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court utilized the standard established in the line of United States Supreme Court cases which hold that the protections guaranteed in the First Amendment are not absolute.[576] Therefore, the court found that upon balancing the parties' respective harms, the defendant's claim that her picketing was a protected form of speech could not be sustained.[577]

THIRD DEPARTMENT

Montgomery v. Muller[578]
(decided February 13, 1992)

Plaintiff, the District Attorney of Warren County, contended that his state[579] and federal[580] constitutional right to free speech was violated when the town justice ordered that he remove an American flag lapel pin during a criminal jury trial.[581] The ap-

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'interpretive' (e.g., text, history) or 'noninterpretive' (e.g., tradition, policy) . . . factors, the 'protection afforded by the guarantees of free press and speech in the New York Constitution is often broader than the minimum required by' the Federal Constitution." *Id.* at 249, 567 N.E.2d at 1278, 566 N.Y.S.2d at 914 (quoting O'Neill v. Oakgrove Constr., Inc., 71 N.Y.2d 521, 529 n.3, 528 N.Y.S.2d 1, 5 n.3, 523 N.E.2d 277, 281 n.3); *see also* People *ex rel.* Arcara v. Cloud Books, 68 N.Y.2d 553, 557-58, 503 N.E.2d 492, 494-95, 510 N.Y.S.2d 844, 846-47 (1986) ("[T]he minimal national standard established by the Supreme Court for First Amendment rights cannot be considered dispositive in determining the scope of this State's constitutional guarantee of freedom of expression.").

576. *See* New York Times v. Sullivan, 376 U.S. 254 (1964); Nebraska Press Ass'n v. Stuart 427 U.S. 539 (1976); Gitlow v. New York, 268 U.S. 652 (1925).

577. *Bingham,* 184 A.D.2d at 90, 591 N.Y.S.2d at 159.

578. 176 A.D.2d 29, 580 N.Y.S.2d 110 (3d Dep't), *lv. denied,* 80 N.Y.2d 751, 599 N.E.2d 691, 587 N.Y.S.2d 287 (1992).

579. N.Y. CONST. art. I, § 8 ("Every citizen may freely speak . . . on all subjects . . . and no law shall be passed to restrain or abridge the liberty of speech . . . .").

580. U.S. CONST. amend. I, cl. 3 ("Congress shall make no law . . . abridging the freedom of speech . . . .").

581. *Montgomery,* 176 A.D.2d at 31, 580 N.Y.S.2d at 111.

pellate division, second department, while recognizing the plaintiff's free speech rights, held that the defendant's state[582] and federal[583] constitutional rights to a fair trial, including the right to a fair and impartial jury, outweighed the plaintiff's right to wear the pin.[584]

Upon the request of counsel for a criminal defendant, the petitioner, District Attorney William Montgomery, III and his assistants were instructed by the town justice to remove American flag lapel pins during the voir dire and jury trial. At the time the request was made, the United States was engaged in the Persian Gulf crisis. In upholding the request, the justice court noted that the wearing of the pins could interfere with the defendant's right to a fair trial.[585]

The appellate division considered, *inter alia*, whether the town justice had exceeded his power to control the behavior of counsel by ordering him to remove the pin.[586] The court began its analysis by stating that it is "axiomatic" that a defendant has the "right to a fair trial which encompasses a panel of impartial and indifferent jurors."[587] This right, the court found, would be impaired by any innuendo or inappropriate suggestion conveyed to the jury by an attorney.[588] According to the court, the American flag symbolized "patriotism and national pride," and therefore could influence a juror with a heightened sense of national pride arising out of the Gulf crisis.[589] Consequently, the court determined that the wearing of the American flag by the prosecutor during the jury trial, considering the immediacy of the Gulf War, implicated the criminal defendant's right to a trial by an impartial

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582. N.Y. CONST. art. I, §§ 2, 6.

583. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury . . . .").

584. *Montgomery*, 176 A.D.2d at 32, 580 N.Y.S.2d at 112.

585. *Id.* at 31, 580 N.Y.S.2d at 111.

586. *Id.* at 31-32, 580 N.Y.S.2d at 112.

587. *Id.* at 32, 580 N.Y.S.2d at 112 (citing Sheppard v. Maxwell, 384 U.S. 333, 362 (1966); People v. Rodriguez, 71 N.Y.2d 214, 218, 519 N.E.2d 333, 335, 524 N.Y.S.2d 422, 424-25 (1988)).

588. *Montgomery*, 176 A.D.2d at 32, 580 N.Y.S.2d at 112.

589. *Id.*

jury. That being the case, the justice court was within its power to regulate the plaintiff's attire.[590]

In support of its judgment that the justice court had the power to regulate the District Attorney's conduct, the appellate division relied upon *LaRocca v. Lane*.[591] In *LaRocca*, the New York Court of Appeals stated that the court has the power to regulate an attorney's conduct and appearance in order to preserve the impartiality of the jury in a criminal trial.[592] The *LaRocca* court had to balance the free exercise rights of the defense attorney, a Roman Catholic priest, who sought to wear his clerical garb in court, with the ability of the defendant and the state to obtain a fair trial.[593] The court stated that a "lawyer is subject to the regulation of the Judge in matters of attire when the regulation is reasonably related to . . . the protection of the rights of the parties . . . and generally to the furtherance of the administration of justice."[594] Because a "fair trial is a paramount constitutional condition" in a criminal proceeding,[595] the court concluded that the attorney's right to the free exercise of religion must give way since the "risk that a fair trial could not be had outweighed this incidental limitation."[596]

It does not appear that this issue has been squarely addressed by the federal courts. However, it has nonetheless been stated by the United States Supreme Court that "Due Process requires that the

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590. *Id.*; *see also* Sheppard v. Maxwell, 384 U.S. 333 (1966) (defendant's due process rights were violated and conviction reversed and remanded for new trial, where jurors were exposed to media commentary prior to sequestration for deliberations, and inadequate procedures were taken to insulate jury from prejudicial media coverage).

591. 37 N.Y.2d 575, 338 N.E.2d 606, 376 N.Y.S.2d 93 (1975), *cert. denied*, 424 U.S 968 (1976).

592. *Id.* at 582, 338 N.E.2d at 612, 376 N.Y.S.2d at 100.

593. *Id.* at 577, 338 N.E.2d at 608, 376 N.Y.S.2d at 95-96.

594. *Id.* at 582, 338 N.E.2d at 612, 376 N.Y.S.2d at 100.

595. *Id.* at 582-83, 338 N.E.2d at 612, 376 N.Y.S.2d at 101.

596. *Id.* at 584, 338 N.E.2d at 613, 376 N.Y.S.2d at 102; *but see* People v. Rodriguez, 101 Misc. 2d 536, 548, 424 N.Y.S.2d 600, 608 (Sup. Ct. Kings County 1979) (court claimed that *LaRocca v. Lane* violated the cleric/attorney's equal protection rights when it denied him the right to wear his clerical garb at trial).

accused receive a trial by an impartial jury . . . ."[597] Additionally, in *Gentile v. State Bar of Nevada*,[598] the Supreme Court declared that an attorney's free speech rights are "extremely circumscribed" while in the courtroom during a judicial proceeding.[599] Together, these statements indicate that a court has the discretion to limit an attorney's free speech rights while in the courtroom in order that an accused may receive a fair trial.

The Second Circuit had the opportunity to address this very issue in *LaRocca v. Gold*,[600] but declined on collateral estoppel grounds. The Second Circuit held that LaRocca, the same Catholic priest who had been before the New York Court of Appeals in *LaRocca v. Lane*, was precluded from raising his First Amendment free exercise claim because it had been litigated "fully, fairly, thoroughly, and repeatedly before the [New York] state courts."[601] Additionally, the Second Circuit rejected LaRocca's equal protection claim. He argued that New York courts, by denying him the right to wear his collar in the courtroom while at the same time allowing parties and witnesses to wear religious clothing, violated the Fourteenth Amendment.[602] The court dismissed this claim by stating that the jurors' task is to judge a party or witness' credibility. The court stated, however, that a lawyer should not put himself in this position because he, "unlike a witness or a party, does not speak for himself but for his client. The jury should have no need to judge the lawyer's credibility."[603]

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597. Sheppard v. Maxwell, 384 U.S. 333, 362 (1966); *see also* Estelle v. Williams, 425 U.S. 501, 503 (1976) ("The right to a fair trial is a fundamental liberty . . . ."); Sacher v. United States, 343 U.S. 1, 8 (1952) ("The rights and immunities of accused persons would be exposed to serious and obvious abuse if the trial bench did not possess and frequently exert power to curb prejudicial and excessive zeal of prosecutors.").

598. 111 S. Ct. 2720 (1991).

599. *Id.* at 2743.

600. 662 F.2d 144 (2d Cir. 1981).

601. *Id.* at 148.

602. *Id.* at 149; U.S. CONST. amend. XIV.

603. Gold, 662 F.2d at 149.

Thus, both the state and federal judiciary have the discretion to limit the free speech rights of attorneys when they appear in court before a jury where the court finds that their conduct or attire could impinge upon the criminal defendant's right to a fair trial, including the right to an impartial jury.

CRIMINAL COURT

NEW YORK COUNTY

People v. Stephen[604]
(decided February 10, 1992)

In a disorderly conduct prosecution for verbally taunting a police officer in public, defendant moved to dismiss the charge stating that Penal Law section 240.20(1)[605] violated his right to freedom of speech as guaranteed by the First Amendment[606] and article I, Section 8 of the New York State Constitution.[607] The court held section 240.20(1) unconstitutional as it pertains to the defendant, and dismissed the charge of disorderly conduct.[608]

A police officer observed the defendant engaging in offensive conduct and using profane language, while in public, in front of approximately 15-20 people.[609] The police officer witnessed defendant publicly "clutching his genital area with his hands and yelling at deponent, 'Fuck you,' 'If you were in jail, I'd fuck

604. 153 Misc. 2d 382, 581 N.Y.S.2d 981 (N.Y. Crim. Ct. 1992).

605. N.Y. PENAL LAW § 240.20(1) (McKinney 1989). The statute states in pertinent part that: "A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof; 1. He engages in fighting or a violent, tumultuous or threatening behavior . . . ." *Id.*

606. U.S. CONST. amend. I.

607. N.Y. CONST. art. I, § 8.

608. *Stephen*, 153 Misc. 2d at 390, 581 N.Y.S.2d at 987.

609. *Id.* at 383, 581 N.Y.S.2d at 982-83.