Judge Wright and the First Amendment

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I

It is a short and simple gospel, the faith that free speech means that speech shall be free. The founding fathers gave that original summons to the faithful two centuries ago. By the time the call reached the courts, a century and a half had passed, and the words had become strangely muted with time.[1]

The twentieth century brought new prophets to an old faith. During the first third of this century, the judicial sages were Holmes, Brandeis, and Learned Hand. In the period between 1940 and 1980, Holmes and Brandeis departed and Hand became an heresiarch.[2] But new figures have come forward, among them J. Skelly Wright. If Justice Black was the philosopher of free speech and Justice Douglas its historian, Judge J. Skelly Wright is its broken field runner. Without the freedom of a high court judge to brush aside his obstacles, and without a single completely like-minded colleague, he has darted and twisted and turned, leaping over every obstruction to advance the ball.

Wright routinely faces free speech problems infinitely more sophisticated and far-reaching than those confronting his predecessors. Holmes' finest hour came in a case involving a tiny group of persons conspiring to print 5,000 leaflets principally distributed by being thrown out of a window.[3] Brandeis did his best for a Miss Whitney in a case in which she, though a member of something called the Communist Labor Party, had not personally done anything.[4] These are classic cases of a challenged right to make insignificant communications with-

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1. For a close analysis of the evolution of the free speech concept from Lockian idealism to Jamesian pragmatism, see Frank, *Bill of Rights: Physics, Idealism and Pragmatism*, in CONSTITUTIONAL GOVERNMENT IN AMERICA 475 (R. Collins ed. 1979).

2. *See, e.g.*, United States v. Dennis, 183 F.2d 201 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1950).

3. Abrams v. United States, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

4. Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

out meaningful accompanying activity to a small group of people. These cases concern brave, possibly foolish, but certainly infinitesimal communication.

Wright, on the other hand, copes with audiences in the millions and their right to hear. Most cases involving regulatory agencies such as the Federal Communications Commission are ordinarily reviewed in Wright's court and rarely go before the Supreme Court. When Congress prohibited cigarette advertising on the air, for instance, Wright dissented from a majority which held the statute valid.[5] The ads in question were distributed nationwide, costing millions of dollars; the challenged speech was by major corporations, and was heard nationwide.

Wright wishes to let the world know that he is no friend of the Marlboro Man or the Salem Girl, who are really "seductive merchants of death."[6] The First Amendment, however, "does not protect only speech that is healthy or harmless."[7] As his court had previously held that cigarette advertising "states a position on a matter of public controversy," such advertising is within the core protection of the First Amendment.[8] He regards the prohibition on cigarette advertising as a coup for the cigarette industry, for under earlier decisions of his court, stations which carried cigarette advertising were required under the Fairness Doctrine to "present a fair number of anti-smoking messages."[9] The net effect was a reduction in cigarette consumption. The very success of such anti-cigarette advertising "frightened the cigarette industry into calling on Congress to silence the debate."[10] Judge Wright found this antithetical to the principles underlying the First Amendment: "The theory of free speech is grounded on the belief that people will make the right choice if presented with all points of view on a controversial issue."[11]

5. Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582, 587 (D.D.C. 1971) (Wright, J., dissenting), *aff'd*, 405 U.S. 1000 (1972).

6. *Id.* at 587.

7. *Id.*

8. *Id.* Wright long anticipated the Supreme Court's new position on commercial speech in the First Amendment in this and other cases.

9. Banzhaff v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

10. Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582, 590 (D.D.C. 1971) (Wright, J., dissenting).

11. *Id. See* A. MEIKLEJOHN, POLITICAL FREEDOM 26-28 (1960); Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 881 (1963). I return to this theoretical base in the last section of this essay, noting now merely that this cockeyed optimism is a fragment of the belief that evolution is ever upward, without retrograde mutation. I do not know that Wright has ever dealt with Mill's observation of the "idle sentimentality that the

Wright engaged in the most complicated kind of free speech analysis when reviewing FCC rules which prohibit pay exhibitions of feature films that are more than three, but less than ten years old on television, and concerning related restrictions on commercial advertising.[12] Fifteen cases dealing with facets of this problem were consolidated.[13] The free speech portion of the opinion is clearly Wright's. The opinion finds the rules invalid as to pay cable but not necessarily invalid as to subscription broadcast television.[14] Wright accepts the observation of Professor Meiklejohn that "rules restricting speech do not necessarily abridge freedom of speech."[15] He draws explicitly from Meiklejohn for the proposition that "regulations which transform cacophony into ordered presentation" may be consistent with the First Amendment in the sense that the hearers cannot comprehend unless each speaker speaks in turn.[16] Nonetheless, restrictions on speech are presumptively invalid, and as to pay cable, the "no advertising" rule serves no "important or substantial . . . interest."[17] On the other hand, a series of specialized restrictions as to subscription broadcasts were upheld.[18]

Another Wright opinion concludes that the FCC may prohibit the makers of Listerine from proclaiming the medicinal virtues of a product which is really not very beneficial to sufferers of colds or sore throats, and may also require corrective advertising which states that the product does not have the advertised curative effects.[19] On the other hand, Wright does not accept the requirement that the corrective advertising carry language "contrary to prior advertising," as such would constitute a needless humiliation.[20] But to do less than to require corrective advertising would mean that any advertiser could deceive as long as he wished and be secure in the knowledge that, at worst, he could only be ordered to stop. The Supreme Court has

truth, merely as truth, has any inherent power denied to error." J.S. MILL, ON LIBERTY, *quoted in* R. FRASER, THE DARK AGES AND THE AGE OF GOLD 45 (1973).

12. Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977).

13. *Id.* at 17. Wright's position on a court which must review reactions of administrative agencies has led to his intense interest in that subject. *See, e.g.*, Wright, *Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375 (1974); Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575 (1972).

14. 567 F.2d at 13-15.

15. *Id.* at 46.

16. *Id.*

17. *Id.* at 49-50.

18. *Id.* at 59-60.

19. Warner-Lambert Co. v. FTC, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978).

20. 562 F.2d at 763.

aligned itself with Wright's earlier views on commercial speech, and such restrictions have become current Supreme Court policy.[21]

In yet another FCC case, Judge Wright invalidated an agency requirement that compelled all noncommercial educational radio and television stations receiving federal funding to make audit records of all broadcasts "in which any issue of public importance is discussed" available to the Commission and others.[22] The matter could have been approached on First Amendment or equal protection grounds, but Wright was able to obtain a majority only on the latter basis.[23] The court split five to four, three judges agreeing on First Amendment and equal protection grounds, two on equal protection grounds, and four dissenting.[24] The First Amendment question addressed the substantial burden placed on noncommercial broadcasts, the risk of direct governmental interference in program content, and the absence of any readily apparent public interest; the court concluded that any classification having such an impact must be "narrowly tailored to serve" the public interest.[25]

In each of these cases, Wright is dealing with the communications industry, with giant businesses and giant audiences. None of these cases have any special political significance; all are fundamentally problems in commercial communications. This is not to suggest that Judge Wright does not hear the old-line cases as well. A classic problem involves telephone company records of personal communications.[26] The question is whether and to what extent these records may be made available to law enforcement authorities or used directly in connection with criminal prosecutions. A reporter's committee sued AT&T for a determination that its phone records could not be turned over "without prior notice to subscriber." The committee lost. The majority emphasized the fact that the disputed records gave only the information that a call had been made from one number to another; the content of the conversation was not revealed.

However, the very fact of communication does reveal a reporter's sources. A string of calls to his wife may simply relate to the domestic

21. *Id.* at 762.

22. Community-Service Broadcasting v. FCC, 593 F.2d 1102, 1103 (D.C. Cir. 1978).

23. *Id.* at 1103-04.

24. *Id.* at 1104.

25. *Id.* at 1122-23.

26. Reporters Comm. v. AT&T, 593 F.2d 1030 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 949 (1979). An unrelated speech-press-fair trial problem is trial news coverage. While it has not cropped up in Wright's cases, it appears in his general writing; see Wright, *A Judge's View: The News Media and Criminal Justice*, 50 A.B.A.J. 1125 (1964); Wright, *Fair Trial-Free Press*, 38 F.R.D. 435 (1965).

scene, but a series of calls to a staff member of a public official, or even an isolated call, in context, may reveal a source. The issue, as Judge Wright noted in an extensive dissent,[27] is whether the confidentiality of the reporter's sources is entitled to any constitutional protection. "First Amendment rights to gather and disseminate news," he argued, "are implicated when the confidentiality of their sources is threatened."[28] He found that this "wholesale disclosure" would turn up "the names of all the sources with whom the reporter has communicated, many of whom may be individuals who bear no relation to *any* potential criminal investigation and thus would never be subject to disclosure through grand jury proceedings."[29]

The publication cases have occupied much of Wright's attention. In most cases, as a matter of personal style, he writes strongly and with conviction. In the *Pentagon Papers* case,[30] he wrote with unusual passion. That case moved from the normal panel of three to an *en banc* proceeding within twenty-four hours, but Wright was on the first panel and there dissented from the order of the majority which permitted an injunction "for the shortest possible period" to let the government substantiate its claim for a preliminary injunction:

> This is a sad day for America. Today, for the first time in the two hundred years of our history, the executive department has succeeded in stopping the presses. It has enlisted the judiciary in the suppression of our most precious freedom. As if the long and sordid war in Southeast Asia had not already done enough harm to our people, it now is used to cut out the heart of our free institutions and system of government. I decline to follow my colleagues down this road and I must forcefully state my dissent.[31]

According to Wright, *Near v. Minnesota*,[32] with its severe and almost total restriction on prior censorship of the press, was controlling in the *Pentagon Papers* case. He acknowledged that there were "some prospective harms which might conceivably justify a prior restraint on speech or press," citing as examples from *Near* the publication of the sailing dates of transports and the number and location of troops; but Wright insisted that "[a]ll of the presumptions must run in favor of free speech, not against it," and placed the burden on the government to show "substantial and specific injury sufficient to override strong First

27. Reporters Comm. v. AT&T, 593 F.2d 1030, 1079 (D.C. Cir. 1978).
28. *Id.* at 1082.
29. *Id.* at 1085.
30. United States v. Washington Post Co., 446 F.2d 1322 (D.C. Cir. 1971).
31. *Id.* at 1325.
32. 283 U.S. 697, 713 (1931).

Amendment interests."[33] Here, no such injury was shown. Wright put it bluntly: the label "top secret" is not enough, for "to allow a government to suppress free speech simply through a system of bureaucratic classification would sell our heritage far, far too cheaply."[34] A day later the full court, also following *Near v. Minnesota*, refused to issue an injunction.[35] The Supreme Court reached the same conclusion shortly thereafter.[36]

Wright has heard his share of libel cases, and controversial Washington columnist Drew Pearson was more than once before his court as a defendant. In *Washington Post Co. v. Keogh*,[37] Pearson's statement was false, but the defense prevailed on the ground that the record raised no genuine issue of fact as to actual malice. Wright, writing for a divided court, addressed the practical problems of verification, "a time-consuming process, a factor especially significant in the newspaper business where news quickly goes stale, commentary rapidly becomes irrelevant, and commercial opportunity in the form of advertisements can easily be lost. In many instances considerations of time and distance make verification impossible."[38] It is, he added, a costly process, and insistence upon it would result in "self-censorship."[39] He applauded columnists who "seek and often uncover the sensational, relying upon educated instinct, wide knowledge and confidential tips. Verification would be certain to dry up much of the stream of information that finds its way into their hands."[40] He would trim malice back to deliberate publication of that which is known to be false, imposing almost no duty to determine truth or falsity.[41] On this

33. United States v. Washington Post Co., 446 F.2d 1322, 1325-26 (D.C. Cir. 1971).

34. *Id.* at 1326.

35. United States v. Washington Post Co., 446 F.2d 1327 (D.C. Cir. 1971).

36. United States v. Washington Post Co., 403 U.S. 943 (1971).

37. 365 F.2d 965 (D.C. Cir. 1966).

38. *Id.* at 972.

39. *Id.* Wright is keenly attuned to the reality that the expense of litigation may cause persons to abandon what may be legitimate First Amendment rights. This highly practical concept receives an unusual application in Reed Enterprises v. Corcoran, 354 F.2d 519 (D.C. Cir. 1965), in which Congress had altered the venue statute for the mailing of obscene materials so that a criminal action for the offense might be brought in the state of origin, the state of delivery, or any state through which the material passes. The validity of the statute was not at issue; at issue was the publisher's right of access to a three-judge court to challenge the statute. On holding that access was appropriate, Wright linked the special considerations applicable to claimed First Amendment rights, on the one hand, with the disastrous effect of multiple defenses through normal criminal prosecutions, on the other.

40. 365 F.2d at 972.

41. *Id.* Judge Wright's application of New York Times Co. v. Sullivan, 376 U.S. 254 (1964), will result in very few libel verdicts. He believes that, even where public officials are not involved, a judge should rule as to actual malice on summary judgment; that the judge

point his is a lone position on his court.

In two other Drew Pearson cases, Judge Wright dealt with purloined papers.[42] In the more important of the two, *Pearson v. Dodd*, an employee of Senator Dodd of Connecticut had taken papers from the senator's office, copied and returned them. Pearson then used them. Addressing first the question of claimed invasion of privacy, Judge Wright found that since the papers "clearly bore on appellee's qualifications as a United States Senator," there was no privacy claim.[43] He fully recognized tort liability for intrusions such as bugging a dwelling or tapping a phone or snooping through windows, but he would not recognize liability for receiving the information:

> A person approached by an eavesdropper with an offer to share in the information gathered through the eavesdropping would perhaps play the nobler part should he spurn the offer and shut his ears. However, it seems to us that at this point it would place too great a strain on human weakness to hold one liable in damages who merely succumbs to temptation and listens.[44]

Where a wiretap is involved, though, Wright has firmly protected the privacy of the person tapped.[45] In the case of *New York Times*

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should rule a second time at the end of plaintiff's case; that the judge should rule a third time before submission of the case to the jury; and that if actual malice is proposed to the judge's satisfaction all three times, the matter should then go to the jury, which in turn should decide whether there is actual malice. Wasserman v. Time, Inc., 424 F.2d 920 (D.C. Cir. 1970). A libel which passes the test four times will have to be some libel!

42. Liberty Lobby, Inc. v. Pearson, 390 F.2d 489 (D.C. Cir. 1968) and Pearson v. Dodd, 410 F.2d 701 (D.C. Cir. 1969), *cert. denied*, 395 U.S. 947 (1969). *Liberty Lobby* involved wrongfully acquired source material, but there was no evidence of complicity between the thief and the columnist.

43. 410 F.2d at 703.

44. *Id.* at 705. Judge Tamm, reluctantly concurring, made sharp comment: "Conduct for which a law enforcement officer would be soundly castigated is, by the phraseology of the majority opinion, found tolerable; conduct which, if engaged in by government agents, would lead to the suppression of evidence obtained by these means, is approved when used for the profit of the press." *Id.* at 708 (Tamm, J., concurring).

45. Wright is keenly sensitive to the interplay between the First and Fourth Amendments. One of his opinions for the court, sitting *en banc*, is Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975). The case involved warrantless wiretaps by the Attorney General and the FBI of the Jewish Defense League (JDL), an extremist group that was embarrassing the United States in its aspirations toward detente with the Soviet Union. The administration claimed the right to undertake surveillance without a warrant on the theory that it related to foreign intelligence gathering. Judge Wright, closely following United States v. United States Dist. Court (Plamondon), 407 U.S. 297 (1972), held that this wiretap of a purely domestic organization could not be allowed without a warrant, and the opinion broadly suggests that no warrantless wiretap will be sustained. The practice, which could be traced back to President Franklin Roosevelt, was found unpardonable regardless of precedent, and his recitation of gross abuses in both the Kennedy and Nixon administrations is hair-raising. See 516 F.2d at 635-36. The opinion asserts that "[t]o allow the Executive Branch to make its own determinations as to such matters invites abuse, and public knowledge that such

reporter Hedrick Smith against President Nixon and various other officials,[46] and in the related case of Halperin against Secretary Kissinger and others,[47] reporter Smith's home telephone was tapped as part of an effort to identify employees who were disclosing confidential government information. Wright found that there was no record of justification for the tap. While Smith, as a newspaperman, had no "special legal privileges by dint of" that work, there remained the legitimate "First Amendment interests of all of the appellants in not having their private conversations overheard by the Government."[48]

Since the matter does not depend upon the employment of the individual, the same result is reached in *Halperin*: "Without vigilant protection of a private space in which each citizen is free to pursue his own ideas and aspirations, we would betray our vision of a society based on the dignity of the individual."[49]

Regarding the executive privilege and immunity issue, Judge Wright was willing to assume that the executive must retain some special powers as to national emergencies, but these "must be limited to instances of immediate and grave peril to the nation."[50] Otherwise the executive is limited to the powers "enumerated in the Constitution or provided by law."[51]

Judge Wright was capable of tart comment on the Viet Nam War and his sympathy for protesters was reflected in his constitutional doctrine. Wright felt that the White House and the Capitol ought to be the focus of the right of petition because they are the symbols of the center of government. In *Women Strike for Peace v. Morton*,[52] the court held invalid a prohibition on antiwar displays in the Ellipse, a park area surrounding the Washington Monument and adjacent to the White House.[53] Wright's colleagues were prepared to uphold the right to make the display on equal protection grounds.[54] Wright wished to go

abuse is possible can exert a deathly pall over vigorous First Amendment debate on issues of foreign policy." *Id.*

46. Smith v. Nixon, 606 F.2d 1183 (D.C. Cir. 1979).

47. Halperin v. Kissinger, 606 F.2d 1192 (D.C. Cir. 1979).

48. Smith v. Nixon, 606 F.2d at 1190.

49. Halperin v. Kissinger, 606 F.2d at 1200.

50. *Id.* at 1201.

51. *Id.*

52. 472 F.2d 1273 (D.C. Cir. 1972).

53. Wright also wrote a concurring opinion on the same problem in Women Strike for Peace v. Hickel, 420 F.2d 597, 604 (D.C. Cir. 1969), but the case under discussion above, *Women Strike for Peace v. Morton*, is one of his most important theoretical analyses of free speech.

54. 472 F.2d at 1304.

further: in a lone opinion he stressed the First Amendment right to demonstrate "as close as possible to the seat of government" under the petition clause.[55]

The challenged demonstration in this instance was an antiwar display portraying tombstones, and he found it similar to other forms of symbolic speech that have been permitted.[56] His problem was difficult: "[T]he law relating to communicative conduct has developed to the point where a full reconciliation of all the cases is no longer possible."[57] Nonetheless, he found this case to fall within "a hard core of shared premises,"[58] one of them being that a "public gathering" is necessary to invoke the protection of the First Amendment.

In another demonstration case, Representative Dellums of California and nine other persons brought suit seeking to represent a class of all persons arrested on the steps of the Capitol on May 5, 1971, during a protest against the Viet Nam War.[59] During the demonstration, in which at least two members of Congress participated, the police cordoned off the bottom of the steps and made large-scale arrests. Those arrested were held for periods of from several hours to several days. Plaintiffs claimed $7500 in damages for violation of their First Amendment rights.

Judge Wright declared that the plaintiffs had a cause of action for violation of their First Amendment rights and that the infringement of those rights was "directly attributable to the arresting officers."[60] The officers were held to have directly violated the First Amendment rights of Representative Dellums; his audience "was arrested, thereby preventing him from speaking to them."[61] Removing the audience is a harm "as great as if the speaker had himself been silenced."[62] Judge Wright did not allow money damages, however; no out-of-pocket loss was shown.

Judge Wright was aware, however, that a demonstration can become a riot. This happened in the aftermath of the Martin Luther King assassination in 1968. Burnings, lootings and vast numbers of arrests followed, with persons charged under the District of Columbia anti-riot

55. *Id.* at 1287.
56. *Id.* at 1274, 1287-88.
57. *Id.* at 1280.
58. *Id.* at 1281.
59. Dellums v. Powell, 566 F.2d 167 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978); 566 F.2d 216 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978).
60. 566 F.2d at 195.
61. *Id.*
62. *Id.*

statute for engaging in "tumultuous and violent conduct." Wright's dissent[63] from the opinion affirming convictions under the District of Columbia anti-riot statute[64] frankly faces the problem: "It would blink reality not to realize that what begins as a political or social demonstration may end violently, and the violence may come from some of the demonstrators, from counter demonstrators, or from officials."[65] While he had no doubt but that society could suppress and punish violence, he found it very necessary to "focus precisely and exclusively on violent conduct and on its perpetrators and not beyond."[66]

In another Viet Nam era case, the defendant said that he would refuse induction into the armed services and declared: "If they ever make me carry a rifle the first person I want in my sights is LBJ."[67] His conviction for threatening the life of the President was affirmed, with Wright dissenting.[68] Because speech conveys ideas, he said, specific intent should be required.[69] Wright criticized cases in which persons were convicted for saying words "meant as jest, as rhetoric, or as hyperbole," and he observed that "the label 'threat' does not preclude First Amendment protection any more than do the labels 'obscenity' or 'libel'."[70]

In *Avrech v. Secretary of Navy*,[71] the defendant, while in service in Viet Nam, made remarks highly critical of the war. He contended that the South Vietnamese should be more active in defending themselves and criticized the slow progress of the peace talks. The military court's instruction on free speech did not require that the particular statement create a clear and present danger; it merely required a determination as to whether statements such as this were protected by the First Amendment.[72] The Court of Appeals found that the First Amendment issue was not properly adjudicated before the military tribunal.[73] Judge Wright believed that the instruction was "100% wrong" and that the

63. United States v. Matthews, 419 F.2d 1177, 1186 (D.C. Cir. 1969) (Wright, J., dissenting).

64. 22 D.C. CODE ANN. § 1122 (1973 & Supp. V 1978).

65. 419 F.2d at 1188.

66. *Id.*

67. Watts v. United States, 402 F.2d 676 (D.C. Cir. 1968), *rev'd*, 394 U.S. 705 (1969). On this one, the commentator cannot even maintain a feigned neutrality. I cannot conceive how Wright could have failed to persuade his colleagues here; the distance from blather to bullet is so ludicrously great that the biggest surprise is why the case was ever brought at all.

68. 402 F.2d at 686.

69. *Id.* at 691.

70. *Id.* at 690.

71. 520 F.2d 100 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 970 (1976).

72. 520 F.2d at 104 n.11.

73. *Id.* at 104-05.

speech was protected unless it did create a clear and present danger.[74] This decision was reached well after the war was over, and Wright, in calling for a new trial, concluded, "[n]ow that [the defendant] has been proved right, rather than disloyal, it is the least that should be done."[75]

Wright's opinions also reach conventional problems of legislative power. When a witness before a congressional committee refused to answer questions about his affiliation with a communist party and was held in contempt, Judge Wright held that the subpoena was improperly issued because the chairman alone did not have the authority to issue it.[76]

More unusual was a suit to enjoin publication and distribution of a congressional committee report on the district school system.[77] The report contained the names of school children and complaints concerning them, including a recital of failing grades, and disciplinary letters regarding sexual misconduct, vulgar behavior and vandalism. There was no issue as to the right of Congress to look into these matters; the sole issue was the right to privacy of the particular individuals involved.

The majority held that no constitutional right was infringed by the publication, and Judge Wright dissented.[78] He regretted the "disheartening callousness to the legitimate interests of appellant children."[79] Stressing the fact that these students were required to attend school and the fact that they were not public figures, Wright observed that they would be branded by this report in a manner that would seriously hamper their future employment.[80] Wright enthusiastically followed the Supreme Court's view[81] that legislative committees may not "expose for the sake of exposure."[82]

74. *Id.* at 107. The Supreme Court has taken a much more restrictive view of freedom of expression in the armed services. *See* Brown v. Glines, 444 U.S. 348 (1980), and cases cited therein; Justice Brennan, dissenting, is, as usual, closer to Judge Wright's view than any of the other judges. *Id.* at 361.

75. 520 F.2d at 108.

76. Liveright v. United States, 347 F.2d 473 (D.C. Cir. 1965). Judge Wright also used the device of giving strict and narrow interpretation to the procedures by which a congressional committee could subpoena a witness in order to hold that a newspaperman, and one quite possibly called by utter mistake by a member of the committee staff, was not in defiance by virtue of his answers especially since he had not been properly called in the first place. The avoidance of the "delicate area of First Amendment freedoms" warranted the rigidity of construction. Shelton v. United States, 327 F.2d 601, 605 (D.C. Cir. 1963).

77. Doe v. McMillan, 459 F.2d 1304 (D.C. Cir. 1972), *rev'd in part, aff'd in part, and remanded*, 412 U.S. 306 (1973).

78. 459 F.2d at 1319 (Wright, J., dissenting).

79. *Id.* at 1320.

80. *Id.* at 1327.

81. Watkins v. United States, 354 U.S. 178, 200 (1957).

82. Shelton v. United States, 404 F.2d 1292, 1307 (D.C. Cir. 1968), *cert. denied*, 393 U.S.

Wright's free speech positions have frequently pushed back the parameters of First Amendment protection. Three colorful cases illustrate:

1. In one of his dissents Wright wrote that a federal employee who made a false statement on an official form concerning past Communist associations should not have been subject to discharge; Wright argued that the employee "used the only means available to protect himself against an unconstitutional assertion of government power."[83] Relying heavily upon *Baird v. State Bar of Arizona*,[84] he reminded his brethren that the employee could not have been punished had he declined to answer at all; since the state had no "need to know" in the first place, it had "no constitutionally legitimate interest in a correct answer."[85] Granting that it would have been better had the applicant "forthrightly challenged the questions asked him and courageously stood on his rights,"[86] Judge Wright asserted that First Amendment rights are not limited to the courageous: "We need a Constitution because there are also ordinary people in this country who, while more easily intimidated, are still entitled to political freedom."[87]

1024 (1969). In this case Wright recognized the right of a political organization (the Ku Klux Klan) to protect its membership list. In this particular case, the right was not upheld only because it was not timely raised and because its belated assertion appeared to be a cover to avoid the revelation of other perfectly proper material.

83. Rodriguez v. Seamans, 463 F.2d 837, 843 (D.C. Cir. 1972) (Wright, J., dissenting), *cert. dismissed*, 409 U.S. 1094 (1972).

84. 401 U.S. 1 (1971).

85. 463 F.2d at 849.

86. *Id.* at 852.

87. *Id.* at 853. In *Rodriguez* the falsehood was immaterial because the question itself was improper. On the other hand, where the question is perfectly proper, then full consequences follow from a falsehood. See Robinson v. FCC, 334 F.2d 534 (D.C. Cir. 1964), in which an applicant for a radio station license who made misrepresentations was summarily denied the license on that ground alone. Judge Wright also joined in denial of another renewal where the licensee's programming plans were found to have been misrepresented to the Commission; see Brandywine-Main Line Radio, Inc. v. FCC, 473 F.2d 16 (D.C. Cir. 1972). The case deserves passing mention as a phenomenon occurring from time to time in the District of Columbia Circuit, illustrating the perfectly amazing capacity of the court to get itself all tangled up. In the *Brandywine* case, Judge Tamm wrote a very able forty-page opinion upholding refusal of the license on multiple grounds, including violation of the Fairness Doctrine, violation of the "personal attack principle," and misrepresentation. Judge Wright concurred in less than a page, *id.* at 62. On the one hand Wright praised the opinion of Judge Tamm and, on the other, he noted that he was "not necessarily in agreement" with all the details, and therefore he rested his conclusion on the misrepresentation argument. Judge Bazelon concurred in a word on the misrepresentation ground, reserving his opinion for a later date, *id.* at 63. Thereupon, having concurred, Judge Bazelon dissented, *id.* Judges Wright and Tamm then filed a "response" to the dissent from the concurrence, *id.* at 80. As is illustrated elsewhere in this review, there are days in the District of Columbia Circuit when earnestness vanquishes judgment.

2. In another case Judge Wright held that routine dissemination of arrest records in the District of Columbia to the FBI was prohibited by a District of Columbia ordinance.[88] None of the persons involved had been convicted. While Judge Wright had "severe doubts about the constitutionality of this practice," the court ultimately rested its decision on a District ordinance which was found to prohibit such a sweeping invasion of privacy.[89]

3. Finally, in a third case, Wright held that a tenant may not be evicted in retaliation for reporting housing code violations, even though under a District of Columbia statute on eviction,[90] a landlord was free to evict a month-to-month tenant "for any reason or for no reason at all."[91] In *Edwards v. Habib*, Wright held that "[a] state court judgment, . . . even by adjudicating private lawsuits, may unconstitutionally abridge the right of free speech as well as the right to equal protection of the laws,"[92] even though, as he held in another part of the opinion, reporting violations of law cannot be upheld as a matter of statutory construction.[93] One of his two colleagues dissented,[94] and the other agreed with him only on the statutory holding, avoiding what he termed, Wright's "constitutional speculations."[95]

Because the First Amendment covers freedom of religion as well as freedom of speech and press, we may note a few religion cases in the Wright canon. In *Application of President and Directors of Georgetown College, Inc.*,[96] the issue was whether Mrs. Jones, a Jehovah's Witness, could be required to accept a blood transfusion over her own and her husband's religious objections. Because the decision had to be made immediately, Judge Wright alone ordered the transfusion. The district court denied review,[97] and the Supreme Court denied certiorari.[98]

Wright, tormented by the problem, wrote an extensive opinion. It was well established that the state could, without regard to religious consideration, compel avoidance of communicable diseases, as by vaccination, but a possible "right to die" presented the most private of

88. Utz v. Cullinane, 520 F.2d 467 (D.C. Cir. 1975).
89. *Id.* at 483. *See* the Duncan Ordinance, Oct. 31, 1967.
90. 45 D.C. CODE ANN. § 902, 910 (1973).
91. Edwards v. Habib, 397 F.2d 687, 689 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969).
92. 397 F.2d at 694.
93. *Id.* at 702.
94. *Id.* at 703 (Danaher, J., dissenting).
95. *Id.* at 703 (McGowan, J., concurring).
96. 331 F.2d 1000 (D.C. Cir. 1964).
97. *Id.* at 1010.
98. 377 U.S. 978 (1964).

determinations. Clearly the matter was not for the husband to decide; he had no authority "to order the doctors to treat his wife in a way so that she would die."[99] In some jurisdictions suicide is a crime, but the law on suicide was not clear in the District of Columbia.

Wright went to the hospital, inquired about the patient, and found her "hardly *compos mentis* at the time in question; she was as little able competently to decide for herself as any child would be."[100] Moreover, she was only twenty-five years of age and had a seven-month old child; her decision to die would be the "most ultimate of voluntary abandonments."[101] There are times when a judge cannot be legalistic in a bookish sense, and this was one of them: "The final, and compelling, reason for granting the emergency writ was that a life hung in the balance. There was no time for research and reflection. Death could have mooted the cause in a matter of minutes, if action were not taken. . . ."[102]

No personal torment was reflected in a decision involving the Church of Scientology, which was selling an electrical device said to cure cancer and other diseases.[103] One issue was whether the device was misbranded.[104] If the Church's assertions as to the efficacy of the device were false, then the religious doctrines must necessarily be false, because the device and the doctrines were inseparable. Wright held that Scientology was a religion, but held also that it may not defraud the public by selling a worthless device without fair labeling.[105]

The two cases cited above stand out as unusual among cases involving freedom of religion. Far different is a decision regarding the extent to which a religious group operating radio and television stations may require a particular religious affiliation as a condition of employment. In *King's Garden, Inc. v. FCC*,[106] a radio licensee whose pious name reflected its orientation wished to include only Christians among its employees. Judge Wright's opinion upheld the FCC's refusal to allow such a policy in relation to employees who do not deal with program content. At issue was an amendment to Title VII of the 1964 Civil Rights Act, which appears to exempt all activities of religious cor-

99. 331 F.2d at 1008.
100. *Id.*
101. *Id.*
102. *Id.* at 1009.
103. Founding Church of Scientology v. United States, 409 F.2d 1146 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 963 (1969).
104. 409 F.2d at 1161.
105. *Id.* at 1160-62.
106. 498 F.2d 51 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 996 (1974).

porations from the Act's prohibition on religious discrimination in employment.[107] The court's choice, if it were to uphold the Commission as it did, was either to invalidate the statute or to construe it as not applying to the Federal Communications Act. Wright held that Congress was probably not required to forbid employment discrimination in the first place, but if it did, it could not then violate the establishment clause by granting a special exemption to federally licensed businesses using public air waves. Faced with the comprehensive and richly detailed opinion in *King's Garden*, a commentator can do little more than marvel at the brilliance of Wright's analysis.

II

We turn from an overview of Wright's opinions to a consideration of Wright's method. His way of solving problems and presenting answers is the same across-the-board: Wright on free speech is the same craftsman as Wright on any other subject. At the same time there is a special intensity in his free speech opinions, as the values involved seem to stir him to the roots of his being. One is impressed by his extraordinary sincerity.[108] The three dominant factors of Wright's work are creativity, drive and fairness.

Rarely is the work of a judge on an intermediate court subject to close published analysis. We have become used to the grand style of the Supreme Court, which is free to overrule. An intermediate judge must follow, and a member of a tribunal that sits in panels has obligations not merely to a higher court but to the decisions of other panels in his own court. Working from this position, Wright must build with blocks which, at first glance, are not always well hewn to the task.

There are times when Wright must rely on a single authority; in the *Pentagon Papers* case,[109] for example, *Near v. Minnesota* and the rule against prior restraint virtually disposed of the issue in question. On rare occasions, Wright, after canvassing all authorities, can do little

107. *See* 42 U.S.C. § 2000(e)-1 (Supp. II 1972) (amending 42 U.S.C. § 2000(e)-2 (1970)).

108. The frequent isolation of Wright's position, a matter developed more fully below, leaves one with an occasional doubt as to whether the matter is always worth the bother. *See, e.g.*, Von Sleichter v. United States, 472 F.2d 1244 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1063 (1972), in which Judge Wright, dissenting, contends in some detail and with much scholarly analysis that there must be a determination as to community standards where someone trafficking in heroin, and told to stop by a police officer, shouted an epithet and ran away. 472 F.2d at 1257. A conviction for disorderly conduct was upheld by the majority, and I have some doubt that the problem was worth as much attention as the full panel gave it.

109. *See* notes 30-36 and accompanying text *supra*.

more than give up and shoot from the heart; in the blood transfusion case,[110] after every authority had been considered and all were found wanting, the fact that "life hung in the balance" was allowed to control.

The usual Wright approach, however, is constructively creative, making fair use of legal materials but in a quite original manner. In *Edwards v. Habib*,[111] for example, Wright worked from the Restrictive Covenant cases, but applied them to a new field:

> [May] a court . . . consistently with the Constitution prefer the interests of an absentee landlord in evicting a tenant solely because she has reported violations of the housing code to those of a tenant in improving her housing by resort to her rights to petition the government and to report violations of laws designed for her protection . . .[?] On this theory, if it would be unreasonable to prefer the landlord's interest, it would also be unconstitutional.[112]

He supported his hypothesis with *Marsh v. Alabama*,[113] "which, like the instant case, involved state-aided privately-initiated abridgement of First Amendment freedoms."[114] Wright displays originality here. No other judge, I suspect, would have had the ingenuity to fashion these ideas into his analysis; at the same time, he marshalls legal materials to his support and is very convincing. He also develops the idea that, quite apart from freedom of speech, a right to petition the government to report the violation of laws "is constitutionally protected."

Wright's sense of fairness manifests itself in many ways. For example, in the blood transfusion case[115] Wright was not about to let someone die while he retreated to the sidelines to make up his mind. In the Listerine advertising case,[116] Wright saw that an advertiser should not go unpunished for lying, but recognized also that the advertiser cannot fairly be made a spectacle of public breastbeating. And, as Wright noted in the *Edwards* case, a person cannot fairly or rationally be evicted from his house because as a good citizen he reports a violation of the law. Wright argued similarly that while part of our constitu-

110. Application of President & Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir. 1964). *See* notes 96-102 and accompanying text *supra*.

111. 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969). *See* notes 90-95 and accompanying text *supra*.

112. 397 F.2d at 695.

113. 326 U.S. 501 (1946).

114. 397 F.2d at 695.

115. Application of President & Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir. 1964). *See* notes 96-102 and accompanying text *supra*.

116. Warner-Lambert Co. v. FTC, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978). *See* notes 19-21 and accompanying text *supra*.

tional tradition allows one to preach any religious faith, religious freedom does not translate into a license to sell mismarked electrical appliances.[117]

Further illustrations would be superfluous. A distinguished authority, who had occasion to know, once said, "the law is a ass, a idiot."[118] To this we may add Wright's corollary, "Not while this court sits."

One measure of the extent to which Wright beats new paths is the extent to which he is forced to state his views without support from other judges on the panel. In *Reporters Committee for Freedom of Press v. AT&T*,[119] a case involving the accessibility of telephone company toll billing records in criminal investigations of reporters, Wright was compelled to go it alone in dissent.

In another case involving the requirement that noncommercial educational stations make audit records of all broadcasts available to the FCC, the court sat as a panel and Wright was unable to find a single persuasive voice among those of his colleagues. In one of the Drew Pearson cases,[120] he spoke for the court, but his colleague, Judge McGowan, disagreed with two sections of his opinion. Judge McGowan, not wishing to accept Wright's constitutional arguments, also declined to join his opinion in the *Edwards* eviction case.[121]

These examples should suffice to make the point: very frequently when Wright is making major advances in constitutional theory, he is on his own. He does not enjoy the support of a Douglas, a Brennan, a Murphy or a Rutledge. The vastness of the field he has tilled is all the more remarkable because he has tilled it alone.

On occasions when he finds two like-minded colleagues, Wright can be adventurous. For example, in *Utz v. Cullinane*,[122] the court held that routine dissemination of arrest records to the FBI was prohibited by a District of Columbia ordinance. None of the four persons seeking to restrain the distribution had been convicted. The panel, consisting of Judge Robinson (with whom Judge Wright's First Amendment views are usually compatible) and Judge Mehrige of Richmond, Virginia (the one figure in the American legal system who can probably

117. Founding Church of Scientology v. United States, 409 F.2d 1146 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 963 (1969) discussed in notes 103-105 and accompanying text *supra*.

118. C. DICKENS, PICKWICK PAPERS, in Ch. 51, words of Mr. Bumble.

119. 593 F.2d 1030 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 949 (1979).

120. Washington Post Co. v. Keogh, 365 F.2d 965 (D.C. Cir. 1966).

121. Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969).

122. 520 F.2d 467 (D.C. Cir. 1975).

"out liberal" Judge Wright)[123] decided the case on statutory grounds. The three also managed to cast considerable constitutional doubt on the practice, finding that, given the presumption of innocence, there could be no value in distributing this information.[124]

The work Wright does, whether on his own or with others, is extraordinarily substantial. Justice Murphy, the very symbol of the just man come to judging, on one occasion said, "I don't care what the technicalities are; this is so wrong that I just won't do it."[125] Judge Wright, ever the supreme artisan, stands as firmly. Wright crafts the most novel of his arguments so solidly that those who would disagree must work hard to refute them. Holding that a flat ban on paid public issue announcements by broadcast licensees violates the First Amendment, at least where other paid announcements are accepted, Wright rejected a "crabbed judicial view of 'state action' "[126] and adopted Professor Emerson's concept of "[t]he First Amendment values of individual self-fulfillment through expression and individual participation and public debate. . . ."[127] A ban on all controversial speech "is a form of censorship, just the same. It is a favoritism toward the status quo and public apathy and, in these cases, a favoritism toward bland commercialism."[128]

Wright's unusual thoroughness is further demonstrated by his treatment of the arrests that followed the riots triggered by the assassi-

123. Wright opened an article honoring Judge Bazelon by saying: "I am probably the only judge on any federal court of appeals who can call Judge David L. Bazelon conservative." Wright, *A Colleague's Tribute to Judge David L. Bazelon, on the Twenty-Fifth Anniversary of his Appointment*, 123 U. PA. L. REV. 250 (1974). Judge Wright has given a great deal of thought to the role of judges as policy makers; see, *e.g.*, Wright, *Role of the Supreme Court in a Democratic Society—Judicial Activism or Restraint?*, 54 CORNELL L. REV. 1 (1968).

124. Occasionally Caesar nods, and so does Wright; this is one of the rare instances of a disjointed and ill-organized Wright opinion. His opinions run to the monumental but rarely to the superfluous. For further application of Wright's view on the impropriety of dissemination of arrest records in an unusually complicated procedural situation, see Morrow v. District of Columbia, 417 F.2d 728 (D.C. Cir. 1969).

125. Carter v. Illinois, 329 U.S. 173, 183 (1946).

126. Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642, 650 (D.C. Cir. 1971).

127. *Id.* at 655.

128. *Id.* at 661. For all his enthusiasm for controversial discussion and his wish to eschew the bland, Wright ran into real problems in passing on the license renewal for a radio station engaged in racially offensive broadcasting. In Anti-Defamation League v. FCC, 403 F.2d 169, 172 (D.C. Cir. 1968), Wright concurred in the holding that the station should be permitted to be relicensed, but he was obviously unhappy over the station's practices. His concurrence was more an expression of pain than a serious analysis of a problem, how to deal with it, and how to square it with his general endorsement of even offensive free speech. He appeared to accept the dissenting views in Beauharnais v. Illinois, 343 U.S. 250, 267-305 (1952), but elucidation of just where he is on this difficult subject will have to wait.

nation of Martin Luther King.[129] Wright wished to control violence without suppressing activities protected by the First Amendment. He found that the applicable District of Columbia statute "may easily deter people from attending an assemblage at which violence *might* occur."[130] Wright comprehensively analyzed both the problem and the relevant law in his and other jurisdictions. The point here is that regardless of whether Judge Wright is right or wrong, persuasive or unpersuasive, the case he makes to sustain his point of view is always superbly structured and meticulously researched.

III

I now turn to the intellectual understructure of Wright's First Amendment work, his philosophic belief in the freedom of ideas. For this purpose, I put aside the rest of the First Amendment and focus only upon freedom of speech and freedom of the press.[131]

A judge need not have any meaningful or coherent philosophy regarding any part of the law. His approach may consist simply of matching the reformation at hand to the information in the books and aligning the case at bar with the precedent most appropriate under the circumstances. Yet if the judge is to be more than a ribbon clerk, he needs skill greater than that required for simply matching colors. As Justice Cardozo put it:

> A philosophy of law will tell us how law comes into being, how it grows. . . . It is these generalities and abstractions that give di-

129. United States v. Matthews, 419 F.2d 1177 (D.C. Cir. 1969) (Wright, J., dissenting).

130. *Id.* at 1193.

131. This requires the discarding of some thought-provoking material on privacy, a matter to which Judge Wright has given intense consideration. It is, for example, a distinct advance over all other thinking on privacy to hold that a congressional committee might be enjoined from publishing its report where the report gratuitously includes names and details concerning alleged misdeeds of school children. Judge Wright argued persuasively that "[t]he right of individuals to live their lives and maintain their personalities and affairs free from undue exposure to the outside world is a central premise of our constitutional and legal framework." Doe v. McMillan, 459 F.2d 1304, 1325 (D.C. Cir. 1972). In holding that President Nixon was not free to direct the wiretapping of the home telephone of a newspaper reporter, Wright stressed the legitimate First Amendment interest in keeping the government out of private conversations. Smith v. Nixon, 606 F.2d 1183, 1190 (D.C. Cir. 1979). These and other opinions give practical effect to the concept of the right of the individual to be left alone, a belief which is at the heart of his philosophy concerning man and society. For a most comprehensive analysis of the interplay between defamation, privacy and the public's right to know, see Wright, *Defamation, Privacy, and the Public's Right to Know: A National Problem and A New Approach*, 46 TEX. L. REV. 630 (1968), in which he describes these as "three disparate and often conflicting interests. Defamation and privacy work to restrict publication, whereas the essence of the third interest—the public's right to know—is free and unfettered communication." *Id.* at 633.

> rection to legal thinking, sway the minds of judges, that determine when the balance waivers, the outcome of the doubtful lawsuit. Implicit in every decision where the question is, so to speak, at large, is a philosophy of the origin and aim of law, a philosophy which, however veiled, is in truth the final arbiter. It accepts one set of arguments, modifies another, rejects a third, standing over in reserve as a court of ultimate appeal.[132]

Cardozo wrote as the judge of the highest court in New York; he was the philosopher-king and, unless he happened into an area of federal law, there was no other court to say him nay. Wright on the Court of Appeals does not have the same freedom that Cardozo had. Yet Wright's opinions are seldom reviewed, and Wright often seeks to persuade his own and future generations even if he is not successful in persuading his own court. Wright is truly a philosopher of the freedom of speech and of the press, yet he rarely accepts the scepter of a philosopher-king; he is instead a Socrates, a teacher, one who guides as often as he commands.

The fundamental philosophic battles over the First Amendment in this century, have grown out of the conflict between idealism and pragmatism.[133] While discoveries in the field of physics may reasonably be expected to change the pattern of intellectual thought in the free speech area in some distant tomorrow,[134] the deaths of such First Amendment thinkers as Justices Black, Douglas, Frankfurter, Harlan, and Professors Meiklejohn and Bickel have created an intellectual void. Professor Thomas I. Emerson remains our most distinguished First Amendment scholar in the academic world, and Wright, near the end of his career, stands virtually alone in the American judiciary as a preeminent theoretician on the freedom of communication. The tendency of even the best of today's judicial generation is simply to react to speech and press problems; Wright truly deliberates.

Unfortunately, the case and controversy system sifts out many of the cases which are sufficiently varied and complex to invite the elucidation of a coherent system of thought on speech and press; perhaps Judge Wright will be persuaded to follow the course chosen by Justice

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132. B. CARDOZO, *Growth and Law*, in SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 196-97 (M. Hall ed. 1947).

133. Frank, *Hugo L. Black: Free Speech and the Declaration of Independence*, 1977 U. ILL. L. F. 577. Without stating them in the same way, Judge Wright adopts much the same conclusions with his "Meiklejohnian" absolutism regarding the First Amendment. See his comprehensive essay on the role of the Supreme Court generally, with a substantial aside on this point, in Wright, *Professor Bickel, The Scholarly Tradition and the Supreme Court*, 84 HARV. L. REV. 769, 786-87 (1971).

134. *See* J. FRANK, *The Bill of Rights: Physics, Idealism and Pragmatism*, in CONSTITUTIONAL GOVERNMENT IN AMERICA 475 (R. Collins ed. 1979).

Black[135] and present lectures which do so.

Perhaps the most difficult First Amendment problem involves drawing a distinction between speech which is protected and action which may be illegal. Picketing, for example, may be a form of free speech, but it is not protected when its purpose is to compel a violation of the antitrust laws.[136]

Wright saw the *Pentagon Papers* case as a simple matter of a prior restraint on publication; yet, for all of the fervor with which he decried prior restraint when it was imposed "even before the judges have read the offending material,"[137] he nonetheless recognized that "there are *some* prospective harms which might conceivably justify prior restraint on speech or press."[138] He accepted the proposition from *Near v. Minnesota*,[139] for example, that the government might enjoin publication of the sailing dates of transports and of the number and location of troops.[140]

The Wright opinion in the *Pentagon Papers* case adds more fervor than light to the solution of the underlying problem; because of the extreme haste of the occasion, he could say no more than that "[t]here must be a showing of substantial and specific injury sufficient to override strong First Amendment interests."[141] This approach is more of a procedure than a philosophy. It is a method calling for a balancing of interests in a form resembling the clear and present danger test, a formula that appeals to Wright. He took this approach in his dissent in *Avrech v. Secretary of the Navy*,[142] where he maintained that if a military officer in Viet Nam who was critical of the management of the war was to be courtmartialled, it could only be upon a showing that his criticism had created a clear and present danger of some specific harm.

On other, less hurried occasions, Wright has had the opportunity to grapple with the relationship between word and deed. His most extensive analysis of free speech was in the Ellipse demonstrators case.[143]

135. *See* H. BLACK, A CONSTITUTIONAL FAITH (1968). A copy of Wright's 1979 Harvard Francis Biddle lecture on "Judicial Review and the Equal Protection Clause" reflects the comprehensiveness Wright can achieve by the fluid lecture method.

136. Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949).

137. United States v. Washington Post Co., 446 F.2d 1322, 1325 (D.C. Cir. 1971) (Wright, J., dissenting).

138. *Id.* at 1326 (Wright, J., dissenting).

139. 283 U.S. 697, 713 (1931). *See* notes 32-36 and accompanying text *supra.*

140. 283 U.S. at 716.

141. 446 F.2d at 1325-26 (Wright, J., dissenting).

142. 520 F.2d 100, 107 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 970 (1976).

143. Women Strike for Peace v. Morton, 472 F.2d 1273 (D.C. Cir. 1972). *See* note 52 and accompanying text *supra.*

In that case, the object of the demonstrators was to place an antiwar exhibit on the Capitol Ellipse while others were holding, with Park Service sanction, a Christmas Pageant for Peace. The latter was in the Christmas tradition, the former in an anti-Viet Nam War spirit. The Park Service had approved the conventional and disapproved the unconventional display, and none of the judges had any trouble in concluding that this selectivity was a denial of equal protection.[144]

However, Judge Wright took the occasion to state that it was also an interference with First Amendment rights.[145] He asserted the existence of "an absolute right to speak" when the speech "in no way interferes with the rights of others."[146] One must assume that the choice of the term "absolute" is deliberate. He cites as examples the right to wear a black armband to protest the Viet Nam war and the right to view offensive movies in one's own home.[147] Because this right is "absolute," given the condition of noninterference with the rights of others, the government's attitude is immaterial. Wright felt that equal protection "is no substitute for the independent right of free expression."[148]

Wright is aware that he skirts the border of familiar law in the speech-conduct cases: "[F]ull reconciliation of all of the cases is no longer possible . . . . We can be confident in assuming that eventually a new legal theory will emerge from this conflict—a theory which takes full account of society's counterveiling interests and full discussion in public order."[149] While he observes the distinction betwen speech and conduct, Wright reminds readers that only the gravest abuses endangering truly paramount interests will justify a limitation on speech.[150] And if, as many believe, conduct may be freely regulated under a rational basis test, then "the first task" is to distinguish between "expression" and "action."[151] Wright has come to believe that this is often distinction without a difference. He concluded, for instance, that there is no real difference in terms of the speech-action distinction between *Edwards v. South Carolina*[152] and *Cox v. Louisiana*.[153] He acknowl-

144. *Id.* at 1274.
145. *Id.*
146. *Id.* at 1280.
147. *Id.* at 1287 (citing Tinker v. Des Moines Independent Community School Dist. 393 U.S. 503 (1969) (armband); Stanley v. Georgia, 394 U.S. 557 (1969) (offensive movies)).
148. 472 F.2d at 1280.
149. *Id.* at 1280-81.
150. *See* United States v. Washington Post Co., 446 F.2d 1322 (D.C. Cir. 1971), discussed in notes 33-34 and accompanying text *supra*.
151. 472 F.2d at 1281.
152. 372 U.S. 229 (1963).
153. 379 U.S. 559 (1965).

edged that there may be important differences between demonstrating before a legislature and demonstrating before a courthouse, but these differences

> clearly do not correlate with the difference between speech and conduct—at least as those terms are used in common parlance. Nor are these terms, as commonly used, responsive to the interests which the First Amendment was designed to protect. Thus we would say in ordinary conversation that a man making an obscene telephone call is "speaking" whereas a man distributing hand bills is "acting." And in this situation, it is surely the act rather than the speech which should be protected.[154]

Testing new ground, Wright explores the possible term of art meanings of these words. He agrees with Professor Emerson that the possible harm attributable to speech is less immediate than harm attributable to action, and that the latter would be instantaneous and irremediable except by preventing the conduct, perhaps under a clear and present danger test. But a demonstration, while perhaps not precisely what the Framers of the First Amendment had in mind, may be a dissemination of ideas by persons who do not have the money to publish newspapers or to buy media time.[155] Moreover, First Amendment freedoms cannot be made to depend upon the state's judgment that the communication has not been made at an appropriate place of "public gathering." Parks are often the ideal place for the communication of ideas.

But in spite of having decried the distinction between speech and conduct in these opinions, Wright nevertheless relied on the distinction in the Ellipse demonstration case: "It must be conceded that [the] proposal, like virtually all proposals for exercise of First Amendment rights, involves not speech alone, but conduct mixed with speech."[156] The government may regulate this conduct aspect "if it can show a valid reason for doing so. Moreover, it is permissible for such regulation to curb the speech aspect of the activities if the government can show that the countervailing interest is 'important' or 'substantial.' "[157] Because the government's interest—ecological harm to the park or interference with other displays—was found to be insufficient to warrant

154. 472 F.2d at 1281. His own usual Supreme Court mentor, Justice Black, had been on opposite sides of the matter, providing the decisive vote to permit the demonstration in the legislative case. *See* Edwards v. South Carolina, 372 U.S. 229 (1963).

155. Wright's discussion of the relation of money to speech, wealth and freedom is the best I have ever seen. *See* Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976) (a devastating critique of Buckley v. Valeo, 424 U.S. 1 (1976) from the viewpoint of Alexander Meiklejohn).

156. 472 F.2d at 1288.

157. *Id.*

regulation, Wright did not have occasion to forge a new free speech theory.

A judge, especially an intermediate appellate court judge, is not required to take giant strides. That ideas can be advanced through the reweaving of conventional material is well illustrated in *Business Executives' Move for Vietnam Peace v. FCC*,[158] which holds that the FCC cannot bar radio and television editorials altogether, but must develop standards and regulations to protect against abuses and excesses. Wright has no trouble recognizing that the air waves are not Hyde Park, and that there is not a "corner" in that mode of communication which will sustain unlimited use for everyone.

At the same time the limited nature of broadcast time still permits a reasonably regulated "abridgable" right to speak. Judge Wright, applying Professor Emerson's theories, presses for "the First Amendment values of individual self-fulfillment through expression and individual participation in public debate . . . ."[159] In a brilliant bit of adaptation, Wright extrapolates the notion of free speech in radio and TV broadcasts from the concept of free speech in public forums. If speech is permitted at all in a public forum, then that forum's administrator may not discriminate as to which speech will be permitted. Applying this logic to the television and radio cases, if the media are going to broadcast for hire words exalting toothpaste, they cannot refuse to carry words exalting ideas.

In an intellectual construct which typifies Wright's thinking in this area, he states: "In the end, it may unsettle some of us to see an anti-war message or a political party message in the accustomed place of a soap or beer commercial. But we must not equate what is habitual with what is right—or what is constitutional."[160]

The decision just quoted, *Business Executives' Move for Vietnam Peace v. FCC*, is in a vital sense the most significant of all of Wright's opinions on free speech. Earlier cases held that broadcasters function as "private corporations" immune from First Amendment constraints.[161] James Madison may not have had cause for concern that giant conglomerates could snuff out all dissenting speech by the simple power of ownership of the means of communication, but for fifty years we have recognized that cost and access are serious restraints on com-

158. 450 F.2d 642 (D.C. Cir. 1971), discussed in notes 126-28 and accompanying text *supra*.
159. 450 F.2d at 655.
160. *Id.* at 665.
161. *Id.* at 652.

munication. Wright has advanced the proposition that where, as in radio and television, the public air waves are used by the media in a highly regulated system, "specific governmental approval of challenged action by a private organization indicates 'state action.' "[162] Wright raises a crucial issue here, and in so doing, lays the foundation for a debate which must continue if communication in America is not to be controlled by three giant networks.[163]

Wright similarly concluded that the media could not cut off debate by prohibiting cigarette advertising on the air. The Fairness Doctrine required counter-advertising, and Wright suspected that the prohibition was invited by cigarette companies which were losing the war of free speech and found it more profitable to cut off their own promotion than to bear the blows of their attackers.[164] The underlying concept is the same: the government may not suppress speech on the air waves, nor may it tolerate suppression by others.

Wright used conventional concepts, occasionally adding his own intellectual fillip, to protect free speech. Harking back to Cardozo's philosophy, Wright approaches his cases with the abiding belief that only the truth can make us free. He has never seriously grappled with the question of whether truth really will triumph in the market place, and if he has ever stated his philosophic concept of truth, I do not know it. But he does, fundamentally, accept the notion that, win or lose, the marketplace of ideas is truth's best hope. Hence, for him all presumptions are in favor of free speech, thus making it very difficult for anti-free speech proposals to survive.[165]

Wright's sense of practicality is always with him; he sees a need for decisiveness on free speech issues so that self-censorship for fear of punishment will not chill the free expression of ideas.[166] He recognizes tensions in First Amendment values. The lobbyist, for example, has a right to petition, but the public and the legislature have a concomitant right to know who is doing the lobbying.[167] The need for disclosure makes Wright remarkably tolerant of the use of pilfered materials de-

162. *Id.*

163. For a recent highly relevant work, see A. REEL, NETWORKS—HOW THEY STOLE THE SHOW (1979).

164. *See* Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.C.C. 1971). *See also* notes 5-11 and accompanying text *supra.*

165. United States v. Washington Post Co., 446 F.2d 1322, 1325 (D.C. Cir. 1971) (Wright, J., dissenting).

166. Washington Post Co. v. Keogh, 365 F.2d 965, 968 (D.C. Cir. 1966).

167. Liberty Lobby, Inc. v. Pearson, 390 F.2d 489, 492 (D.C. Cir. 1968).

spite his normal preference for privacy.[168] His opinions are frequently on the frontier of free speech, especially when he reviews FCC actions, where most important First Amendment controversies now occur.

The uncertainties and problems inherent in these novel cases cause Judge Wright to look forward with relief to the occasional case involving the outright suppression of speech or expression. One observes the lust of joyful battle as he throws a spear into the carcass of McCarthyism, recalling that repressive era in one of the rare cases involving employment discrimination because of political views.[169] He also joined in the invalidation of a loyalty oath requirement for members of the faculty at the City College of the District of Columbia.[170] He attacked with clarity and force the notion that public employment is a "privilege"—capable of being capriciously withdrawn—and not a "right." As he stated so succinctly, there is no difference in the standards applicable to membership in suspect organizations as applied to criminal prosecution and employment dismissals. If an employee cannot be convicted criminally for his associations, neither can he be dismissed for his associations.[171] Wright carefully weaves this rule into the case without sacrificing its exceptional power and impact.

Wright's mind is the mind of tomorrow—a mind that does not have all the answers but that deals forthrightly with the toughest of problems. Caught in the battle between "absolutism" and "balancing," Wright is troubled and does not find easy solutions. He noted in the *Edwards* case[172] that Justice Black, the great absolutist, also resorted "to a balancing approach where he perceiv[ed] 'speech plus.' "[173] But Wright is prepared to be an absolutist where, to use his phrase, there is "speech pure."[174] Here there can be no abridgment at all.

The Wright canon on the First Amendment is not finished. Intellectual tangles remain to be clarified, whether in opinions or in lectures. In many respects Wright is the best the contemporary judiciary has to offer. He gives the deepest thought to regulatory problems threatening free expression and the public interest, and he shows the deepest concern for the cry of the lone man in the corporate world.

There is a happy concatenation of geographic and intellectual

168. *See* not only the *Pentagon Papers* case but also Pearson v. Dodd, 410 F.2d 701 (D.C. Cir.), *cert. denied*, 395 U.S. 947 (1969).

169. Rodriguez v. Seamans, 463 F.2d 837, 843 (D.C. Cir. 1972).

170. Haskett v. Washington, 294 F. Supp. 912 (D.D.C. 1968).

171. *Id.* at 917.

172. 397 F.2d 687, 695 n.28 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969).

173. 397 F.2d at 695 n.28 (citing Cox v. Louisiana, 379 U.S. 536, 578 (1965)).

174. 397 F.2d at 695 n.28.

grace in the choice of this most western law school for a perspective on Judge Wright. Among the jurists of the late 20th century, he has been the foremost explorer of what is new in every reach of the Constitution, including the First Amendment. In a land of intellectual, spiritual, and at times physical turmoil, his has been the deepest penetration of *terra incognita*.

One follows this lonely scholar in his journeys with the respect and awe Keats felt in considering Chapman's Homer:

> Then felt I like some watcher of the skies
> When a new planet swims into his ken;
> Or like stout Cortez when with eagle eyes
> He star'd at the Pacific—and all his men
> Look'd at each other with a wild surmise—
> Silent, upon a peak in Darien.[175]

A poet may confuse his explorers and still capture that watcher's sense of "wild surmise." In considering his work as a federal court judge and legal scholar, we can only conclude that Chief Judge J. Skelly Wright has seen farther, and covered more new territory, than any other legal professional of our time.

175. J. KEATS, COMPLETE POETICAL WORKS OF KEATS, 9 (1899).