and possibly back into, the center cities as well as protect the rural land around our metropolitan areas from sprawling development. While growth boundaries are not without flaws—they can artificially inflate land prices and thus rents and home prices, for example—they do seem to slow lopsided growth toward predominantly white neighborhoods while maintaining the integrity of downtown.

Los Angeles has already created a de facto regional government in the form of the South Coast Air Quality Management District. This body also increasingly regulates traffic congestion, job growth and land use. Even five years ago, regional government in the Los Angeles area was considered a fantasy. Today, most metropolitan-area leaders do not question that it is a reality. The next step would be to add social issues to the regional agenda.

§ A third approach is to encourage affordable and public housing in the near-in and fringe suburbs, enabling low-income residents to live closer to the new jobs. Orange County, California, has in the past required that 20 percent of all new residential projects be set aside for affordable housing. Columbia, Maryland, recently issued a taxpayer-supported bond to build low-income housing for minorities. While these measures are unlikely to be widely adopted, the business community could be a powerful ally. Many companies had a hard time filling lower-level jobs in the near-in suburbs during the 1980s, and this situation will be exacerbated in the 1990s. One promising approach is for corporations to team up with nonprofit affordable-housing organizations, such as the Bridge Housing Corporation in San Francisco and Habitat for Humanity, based in Americus, Georgia. An interim measure is the organizing of car pools and setting up of van pools to bring city residents to distant corporate jobs.

§ Fourth, we must improve the efficiency of central city public services. The cost of maintaining existing infrastructure and providing services in the center city is higher than the cost of building new infrastructure and providing services in the fringe suburbs, even if the extra cost of delivering social services to the needy is subtracted. The trade-off many companies face is either moving to a suburb with lower costs and fewer social problems or staying in the high-cost center city with overwhelming social problems. It is not hard to see that moving out makes more sense economically.

If present trends continue, the center city's future—and the future of many of the close-in suburbs—is likely to be similar to the present-day fate of Camden and Newark, New Jersey; of Chester, Pennsylvania; or of South Central Los Angeles. The "Camdenization" of our major cities, resulting in their being populated primarily by an underclass in an environment of hopelessness, has obviously begun. It is probable that the 1990s offer the last chance to reverse this trend, because if most of the 24 million new jobs that the Labor Department estimates will be created between 1990 and 2005 are located at the fringe of our metro areas, the downward spiral of the center cities may become irreversible.

As a nation we are used to moving away from our problems, striking out to new frontiers. If the market is allowed to take job growth to the extreme fringe of our metropolitan areas, our center cities may well require full-time military occupation. The fires in Los Angeles are a warning that an escapist strategy no longer works. The costs are too steep and the stakes are too high. □

MUZZLING LAWYERS

New Order in The Courts

MORTON STAVIS

Do lawyers have free speech? Apparently not to criticize judges publicly. That was the experience of New York City Comptroller Elizabeth Holtzman in 1987 when, as Brooklyn District Attorney, she castigated a judge for, she said, having a rape victim get down on her hands and knees and re-enact her ordeal in the presence of other trial participants.

Holtzman complained about the judge to the Commission on Judicial Conduct. That seemed not to be a problem; but when she issued a letter to the public, sparks started flying. She was reprimanded for her comments by the grievance committee created by the courts to monitor the conduct of lawyers. She appealed the disciplinary action in the state courts, but the committee's ruling was upheld.

Holtzman is not the only lawyer who has recently been punished for daring to voice professional criticism of judicial conduct. What is more, courts are routinely approving these disciplinary actions, and the Supreme Court is seemingly unconcerned about protecting the First Amendment rights of lawyers. Now a new case is brewing: John Gotti's lawyer, Bruce Cutler, who was disqualified by Federal Judge I. Lee Glasser from representing Gotti at his trial, is being prosecuted for contempt of court. The charges include the making of public statements claiming that Gotti was innocent and that government prosecutors were conducting a vendetta against him. In the Cutler case it is not even the judge who was criticized; it was government lawyers.

There is a long line of judicial decisions upholding the right of lawyers to criticize judges, not to mention prosecutors, going back to the early-nineteenth-century impeachment trial of Judge James Peck, a celebrated case at the time. Peck's trial produced an elevated and eloquent discourse in the Senate on freedom of speech and the press and the meaning of the republican form of government we had established by winning our independence from the British monarchy. Following Peck's trial, Congress swiftly placed restrictions on the contempt powers of federal judges. The Peck case has until now been viewed by the Supreme Court as enshrined in constitutional law.

During the 1820s a lawyer whose name, oddly enough, was Lawless practiced in Missouri, litigating land title claims aris-

Morton Stavis, a longtime civil rights lawyer, was a founder and is now president of the Center for Constitutional Right.

ing out of the Louisiana Purchase. Lawless was doing quite well until Judge Peck, then a judge of the U.S. Disrict Court for Missouri, decided a case that Lawless believed served as a bad precedent for other cases he was pursuing. After Judge Peck rendered his decision and while the case was on appeal to the Supreme Court, Judge Peck's opinion was published in full in a local newspaper. Lawless wrote a responsive letter to a rival newspaper criticizing the judge's opinion in great detail. The letter was a model of propriety and read like a legal discourse. It was signed "A Citizen."

Judge Peck took umbrage at the letter and directed the publisher to disclose the name of the author, who was then ordered to appear in court. Upon Lawless's appearance and acknowledgment of authorship of the letter, Judge Peck castigated him, judged him to be in contempt, ordered him incarcerated for twenty-four hours and barred him from appearing in the district court for eighteen months.

Lawless complained to the House Judiciary Committee that Judge Peck by his action had usurped powers that the laws of the land did not give him. Lawless claimed that he had written the letter not only because he thought he had a right to do so but, acting "from a sense of duty to those numerous land claimants by whom he was employed," he was seeking "to counteract the effect that Judge Peck's opinion was calculated to produce on the value of the unconfirmed Spanish and French land titles and to save the claimants from those speculators who would have availed themselves of the panic the opinion created, to buy up those titles for an inadequate consideration."

In due course the Judiciary Committee drew up articles of impeachment of Judge Peck. They charged that the conduct of the judge constituted a "great disparagement of public justice, the abuse of judicial authority, and the subversion of the liberties of the people of the United States."

A trial of the impeachment was held before the Senate from December 20, 1830, to January 31, 1831. The manager of the proceedings was James Buchanan, chairman of the House Judiciary Committee, later to be the fifteenth President.

The argument on Judge Peck's behalf was in essence that he had the same power as English judges, and that it was required of lawyers that they "keep a blaze of glory around [judges] and . . . deter people from attempting to render them contemptible in the eyes of the public." This exalted position derived from the notion that the King can do no wrong and that "the judges sit in the seat of the King," administering his justice.

Buchanan's argument, spoken some forty years after the adoption of the Bill of Rights, was trenchant. First, he pointed out,

> At the Revolution we separated ourselves from the mother country, and we have established a republican form of government, securing to the citizens of this country other and greater personal rights, than those enjoyed under the British monarchy.

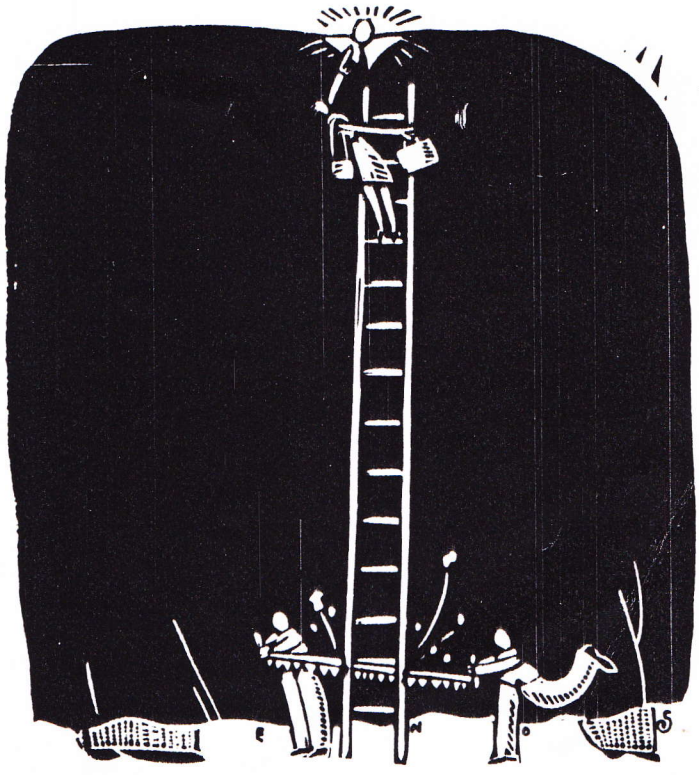
Second, he emphasized the significance of the First Amendment as the decisive guidepost. He insisted that since Congress was constitutionally barred from abridging freedom of speech, judges certainly had no power to do so.

> No free government can long exist without a free press. . . . Its safest protector is a free press; and the constitution of the United States has therefore declared, that "Congress shall make no law abridging the freedom of speech, or of the press. . . ." You might as well attempt to stop the flowing tide, lest it might overwhelm the temporary hut of the fisherman upon the shore, as to arrest the march of public opinion in this country, because in its course it might incidentally affect the merits of a cause depending between individuals.

Finally, on the subject of the independence of the bar he said,

> Had Judge Peck power in this case to suspend Mr. Lawless from practising his profession? . . . If he had, the members of a profession which has ever stood foremost in this country, in the defence of civil liberty, are themselves the veriest slaves in existence. . . . I want then to know whether henceforward I must humble myself and become the sycophant of a judge, whom I may despise, under the penalty of being deprived of the right to practise my profession before him. If a judge be weak, or if he be wicked, his judicial conduct is as fair a subject of discussion among lawyers, as among any other class of citizens; and for exercising this right they incur no punishment, which cannot be inflicted on any other person. If this proposition be not true, they become the mere creatures of the court. Instead of being the firm and fearless asserters of their clients' rights, often in opposition to the preconceived opinions of the bench, they must cringe and assent to any and every intimation of the judge at the risk of their ruin. The public have almost as deep an interest in the independence of the bar as of the bench.

Buchanan closed his argument with a statement: "I will venture to predict, that whatever may be the decision of the Senate upon his impeachment, Judge Peck has been the last man in the United States to exercise this power, and Mr. Lawless has been its last victim." How wrong he was!



The Senate voted 22 to 21 against the impeachment but within thirty days Congress enacted a law, which is still on the books, limiting a conviction of contempt for misbehavior to situations where there is obstruction of judicial proceedings.

Following the *Peck* case, the Supreme Court has applied Buchanan's thesis in innumerable opinions and has made clear that criticism of a judge is not punishable. For example, in *Bridges v. California* (1941) the Court held:

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.

Until recently that reflected what most lawyers considered to be settled law.

In November 1987, Elizabeth Holtzman strongly believed that the rape demonstration conducted in the judge's robing room was highly improper. Holtzman complained by letter to the New York State Commission on Judicial Conduct, expressing her opinion that the demonstration had degraded the victim, exposed her to "extreme psychological pain" and created the potential for turning a judicial proceeding into a vehicle for "sexual titillation." The letter asked for appropriate measures to deal with the judge's conduct.

The reprimand didn't say that Holtzman's letter was false; it made no factual findings.

In the words of the petition for writ of certiorari to the Supreme Court, Holtzman "considered it her duty as a lawyer—and particularly as a district attorney—to improve the criminal justice system. Public awareness of the rape demonstration, she believed, would help mobilize support for reform; and public awareness that the district attorney was actively seeking to protect rape victims from humiliation in the courtroom, she believed, would encourage more rape victims to testify and would encourage people to report instances in which rape victims are mistreated in the courts. Holtzman also believed that, as an elected official, she had both the right and the obligation to inform her constituency about problems in the criminal justice system and her efforts to address them." Accordingly, Holtzman publicly released one of her letters.

The disciplinary committee in the grievance committee proceedings alleged that Holtzman had "engaged in conduct that adversely reflects on her fitness to practice law by making false accusations against a judge without first determining the certainty of the merit of her accusations." In a nine-day hearing, the committee's counsel conceded that the rape demonstration had indeed occurred. The only factual issue about the demonstration was whether it had been done at the behest of defense counsel or on the initiative of the judge—an issue that seems irrelevant since in any event the court countenanced it. Nevertheless, the committee voted to issue a letter of reprimand against Holtzman "*for releasing your letter to the public.*" [Emphasis added.] The committee charged that "the aforesaid conduct was prejudicial to the administration of justice and adversely reflects on your fitness to practice law." The reprimand did not state that Holtzman's letter was false; it contained no factual findings whatsoever.

Holtzman appealed to the Appellate Division of the Supreme Court of New York. At this appeal, the grievance committee did not deny the truth of her statements. The committee stated, "The issue herein is not one of ultimate truth or falsity" of the letter; what mattered to the committee was that Holtzman *had made a public statement* that had "impugned the integrity" of the judge "and thoroughly reduced public confidence in the entire judicial/legal system." According to the committee, "Holtzman's issuance of a public statement—whether true, false or knowingly false" violated "the duty of attorneys to avoid actions which would tend to cast the system in a negative light, thereby reducing public confidence in our system of justice." This does not seem to be much different from Judge Peck's argument.

The Appellate Division confirmed Holtzman's reprimand, finding that "Ms. Holtzman . . . made public accusations of misconduct against a judge without first determining the certainty of the merits of the accusations, in violation" of disciplinary rules. It did not state how Holtzman's accusations were false, nor did it in fact state that they were false. On appeal the New York Court of Appeals (the highest state court) affirmed. In an opinion difficult to comprehend, it says that Holtzman is charged with having "made false accusations against the judge. This charge was sustained by the committee and upheld by the Appellate Division, and the factual finding of falsity (which is supported by the record) is therefore binding on us." Despite what the Appeals Court said, neither the grievance committee nor the Appellate Division ever issued a factual finding that Holtzman's charge was false or indicated how it was false.

On December 9, 1991, the Supreme Court of the United States, with only Justice White dissenting, denied a petition for certiorari to review the decision of the New York Court of Appeals in the Holtzman case. On the same day, the Supreme Court dealt similarly, again with only Justice White dissenting, with a petition filed on behalf of George Westfall, a Missouri lawyer who had been publicly reprimanded for making public statements critical of a judge's opinion and claiming the judge had acted for reasons that he found "somewhat illogical and I think even a little bit less than honest."

On December 16, 1991, *The New York Times* reported on a speech of Justice Rehnquist in which he noted, "Lofty sounding declarations mean little in the absence of a constitutional structure to give them meaning," such as the judicial branch of our government. But what if the pinnacle of the judicial branch simply refuses to act? □