laced oil was sprayed in the early 1970's. *Id.* The NIOSH news conference received extensive local media coverage. *Id.*

13. The letter of Monsanto stated:

> Why is Monsanto concerned? We make no secret of the fact that we have a vested interest in seeing that news coverage of dioxin-related matters is balanced, straightforward and above all accurate. We have no involvement in the truck terminal issue *per se*. But we are currently a defendant in a lawsuit in St. Clair County, Illinois, in which several residents of Sturgeon, Missouri, claim they are suffering or will in the future suffer health problems from alleged exposure to dioxin stemming from a 1979 train derailment and chemical spill.
>
> The jury, which is presently hearing this case, is not sequestered, *i.e.*, they are free to view and listen to local news reports. Obviously we're concerned that the jurors may have heard or read some of the exaggerated NIOSH pronouncements stemming from the March 1 news conference. In closing, we want to make it clear that we are not interested in keeping this 'non-story' alive by discussing it publicly. We merely hope that by calling your attention to the basic facts that relate specifically to the March 1 NIOSH announcement, we can sensitize you to the need to be careful, responsible and accurate in the way dioxin subjects are reported in the future.

*Id.* at 227, 492 N.E.2d at 1331.

14. *See Kemner*, 133 Ill. App. 3d at 598, 479 N.E.2d at 323.

15. *See supra* note 13 for the text of the letter.

16. The story was entitled "Monsanto Takes Aim at Government Report," and discussed the NIOSH news conference, Monsanto's background information, and the litigation Monsanto was then involved in. The story repeated Monsanto's statement that Monsanto had a "vested interest in balanced, straightforward, and accurate media coverage of dioxin related matters." *Kemner*, 112 Ill. 2d at 227, 492 N.E.2d at 1331. The story also expressed Monsanto's concern that press reports would hurt its standing in the St. Clair County lawsuit, because the jurors may have read "some of the exaggerated NIOSH pronouncements." *Id.* The article stated in part:

> Monsanto Thursday released a 2 ½ page attack on the institutes [sic] announcement. Monsanto said the agency's assumptions were technically flawed, but also said it feared press reports would hurt its standing in a lawsuit stemming from Norfolk & Western Railroad derailment in Sturgeon, Missouri, on January 10, 1979.

*Kemner*, 133 Ill. App. 3d at 599, 479 N.E.2d at 324.

17. *Kemner*, 112 Ill. 2d at 227, 492 N.E.2d at 1331. Kemner filed a motion seeking to have Monsanto held in contempt of court, alleging that Monsanto was attempting to communicate with the jurors outside of the courtroom. *Id.* Kemner also sought to have the circuit court issue an order compelling Monsanto to refrain from "issuing any type of press release related to the subject matter of the trial during the time the case was being tried." *Id.*

18. Prior to the issuance of the permanent restraining order, the circuit court

the circuit court issued a "gag order"[19] against Monsanto.[20] The order prevented Monsanto from mentioning the case, trial, or its facts in any press release until final judgment was entered on the pending litigation.[21] The order also prohibited Monsanto from taking any action outside the courtroom which was calculated to, or which would be "reasonably foreseeable" to, influence any juror in the *Kemner* litigation.[22] Monsanto appealed the issuance of the circuit court or-

---

issued a ten-day temporary restraining order prohibiting Monsanto and its attorneys from making any "statements directed to the media which directly or indirectly mentioned the existence" of the then ongoing litigation. *Id.* at 228, 492 N.E.2d 1332. Monsanto contended that the prohibition against issuing any type of press release constituted an unconstitutional prior restraint of free speech as well as being vague and overbroad. *Id.*

A spokesman for Monsanto stated that the letter was not intended to be published in story form as a press release or that the statements be communicated to any juror in St. Clair County. *Id.* The spokesman further stated that the purpose of the letter was to "educate and sensitize" the media to the need for future balanced reporting on issues involving dioxin and that he had set out Monsanto's vested interest in insuring that dioxin news was reported accurately so as not to "taint our credibility with the press." *Id.*

At a hearing to decide whether or not to extend the restraining order, Kemner argued that through its "press releases" Monsanto was attempting to manipulate the local media so that news reports would thereafter be more favorable to Monsanto. *Id.* at 228, 492 N.E.2d at 1332. Kemner also alleged that Monsanto's letter was part of an ongoing scheme by Monsanto to influence the outcome of the trial. *Kemner*, 133 Ill. App. 3d at 599, 479 N.E.2d at 324. Monsanto's counsel assured the circuit court that Monsanto had no intention of mentioning the litigation further. *Id.* The circuit court then extended the temporary restraining order to April 2, 1984.

19. Black's Law Dictionary defines "Gag order" as a term referring to "an order by the court, in a trial with a great deal of notoriety, directed to attorneys and witnesses, to not discuss the case with reporters — such order being felt necessary to assure the defendant of a fair trial . . . and to orders of the court directed to reporters to not report court proceedings, or certain aspects thereof." BLACK'S LAW DICTIONARY 610 (5th ed. 1979). In *Kemner*, the Illinois Supreme Court used the term "Gag order" in referring to the injunctive order of the St. Clair County Circuit Court against Monsanto's free speech. *Kemner*, 112 Ill. 2d at 235, 492 N.E.2d at 1339.

20. On April 2, 1984, the circuit court concluded that Monsanto's reference to the *Kemner* litigation and its juror constituted a "serious and imminent threat to the administration of justice" and issued the following order:

> 1. Defendant Monsanto Company shall not in any press release, background statement, interview, publication or any other contact with the media, by any agent, servant, employee, attorney or independent contractor, mention this case or intimate its existence or its trial or any particular facts of circumstances or positions of parties concerning it until judgment is entered by this court. The term 'media' includes local, national and multi-national, print and electronic.
>
> 2. Defendant Monsanto Company is prohibited from taking any action outside this courtroom that is calculated to or is reasonably foreseeable to influence any juror in this cause.
>
> 3. Monsanto Company is in no way prohibited from engaging in the current national debate on dioxin apart from the specific restrictions attributable to the integrity of the administration of justice in this case.

*Kemner*, 112 Ill. 2d at 228, 492 N.E.2d at 1332.

21. *Id.*

22. *Id.*

der and the appellate court affirmed.[23]

On further appeal, the Illinois Supreme Court reversed the appellate court's decision.[24] The supreme court addressed the question of whether the circuit court order was a prior restraint on Monsanto's right to free speech.[25] The court also determined whether the order was overbroad or vague and whether any alternatives to the order existed.[26] The court found that the order was an impermissible prior restraint on speech, as well as overbroad and vague.[27]

---

23. *Kemner*, 133 Ill. App. 3d at 597, 479 N.E.2d at 322. On appeal, Monsanto alleged that the order constituted an impermissible prior restraint of its right of free speech in that it was entered without the necessary showing of threat to the administration of justice and was impermissibly overbroad. *Id.* at 598, 479 N.E.2d at 323.

The appellate court found that a sufficient "serious and imminent threat" to the administration of justice existed to justify the order, and that the order was not overbroad. *Id.* The appellate court further held that actual prejudice need not have occurred before the entry of the order and that the order was justified as a precautionary measure to preclude Monsanto from attempting to affect the trial outside the courtroom. *Id.* The appellate court found it significant that the Monsanto letter specifically referred to the *Kemner* case as its rationale for providing information to the press. Thus, the appellate court found that Monsanto's communication to the media represented an attempt to shape the jury's opinion, and ultimately its verdict, by means other than the presentation of evidence in court. *Id.* at 561, 479 N.E.2d at 326.

The appellate court further found that the comments which Monsanto directed toward the jurors were more pronounced because of the ongoing and protracted nature of the litigation and the fact that the jury was not sequestered. *Id.* The appellate court also held that the circuit court properly found that alternate measures were inappropriate to preserve the integrity of the proceeding before it. *Id.* at 562, 479 N.E.2d at 327. Specifically, the appellate court found that because the *Kemner* case did not involve pretrial publicity and therefore *voir dire* would prove ineffective at eliminating the effect of prejudice. *Id.* Also, the court found that the length of trial made it impractical to have a sequestered jury. *Id.*

24. *Kemner*, 112 Ill. 2d at 223, 492 N.E.2d at 1327.

25. *Id.* at 232, 492 N.E.2d at 1336. In *Kemner*, Monsanto also appealed the circuit court's denial of its motion to dismiss on the basis of *forum non conveniens*. *Id.* at 228, 492 N.E.2d at 1332. *See supra* note 11. The supreme court also addressed the issue of the appellate court's dismissal of this appeal. *Kemner*, 112 Ill. 2d at 228, 492 N.E.2d at 1332. The supreme court reversed the appellate court's dismissal of Monsanto's appeal and remanded the cause to the appellate court. *Id.* at 232, 492 N.E.2d at 1336.

26. *Id.* at 233-35, 492 N.E.2d at 1337-39.

27. *Id.* at 234-35, 492 N.E.2d at 1338-39. In concluding that the order constituted an impermissible prior restraint, the court relied on CBS Inc. v. Young, 522 F.2d 234 (6th Cir. 1975). In *CBS*, the owner and operator of a television and radio network sought to have a restraining order vacated. *Id.* The order restrained all parties to a civil suit from "discussing in any manner whatsoever" the cases with members of the news media or the public. *Id.* The Court of Appeals for the Sixth Circuit declared the order unconstitutional due to the absence of substantial evidence to establish that a "clear and imminent danger" to the fair administration of justice existed. *Id.*

In further support of its holding that a prior restraint existed, the *Kemner* court cited recent cases. The court cited: Nebraska Press Ass'n. v. Stuart, 427 U.S. 539, 559 (1976) (prior restraint on speech and publication is the most serious and least tolerable infringement on first amendment rights); Organization For A Better Austin v. Keefe, 402 U.S. 415, 419 (1971) (any prior restraint on expression bears a heavy presumption against its validity); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1962) (prior restraints come to the Supreme Court bearing a heavy presumption against

The supreme court began its analysis by noting that prior restraints on speech bear a heavy presumption against their validity.[28] The court held that unless the circuit court order fell within an exception to the prohibition against prior restraints, it would constitute an invalid prior restraint on Monsanto's right to free speech.[29] The court stated that such an exception exists where the conduct of the parties and their attorneys poses a "clear and present danger"[30] or a "serious and imminent threat" to the fairness and integrity of the trial.[31] Furthermore, the supreme court held that sufficient facts of a "clear and present danger" must exist in the trial court record before an order restraining speech will be upheld.[32] In *Kemner*, the

---

constitutional validity); Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 248 (7th Cir. 1975) (a prior restraint is a predetermined judicial prohibition restraining specific expression), *cert. denied*, 427 U.S. 912 (1976).

28. *Kemner*, 112 Ill. 2d at 232, 492 N.E.2d at 336. Any system of prior restraints bears a heavy presumption against its constitutional validity. *See, e.g., Nebraska Press*, 427 U.S. at 545 (order restraining news media held unconstitutional); Southeastern Promotions v. Conrad, 420 U.S. 546 (1975) (denial of the use of municipal facilities for the production of a play constituted an improper restraint); New York Times Co. v. United States, 403 U.S. 713 (1971) (order enjoining newspaper from publishing the contents of a classified historical study of Viet Nam policy held to be an unconstitutional restraint); *Organization For a Better Austin*, 402 U.S. 415 (1971) (an injunction against the peaceful distribution of informational literature held unconstitutional); Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175 (1968) (issuance of a ten-day injunction *ex parte* was incompatible with the freedom of speech provision of the first amendment); *Bantam Books*, 372 U.S. 58 (informal censorship by a youth commission held violative of the fourteenth amendment); Near v. Minnesota, 283 U.S. 697 (1931) (statute permitting suppression by injunction of business or defamatory newspaper periodical held void as infringement of the liberty of the press).

29. *Kemner*, 112 Ill. 2d at 323, 492 N.E.2d at 336. In order to withstand constitutional scrutiny, a restraint on speech must fit within one of the narrowly defined exceptions to the prohibition against prior restraints, and must have been accomplished with procedural safeguards that reduce the danger of suppressing constitutionally protected speech. *Southeastern Promotions*, 420 U.S. 546; *Bantam Books*, 372 U.S. 58.

30. The "clear and present danger" test originated in the case of Schenck v. United States, 249 U.S. 47 (1919). The doctrine is concerned with distinguishing protected advocacy from unprotected incitement of violent or illegal conduct. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 12-9 (1978) [hereinafter TRIBE]. For an in-depth analysis of the history and origins of the "clear and present danger test," see Beschle, *An Absolutism That Works: Reviving the Original "Clear and Present Danger Test,"* 1983 S. ILL. U.L.J. 127.

31. *Kemner*, 112 Ill. 2d at 232, 492 N.E.2d at 1336. The courts have used these two phrases interchangeably. The two phrases refer to the same test. *See Bridges*, 314 U.S. at 263. The *Bridges* Court stated that for a "clear and present danger" to exist the substantive evil must be extremely "serious" and the degree of "imminence" extremely high. For purposes of this casenote, the term "clear and present danger" will be employed to refer to both tests.

32. The Illinois Supreme Court held both the St. Clair County Circuit Court and the Appellate Court for the Fifth District in error on this point. *Kemner*, 112 Ill. 2d at 233, 492 N.E.2d at 1337. The court found no substantial evidence in the trial court record to justify the circuit court's conclusion that a "serious and imminent threat" to the fair administration of justice existed. *Id.* The court found it significant that the plaintiffs did not allege that any jurors saw or were influenced by the Belle-

supreme court stated that the plaintiffs failed to prove the requisite danger to the administration of justice because they did not present sufficient facts alleging that Monsanto's statement influenced any jurors.[33]

The *Kemner* court further held that the circuit court order was unconstitutionally overbroad because it curtailed both out-of-court speech which threatened a fair trial, as well as speech which did not.[34] Also, the court found it significant that the order did not specify, in an adequately clear fashion, what conduct and utterances were prohibited.[35] The court concluded that the "gag order" was incapable of interpretation and therefore had a chilling effect on Monsanto's protected speech.[36] In reaching its holding, the court reasoned that the "gag order" was unnecessary because alternatives to a prior restraint existed.[37]

In *Kemner*, the Illinois Supreme Court arrived at the correct holding for three reasons. First, the court's adoption and application of the "clear and present danger" test to "gag orders" in civil cases, achieves the proper balance between one litigant's right of free speech and the other's right to a fair trial.[38] Second, the *Kemner*

---

ville newspaper story. *Id.*

33. *Id.*

34. *Kemner*, 112 Ill. 2d at 234, 492 N.E.2d at 1338. Other jurisdictions have found similar orders to be overbroad. For example, the court in *CBS, Inc. v. Young* found an order restraining counsel, court personnel, the parties, and their relatives, friends, and associates "from discussing [the case] in any manner whatsoever with members of the news media or the public" to be overbroad. CBS, Inc. v. Young, 522 F.2d 234, 242 (6th Cir. 1975). *See also* Cooper v. Rockford Newspapers, 34 Ill. App. 3d 645, 339 N.E.2d 477 (1975) (order prohibiting a newspaper from writing editorials about the case it was party to); Chase v. Robson, 435 F.2d 1059 (7th Cir. 1970) (order enjoining speech of all parties to a pending criminal case).

35. *Id.* at 235, 492 N.E.2d 1339. Here, the court found the "gag order" to be unconstitutionally vague. In holding the order vague, the court relied upon Hirschkop v. Snead, 594 F.2d 356 (4th Cir. 1979). In *Hirschkop*, an attorney brought suit to challenge the constitutionality of certain Virginia Supreme Court rules relating to attorney comment about pending litigation. The district court found the rules constitutional and the court of appeals held certain provisions of the rule void for vagueness. *Id.* at 371.

36. *Kemner*, 112 Ill. 2d at 235, 492 N.E.2d at 1339.

37. *Id.* The court found that reasonable alternatives were available to the circuit court short of a prior restraint. *Id.* Specifically, the *Kemner* court held the circuit court's contempt power to be a potent alternative. *See generally* Shalkin Inv. Corp. v. Connelly, 128 Ill. App. 3d 518, 470 N.E.2d 1230 (1984) (power to punish for contempt is inherent and the courts may exercise discretion in fashioning appropriate remedies for a party's contumacious behavior); People v. Javaros, 51 Ill. 2d 296, 281 N.E.2d 670 (1972) (all courts have inherent power to punish for contempt as an essential incident to the maintenance of their authority and proper administration and execution of their judicial powers); Estate of Melody, 42 Ill. 2d 451, 248 N.E.2d 104 (1969) (generally, contempt of court is conduct calculated to embarrass, hinder or obstruct the court in its administration of justice or to derogate from its authority or dignity, or bring the administration of law into disrepute).

38. Because the "gag order" in *Kemner* restricted the speech of a litigant, the analysis on this point is limited to infringement of free speech rights of litigants as

court's holding properly ensures that before a litigant's right of free speech may be infringed, a substantial, not merely possible, threat to the administration of justice must exist.[39] Finally, the *Kemner* decision sets precedent for Illinois trial courts to narrowly draft orders restraining a civil litigant's speech so that the litigant's right to free speech will be stifled only in the most extreme cases.

The supreme court correctly held that a showing of a "clear and present danger" to the fair administration of justice, as opposed to a mere "reasonable likelihood"[40] of interference, must exist prior to the issuance of a judicial "gag order" in civil cases.[41] In balancing the conflicting constitutional rights of free speech and a fair trial, the court properly recognized that judicial restrictions on the speech of civil litigants requires the most demanding scrutiny.[42] Although no Illinois authority directly supports this proposition,[43] there is

---

opposed to the press generally. A distinction exists, however, between a litigant's out of court speech and the speech of the press. For example, the press is a non-party to an action. Therefore, the press should be afforded greater protection from first amendment restrictions than litigants. the free press/fair trial controversy, however, is closely related to the analysis in this casenote. *See generally* TRIBE *supra* note 30 §§ 12-11 (1978); Landan, *Fair Trial and Free Press: A Due Process Proposal, The Challenge of the Communications Media*, 62 A.B.A. J. 55 (1976) (burden of proof for restricting press coverage of the judicial process should be on the censor, not the censored); Younger, *Fair Trial, Free Press and the Man in the Middle*, 56 A.B.A. J. 127 (1970) (typical gag order in a criminal trial is directed toward the wrong parties); Comment, *KUTV v. Wilkinson: Another Episode in the Fair Trial/Free Press Saga*, 1985 UTAH L. REV. 739 (1985) (once trial has begun, measures short of a prior restraint should be the exclusive means of protecting the defendant's right to a trial by an impartial jury); Note, *Media Gag Orders: Enhancing Fair Trials or Impeding a Free Press?*, 26 ARIZ. L. REV. 933 (1984) (first amendment values sometimes conflict with, and are limited by the sixth amendment guarantee of the right to a fair trial).

39. The liberty of free speech is within the liberty safeguarded by the due process clause of the fourteenth amendment from invasion by state action. Near v. Minnesota, 283 U.S. 687 (1931).

40. The "reasonable likelihood" test was first enunciated in the case of United States v. Tijerina, 412 F.2d 661, 666-67 (10th Cir. 1969) *cert. denied*, 396 U.S. 990 (1969). *Judicial Restrictions on Attorneys' Speech Concerning Pending Litigation: Reconciling the Rights of Fair Trial and Freedom of Speech*, 33 VAND. L. REV. 499 (1980) [hereinafter *Judicial Restrictions on Attorneys' Speech*].

41. *Kemner*, 112 Ill. 2d at 233, 492 N.E.2d at 1337. For an analysis of the proper application of the "clear and present danger" and "reasonable likelihood" tests, see Note, *supra* note 4 (there is no constitutionally significant difference between the "reasonable likelihood of prejudice" standard and the "serious and imminent threat" standard); Note, *New Jersey Developments In re Hinds: New Jersey Establishes a Standard For Restricting Attorney Speech*, 35 RUTGERS L. REV. 661 (1983) [hereinafter Note, *New Jersey Developments*] (difference between the "clear and present danger" standard and the "reasonably likely" standard compared to the difference between probability and possibility); *Judicial Restrictions on Attorneys' Speech, supra* note 40 (author states that neither test, "reasonable likelihood" or "clear and present danger," will adequately resolve the extrajudicial comment question in the many situations in which it will inevitably arise). For an extensive list of law review articles debating the merits of the "clear and present danger" test and the "reasonable likelihood" standard, see Note, *New Jersey Developments supra* at 670.

42. *See infra* note 47.

43. In *Cooper, supra* note 6, the Illinois Appellate Court confronted a factual

well established precedent in other jurisdictions that supports the Illinois Supreme Court's adoption of the "clear and present danger" test in *Kemner*.[44]

For example, the courts in both *Chicago Council of Lawyers v. Bauer*[45] and *Ruggieri v. Johns Manville*[46] adopted the "clear and present danger" standard for scrutinizing speech restrictions in civil cases.[47] Both cases drew a distinction between the test to be applied in civil cases and that which should apply in criminal cases.[48] These

---

situation similar to that in *Kemner*, yet the court did not resolve the question of whether the "clear and present danger" standard or "reasonable likelihood" standard should apply. *Cooper*, 34 Ill. App. 3d 645, 339 N.E.2d 477.

44. *See, e.g., Chicago Council of Lawyers*, 522 F.2d 242 (7th Cir. 1975) (adopting "clear and present danger" standard to both criminal and civil trials); Chase v. Robson, 435 F.2d 1059 (7th Cir. 1970) ("clear and present danger" test applied to a criminal trial); Ruggieri v. Johns Manville, 503 F. Supp. 1036 (D.R.I. 1980) (adopting the "serious and imminent threat" standard to a civil case).

45. 522 F.2d 242 (7th Cir. 1975). In *Chicago Council of Lawyers*, an association of lawyers brought suit seeking declaratory relief and an injunction against the enforcement of a local criminal rule of the district court and a disciplinary rule of the American Bar Association proscribing extrajudicial comments of attorneys during both civil and criminal cases. *Id.* The District Court for the Northern District of Illinois dismissed the action. *Id.* The court of appeals held the ABA rules relating to extrajudicial comment during criminal cases were overbroad. *Id.* The court found the rule relating to civil cases to be unconstitutional as well. *Id.* For a more detailed discussion of *Chicago Council of Lawyers*, see Comment, *First Amendment Professional Ethics and Trial Publicity: What All the Talk is About-Chicago Council of Lawyers v. Bauer*, 10 SUFFOLK U.L. REV. 654 (1976) (the *Chicago Council of Lawyers* court determined that a fair trial and the due administration of justice could be achieved through a more narrow means than the reasonable likelihood standard); Note, *Chicago Council of Lawyers v. Bauers: Gag Rules—The First Amendment v. the Sixth*, 30 S.W. L.J. 507 (1976) (by rejecting the reasonable likelihood standard for use in gag rules, the Seventh Circuit departed from the apparent mainstream of authority regarding judicial restriction of participating lawyers' public expression); Note, *Trial Publicity — Speech Restrictions Must Be Narrowly Drawn, Chicago Council of Lawyers v. Bauer*, 54 TEX. L. REV. 1158 (1976) (*Bauer* court was justified in imposing a serious and imminent threat standard on the trial publicity rules of the Code of Professional Responsibility).

46. 503 F. Supp. 1036 (D.R.I. 1980). In *Ruggieri*, the district court denied the defendant's motion to disqualify an attorney for the plaintiff and to prohibit the attorney from making extrajudicial comments concerning the litigation. *Id.* The district court held that such an order could not be granted absent a basis for concluding that the conduct of plaintiff's attorney impacted on any potential jurors.

47. *Chicago Council of Lawyers*, 522 F.2d at 249; *Ruggieri*, 503 F. Supp. at 1040.

48. In drawing the distinction, the court of appeals, in *Chicago Council of Lawyers*, held that although the United States places prime value on providing a system of impartial justice to settle civil disputes, even greater insularity is required against the possibility of interference with fairness in criminal cases. 522 F.2d at 257; *accord Ruggieri*, 503 F. Supp. at 1039.

*See also* Hirschkop v. Snead, 594 F.2d 356 (4th Cir. 1979). *Hirschkop* also involved a challenge to a disciplinary rule regarding lawyers' speech of pending litigation. The court of appeals in *Hirschkop* held that the "reasonable likelihood" standard was sufficient for criminal cases. The court, however, held that the rule restricting speech of attorneys involved in civil litigation was unconstitutionally overbroad. *Id.* In arriving at its holding, the *Hirschkop* court discussed the differences between civil and criminal cases:

cases rejected the "reasonable likelihood" test.[49] In *Chase v. Robson*,[50] another case the *Kemner* court relied upon, the United States Court of Appeals for the Seventh Circuit applied the "clear and present danger" standard to a criminal proceeding.[51] This is significant because courts generally apply the "reasonable likelihood of interference with the administration of justice" standard to restrictions on speech in criminal trials.[52]

The "reasonable likelihood" standard is less restrictive and easier to satisfy than the "clear and present danger" test.[53] This lower standard of "reasonable likelihood" should be limited to use in criminal cases because in such cases the scale is balanced more in favor of a fair trial than of free speech.[54] The scale is so balanced because in criminal trials a person's liberty and freedom are in danger of suppression. The "reasonable likelihood" standard, however, is not appropriate for use in civil cases because an individual's freedom and liberty are not in jeopardy in such cases. Civil cases are also more lengthy and protracted than criminal trials. As a result, any

---

> Civil litigation is often more protracted than criminal prosecution because of broader civil discovery rules, the complexity of many civil controversies, and the priority given criminal cases. Thus it is not unlikely that the rule could prohibit comment over a period of years. . . . Civil actions may also involve questions of public concern such as the safety of a particular stretch of highway. . . . The lawyers involved in such action can often enlighten public debate. It is no answer to say that the comments can be made after the case is concluded, for it is well established that the first amendment protects not only the content of speech but also its timeliness.

*Id.* at 373. For additional cases adopting the "reasonableness likelihood" test in criminal trials, see generally United States v. Tijerina, 412 F.2d 661 (10th Cir. 1969), *cert. denied*, 396 U.S. 990 (1969); Younger v. Smith, 30 Cal. App. 3d 138, 106 Cal. Rptr. 225 (1973); *In re* Hinds, 90 N.J. 604, 449 A.2d 483 (1982).

49. *Chicago Council of Lawyers*, 522 F.2d at 249; *Ruggieri*, 503 F. Supp. at 1040.

50. 435 F.2d 1059 (7th Cir. 1970). In *Chase*, the defendants in a criminal trial challenged the constitutionality of a district court order prohibiting defendants and their attorneys from making any public statements in relation to a pending criminal case. *Id.* The court of appeals held that the order was constitutionally impermissible whether applying the "clear and present danger test" or the "*lesser standard*" of "reasonable likelihood." *Id.* at 1061. (emphasis added).

51. The *Chase* court stated:

> While we agree it is fundamental to our system of constitutional democracy that issues of law and fact in criminal proceedings be resolved in the courts, and not in the news media nor the streets, we believe equally fundamental to our system is the right of all citizens, even if they be criminal defendants to exercise their first amendment rights.

*Id.* 435 F.2d at 1061.

52. *See Hirschkop*, 594 F.2d at 362 (applying the "reasonable likelihood" standard to criminal jury trials). The *Hirschkop* court, however, distinguished criminal bench trials from jury trials and held that the rule prohibiting attorney speech at bench trials was unconstitutional. *Id.* at 371. *But see Chicago Council of Lawyers*, 522 F.2d at 242 (holding the "reasonable likelihood" standard unconstitutionally overbroad as applied to criminal trials).

53. *See, e.g., Chase*, 435 F.2d at 1061.

54. *See supra* note 48 for a discussion of the appropriate test for criminal cases.

speech restriction in a civil trial is of a longer duration than those in a criminal proceeding.[55] Thus, the more restrictive "clear and present danger" test is the appropriate standard for use in scrutinizing "gag orders" in civil cases.[56]

The court's reliance upon *Chase, Bauer,* and *Ruggieri*[57] and its

---

55. *See supra* note 48.

56. In civil cases, the only comment that can be proscribed is that which in some meaningful way is targeted to the case and which poses a "serious and imminent threat" to the trial. *Chicago Council of Lawyers*, 522 F.2d at 249 (applying the test to both civil and criminal cases); *Ruggieri*, 503 F. Supp. at 1040. A distinction exists, however, between protective orders restricting a civil litigant's out-of-court speech and orders restricting a litigant's dissemination of information learned through the pretrial discovery process. *See, e.g.*, Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984). In *Seattle Times*, a religious organization brought a defamation action against a newspaper. *Id.* The trial court issued a protective order during pretrial discovery preventing the Seattle Times from disseminating information relating to donations made to the plaintiffs as a religious group. The Seattle Times appealed this protective order. *Id.* at 27. The Supreme Court of Washington affirmed the order. *Id.* On further appeal, the United States Supreme Court held that because the trial court entered the order on a showing of good cause and was limited to the context of pretrial discovery, and did not restrict the dissemination of information gained from sources other than discovery, it was not violative of the first amendment. *Id.* at 37. In holding that a litigant does not have an unrestrained right to disseminate information that has been obtained through pretrial discovery, the court stated that "even though the broad sweep of the first amendment seems to prohibit all restraints on free expression, this court has observed that 'freedom of speech' . . . does not comprehend the right to speak on any subject at any time". *Id.* at 31 (citing American Communications Assn. v. Douds, 339 U.S. 382, 394-95 (1950)).

57. The earlier mentioned cases relied on by the *Kemner* court, involved restrictions on the speech of attorneys. The speech of an attorney in the course of litigating a case is analogous to the speech of Monsanto in *Kemner*. An attorney is the agent for a litigant and as such he speaks for his client. Therefore, no distinction should exist between the speech of an attorney speaking on behalf of his client and speech such as that of Monsanto in *Kemner*. Therefore, the Illinois Supreme Court was correct to rely on them. A distinction, however, should exist between the speech of trial participants and that of the press generally. *See supra* note 38. The order in *Chase*, 435 F.2d 1059, provided in pertinent part:

> Counsel for both the Government and the defendants, as well as each and every defendant herein, make or issue no statements, written or oral, either at a public meeting or occasion, or for public reporting or dissemination in any fashion, regarding the jury . . . the merits of the case, the evidence . . . the witnesses, or the rulings of the court.

*Id.* at 1060.

The restrictions scrutinized in *Chicago Council of Lawyers* and *Ruggieri* were those contained in the ABA Model Code of Professional Responsibility, specifically, DR7-107(G). The restrictions provided:

> A Lawyer or Law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation from or reference to public record, that a reasonable person would expect to be disseminated by means of public communication and that relates to:
>
> (1) Evidence regarding the occurrence or transaction involved.
>
> (2) The character, credibility, or criminal record of a party, witness, or prospective witness.
>
> . . . .
>
> (5) Any other matter *reasonably likely* to interfere with a fair trial or the action (emphasis added).

adoption of the "clear and present danger" standard follows established principles for the balancing of constitutional liberties.[58] When balancing competing constitutional guarantees, a court must first look to the evil sought to be prevented.[59] The extent of that evil must be given a value.[60] The value or extent of the evil sought to be prevented must then be weighed against the detriment which a constitutional liberty will suffer in an attempt to protect against the evil.[61] The evil sought to be prevented with the gag order in *Kemner* was an administration of justice unfair to the plaintiff.[62] In civil cases, an unfair administration of justice is not given a value as high as that in criminal cases.[63] In weighing the evil of an unfair trial sought to be protected in *Kemner*, the Illinois Supreme Court correctly held that very little impingement upon Monsanto's protected speech would be allowed in an effort to protect against the evil of an unfair administration of justice. The court thus correctly adopted the "clear and present danger" standard.

The supreme court also correctly reasoned that a "clear and present danger" to the fair administration of justice could not be established absent a showing of sufficient facts in the trial court record.[64] The mere likelihood that an evil will result is not enough to

---

*Chicago Council of Lawyers*, 522 F.2d at 264; *Ruggieri*, 503 F. Supp. at 1038. *But see* ILL. REV. STAT. ch. 110A, ¶ 7-107(f) (1985) (section pertaining to civil matters omits any mention of a prohibition against speaking on matters *reasonably likely* to interfere with a fair trial) (emphasis added).

58. *See* TRIBE, *supra* note 30, § 12-30; *Constitutional Assessment supra* note 4, at 1119. For a discussion of the first amendment and the right to a fair trial in a criminal context, see Note, *Attorney "Gag" Rules: Reconciling the First Amendment and the Right to a Fair Trial*, 1976 U. ILL. L. F. 763.

59. Reviewing courts should appraise out-of-court comment on a balance between the desirability of free discussion and the necessity for fair adjudication, free from interruption of its processes. Pennekamp v. State of Florida, 328 U.S. 331 (1946).

60. An unfair administration of justice in civil cases can be seen as a substantial evil. *See, e.g., CBS*, 522 F.2d at 234. Moreover, "[t]he theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Id.* (quoting Patterson v. Colorado, 205 U.S. 454, 462 (1907)).

61. *See* Craig v. Harney, 331 U.S. 367, 373 (1947) (the freedom of public comment should weigh heavily against a possible tendency to influence pending cases).

62. *Kemner*, 112 Ill. 2d at 232, 492 N.E.2d at 1336.

63. *Compare*, U.S. CONST. amend. VI (guarantee of an impartial jury in criminal cases) *with* U.S. CONST. amend. VII (guarantees only trial by jury in civil cases). *See also Ruggieri*, 503 F. Supp. at 1039 (greater insularity against the possibility of interference with fairness is required in criminal cases than civil cases).

64. *See, e.g.*, Wood v. Georgia, 370 U.S. 375 (1962). In *Wood*, the Supreme Court overturned a lower court contempt order based on the fact that no witnesses were presented at the contempt hearing and that no evidence was introduced to show that the publications of the defendant resulted in any interference or obstruction of the court or the work of the grand jury. *Id.* Freedom of speech should not be impaired through the use of a court's contempt power unless there is no doubt that the speech in question is a "serious and imminent" threat to the administration of justice. *Craig*, 331 U.S. at 373. Also, for circumstances to create a "clear and present

allow a restriction upon freedom of speech.[65] The evil must be serious, and the evil must be imminent.[66] Moreover, the party moving for a restraint has the burden of proving to the trial court a "clear and present danger" to the administration of justice.[67] The plaintiffs in *Kemner* needed to overcome the presumption of invalidity that a prior restraint carries.[68] They failed, however, to allege facts to prove that jurors had read and were influenced by Monsanto's reprinted statement to the press. Thus, they failed to link Monsanto's statement to any actual juror prejudice.

The appellate court incorrectly reasoned that the statement of Monsanto itself, as opposed to the effect of the speech, could constitute the "clear and present danger."[69] This reasoning is flawed. Such precedent would allow "gag orders" in many civil cases because most litigants have the potential to speak in a way which might adversely influence jurors. The Illinois Supreme Court recognized the defect in the appellate court's reasoning and corrected it.[70] The Illinois Supreme Court's conclusion on this point ensures that the threat or evil sought to be prevented will be substantial and not merely remote or probable.[71]

Additionally, the Illinois Supreme Court accurately found that the circuit court "gag order" was an overbroad prior restraint on Monsanto's right to free speech.[72] The repeated use of the term

---

danger" to judicial administration, a solidity of evidence should be required. *Pennekamp*, 328 U.S. at 331. *See also* Gulf Oil v. Bernard, 452 U.S. 89 (1981). In *Gulf*, the United States District Court for the Eastern District of Texas, entered an order in an employment discrimination suit which prohibited the parties and their attorneys from communicating with potential class members without court approval. *Id.* The Court of Appeals, en banc, held that the order constituted an unconstitutional prior restraint and reversed the order. *Id.* The Supreme Court affirmed the court of appeals, holding that the district court exceeded its authority in entering the order when the trial court record contained no grounds on which the district court could have determined that the order was necessary. *Id.* Furthermore, in *Cooper*, *supra* note 6, the Illinois Appellate Court held that there was not a sufficient showing of either a "clear and present danger" or a "reasonable likelihood" of interference which would justify the restriction placed on a litigant's speech. *Cooper*, 34 Ill. App. 3d at 649, 339 N.E.2d at 461.

65. The *Bridges* court, quoting from *Wood*, described the "clear and present danger" standard "as a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." Bridges v. State of California, 314 U.S. 252 (1941) (quoting *Wood*, 370 U.S. at 384).

66. *Bridges*, 314 U.S. at 262.

67. A restraint on speech creates a presumption of invalidity. *See supra* note 28.

68. *See supra* note 28.

69. *Kemner*, 133 Ill. App. 3d at 600-01, 479 N.E.2d at 1337. *See supra* note 23.

70. *Kemner*, 112 Ill. 2d at 233, 492 N.E.2d at 1337.

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

72. It has been generally, if not universally, considered that the chief purpose of the first amendment is to prevent previous restraints upon publication. *Nebraska Press Ass'n*, 427 U.S. at 539; *Near*, 283 U.S. at 687; Patterson v. Colorado, 205 U.S.

"any" in the circuit court order made the order extremely broad.[73] The order encompassed virtually everyone working for Monsanto, even independent contractors, as well as everything they said on behalf of the company.[74] Overbreath such as this prevents the affected party from speaking on a topic which should not have been included within the order.

Thus, it is necessary to narrowly draft any restraint on speech.[75] In this way speech which has no adverse effect on the administration of justice will not be stifled along with the targeted speech.[76] The overbreadth of the circuit court order was further compounded because the order was unnecessary.[77]

The Circuit Court of St. Clair County had other, less restrictive, means of protecting its judicial processes.[78] The circuit court should have relied upon its contempt power to ensure Kemner's right to a

---

454 (1907). It has been said that prior restraints are the essence of censorship. *Near*, 283 U.S. at 697. Moreover, prior restraints cause an irremediable loss of speech because the prevented speech cannot be replaced and is therefore forever lost to society. *Nebraska Press*, 427 U.S. at 609. "Prior restraints fall on speech with a brutality all their own. . . . It is the hypothesis of the First Amendment that injury is inflicted on our society when we stifle the immediacy of speech." *Id.* at 609 (Brennan, J., concurring) (quoting A. BICKEL, THE MORALITY OF CONSENT 61 (1975)).

*In Nebraska Press Ass'n v. Stuart*, the United States Supreme Court stuck down a restraining order as unconstitutional. Id. at 539. The order restrained the news media from publishing or broadcasting accounts of confessions or admissions made by the defendant. The *Nebraska Press Ass'n* Court stated that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Id.* at 561.

73. *See supra* note 20 for the text of the circuit court gag order.

74. *See supra* note 20 for the text of the circuit court gag order.

75. *See Chase*, 435 F.2d at 1061. Even in the presence of a sufficient justification, an order must be drawn narrowly so as not to prohibit speech which will not have an effect on the fair administration of justice along with speech which will have such an effect. *Id*; *See also Cooper*, 34 Ill. App. 3d at 650, 339 N.E.2d at 482. There is overwhelming support for the proposition that orders restraining the press or trial participants must be narrowly tailored to reach a compelling state interest. *See, e.g., Gag Orders: Enhancing Fair Trials or Impeding A Free Press?*, 26 ARIZ. L. REV. 933, 942 (1984) (citing Globe Newspaper Co. v. Norfolk, 457 U.S. 596 (1982)). Furthermore, "[e]ven though the governmental purpose is legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." United States v. Marcano Garcia, 456 F.Supp. 1354 (D.P.R. 1978) (quoting Shelton v. Tucker, 364 U.S. 479, 488 (1960)). *See also* TRIBE, *supra* note 30, § 12-30 (discussing overbreath in relation to less restrictive alternatives).

76. *Id.*

77. *See* Kemner v. Norfolk & Western Ry. Co., 133 Ill. App. 3d 597, 602, 479 N.E.2d 332, 327 (1985) (Karns, J., dissenting), *rev'd*, 112 Ill. 2d 223, 492 N.E.2d 1327 (1986). In dissenting from the appellate court's affirmance of the circuit court order, Justice Karns thought that the order was not necessary to ensure a fair trial. *Id.* He stated that the news release of Monsanto was not likely to recur, considering the assurance given by Monsanto's counsel. *Id. See supra* note 18.

78. *See* People v. Martin-Trigona, 94 Ill. App. 3d 519, 418 N.E.2d 763 (1980) (the power to punish for contempt is inherent in the court as an essential incident to the administration of judicial power); ILL. REV. STAT. ch. 38, ¶¶ 1-3. (1985) (power to punish for contempt is maintained in the courts).

fair trial.[79] This would have accomplished the same end as the restraining order, using less restrictive means. Prior restraints on speech are by their very nature overbroad because a court can never know with certainty when, how, or what type of speech the restraining order is prohibiting.[80] The Illinois Supreme Court's finding that the circuit court "gag order" was overbroad rests on sound constitutional and historical principles.[81]

In conclusion, the Illinois Supreme Court properly struck down the "gag order" which stifled Monsanto's constitutional right to free speech. The court correctly embraced the "clear and present danger" standard for use in scrutinizing "gag orders" which restrain the speech of litigants in civil trials. In *Kemner*, the supreme court properly found the "gag order" to be overbroad. Furthermore, the Illinois Supreme Court's decision in *Kemner* creates important precedent.[82] Through its holding in *Kemner*, the Supreme Court has established clear guidelines for trial courts to follow in this area of the law. Trial courts must now find a showing of facts in the record that a "clear and present danger" to the administration of justice exists, before the court may restrain a litigant's out-of-court statements. More importantly, the decision of the Illinois Supreme Court in *Kemner* properly limits the authority of trial court judges to issue orders restricting the speech of litigants involved in civil trials. In *Kemner*, the Illinois Supreme Court confronted the free speech/fair trial controversy and properly resolved the conflict.

*Thomas K. Pfister*

---

79. *See Kemner*, 133 Ill. App. 3d at 602, 479 N.E.2d at 327 (Karns, J., dissenting). Justice Karns stated that the circuit court order was unnecessary because any attempt by a party in a pending action by communicating with or attempting to influence the jury is a contemptuous act. *Id.* He further stated that such contemptuous acts may be punished by the court through the imposition of appropriate punishment and sanctions. *Id. See also* ILL. REV. STAT. ch. 38, ¶ 32-4 (1985) (it is a crime to communicate with jurors with the intent to influence such jurors directly or indirectly).

80. *See Southeastern Promotions*, 420 U.S. at 546.

81. *See* TRIBE, *supra* note 30, § 12-24; § 12-25; § 12-36. Also, the principle is well established that means which broadly stifle a liberty cannot be used to achieve a governmental purpose when less oppressive means can more narrowly achieve the end. *See, e.g.*, Shelton v. Tucker, 364 U.S. 479, 488 (1960); *Chicago Council of Lawyers*, 522 F.2d at 249. Prior restraints punish an individual before he breaks the law. It is, however, preferable to punish individuals after they have broken the law rather than to stifle their speech prior to its dissemination. *See Southeastern Promotions*, 420 U.S. at 559. It is always hard to know in advance what an individual will say, and the line between legitimate speech and illegitimate speech is often so finely drawn that the risks of free-wheeling censorship are formidable. *Id.* For an in-depth analysis of prior restraints versus subsequent punishment, see Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11 (1981) (the personalized nature of prior forms of regulation helps explain why these are thought to cause more self-censorship than the subsequent punishment regimes).

82. *See supra* note 6.