Marquette Law Review

Volume 46
Issue 1 *Summer 1962*

Article 6

1962

Free Speech and the Common Good

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Milton Conover, *Free Speech and the Common Good*, 46 Marq. L. Rev. 79 (1962).
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AND THE COMMON GOOD FREE SPEECH

MILTON CONOVER*

Walter Walker spoke to a select audience of one—his own little son. But this personal speech proved to be too free in subject matter for Walter Walker's own personal freedom in his own personal domicile in his own Fifteenth Century England. For he dwelt in quaint Cheapside at the Sign of the Crown Tavern during the reign of Edward the Fourth. He told his lively child that if he would be quiet, he would make him heir of the Crown. Whether he meant the Crown Tavern or the Crown of Edward the Fourth seems not to have engaged the court to the extent of judicial notice. His few words so freely spoken caused him to be "attaint of high treason and executed, tho Markham, Chief Justice, rather chose to leave his place, than assent to this latter judgment."[1]

The Chief Justice apparently opined that this judgment constituted too great a limitation on speech to be in the public interest. Subsequent to his leaving the court, other publicists through the three following centuries made kindred demonstrations in favor of a greater freedom of speech: Algernon Sidney, John Milton, John Wilkes et al. Consequently, Nineteenth Century England enjoyed laws guaranteeing free speech that were nearly as liberal as those of any country, while Nineteenth Century America maintained free speech guaranteed in its Federal Constitution and in each of its State Constitutions. By 1960, this meant freedom for thousands of Walter Walkers in America to speak to audiences of continental scope involving millions of hearers. By this time there were about 645,000 radio and television operators, and 700,000 radio licenses issued. There were about 200,000 associated mobile units organized among fifty different classes of stations. Likewise there were approximately 1,750,000 television receiving sets distributed over the Continent.[2] Microwave relay systems were planned from New York to California. All of this besides the ordinary public speaking through microphones, calliopes, loud speakers and mechanical devices.

With all of this multitudinous acceleration of audio-visual mechanics, however, there still remained some limitations on free speech in the public interest if we define "public interest" more broadly than did the

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[1] 1 HALE, THE HISTORY OF THE PLEAS OF THE CROWN, 115, (1778 edition); The Walter Walker incident and some related data are substantially that used by the writer in a consideration of *"Limitations of Free Speech"* in THE SETON REVIEW, Vol. 1, p. 30 (1952). Since then, the idea of a more effective legal and extra-legal control of public audio-visual impacts has appealed to community *mores*, much of which being Thomistic in that it has visualized the protection of the public good in the interest of individual welfare.

[2] 1949 FCC Ann. Rep. 41.

Court of Edward IV, so that it be understood as the "common good" in the St. Thomas Aquinas sense, especially where he senses that governmental "Actions are indeed concerned with particular matters: but those particular matters are referable to the common good, not as to a common genus or species, but as to a common final cause, according as the common good is said to be the common end."[3] There were demands for more laws "ordained to the Common Good," i.e., laws that were ordinances "of reason for the Common Good, made by him who has care of the community, and promulgated."

There were demands for further limitations on speech for reasons other than treason. The mechanical age had expanded the public interest. By 1936, the United States Conference of Mayors had observed the need of anti-noise ordinances. By 1942, the National Noise Abatement Council had noted that 165 American cities had enacted "Ordinances and other Measures for the Elimination of Unnecessary Noise." This restraining program could be justified only in the interest of the common good. Mr. Herbert C. Hoover, as Secretary of Commerce, stated to the Fourth National Radio Conference, in 1925, that "The use of a radio channel is justified only if there is a public benefit. The dominant element for consideration in the radio field is, and always will be, the great body of the listening public, millions in number, country wide in distribution." This principle was adopted by the Conference, which further considered that the broadcasting privilege, like public utility privileges, should be based on convenience and necessity, combined with fitness and ability to serve, and due consideration should be given to existing stations and services which they have established. Later this idea was embodied in the Federal Radio Act of 1927.

By 1939, the Public Interest has become articulate "in accents disconsolate." The Federal Communications Commission found that about fifty complaints a week were being registered against the radio programs. Complaints were made against radio talks concerning fortune telling, solicitation for funds, astrology, indecent and obscene programs, political discussions, offensive religious or racial comments, and thriller programs for the excitement of children in special children's programs. Then, too, there were objections to false, fraudulent and misleading advertising and to defamatory statements. These latter two

[3] 8 SUMMA THEOLOGICA, Part Second, First Part, Question 9, Article 2, translated by the Fathers of the English Dominican Province. (London: Burns, Oates & Washbourne Ltd., 1927), p. 5. This volume includes St. Thomas' Treatise on Law, Questions XC-CVIII, pp. 1-319. Volume 9, treats of Peace, Discord, Contention and Sedition in Questions XXIX, XXXVII, XXXVIII, and XLII, in the later of which St. Thomas declares that "it is evident that the unity to which sedition is opposed is the unity of law and the common good: whence it follows manifestly that sedition is opposed to justice and the common good." Justice as such is treated more exhaustively in Volume 10, Questions LVII-LXXIX, pages 104-350, but Volume 8 deals more especially with the common good.

complaints might find remedy through personal action for criminal libel or for damages—matters of private rather than of public interest. For instance, by 1932, there were 23 States that allowed action for libel or slander of dead persons—aside from common law actions. But the complaints concerning children's programs distinguished free speech from the free press. Parents might keep objectional publications from their children—but it was found difficult to keep them immune from offensive radio programs. They had no chance to examine them before permitting the children to hear them. The long line of existing precedents for freedom of the press furnished nice standards for freedom of speech, and for its limitations, but they were insufficient for the new problems of radio and television. Unprecedented controls were necessary. The speaker could have a charm for ill more effectively than could the printed word. The original purpose of free speech was not to foster depravity in children by either stories or the oral advertising of immoral commodities.

With expansive use of loud speakers and calliopes, there also came assertion of the right to privacy and to silence, to domestic tranquility and to protection of the nerves from plain noise labeled as free speech. In Mr. Justice Brandeis' classic dissent in *Olmstead v. United States*[4] in 1928, he said that our Constitution makers "recognized the significance of man's spiritual nature, of his feelings and his intellect. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment."

If the Government may be restrained from intrusion upon personal privacy—even when in search of evidence of crime—why may not loud speakers be curbed from intrusion upon personal peace—the right to silence? In the New Jersey case of *Bednarik v. Bednarik*,[5] it was stated that in the Roman law, "the punishment of one who had not committed any assault upon another, or impeded in any way his right of locomotion, but who merely attracted public attention to the other as he was pacing along a public highway or standing upon his private grounds, evidence the fact that the ancient law recognized that a person had a legal right 'to be let alone' so long as he was not interfering with the rights of other individuals or of the public. This notion is the basis of our exercise of injunctive process in cases of private nuisance, resulting from noise which interferes with the enjoyment of his home." The court

[4] 227 U.S. 438 (1928).
[5] 18 N.J. Misc. 633 (1940).

further recalled that "the reason for the punishment of eavesdroppers and common scolds was not for the protection of property rights, but the fact that their conduct was a disturbance of the right to quiet and repose." Would not the same theory apply to loud speakers?

Synchronomously, new political fears had arisen that fostered greater considerations for national safety. These were more like the Walter Walker case. It centered on the rise of international Communism. It was given expression in 1950 in a dissenting opinion of the United States Supreme Court in the case of *American Communications Association v. Douds.*[6] Here Mr. Justice Jackson, referring to the Communist Party, said that "It is a satrap party, which to the threat of civil disorder, adds the threat of betrayal into alien hands. . . . In not one of the countries it now dominates was the Communist Party chosen by a free or contestable election, in not one can it be evicted by any election. The international police state has crept over Eastern Europe by deception, coercion, *coup d'etat,* terrorism, and assassination." He considered that the Communist Party in America was the same and that it "adds occasional terroristic and threatening methods, such as picketing courts, and juries, political strikes, and sabotage—conspiracy, violence, intimidation. . . ." Prior to this case, some of the States had taken action to curb expressions of Communist sympathy. The display of the Red Flag was punishable in 32 States and there had been some prosecutions for doing so. Anti-syndicalist statutes had been enacted extensively. Teachers loyalty oaths had been required in several states—thus denying teachers the right to teach upon refusal to take such oaths. Profanity in speaking was prohibited in 36 States. In Washington, it was illegal to speak disrespectfully of the law, and the law was upheld in the case of *State v. Fox.*[7] It was a crime in Vermont to defame a magistrate; in Florida to upbraid a teacher in the presence of pupils. So public order had enlisted defensive measures for the common good.

The idea of the common good had been refined in the 13th Century through treatments of it in the various writings of St. Thomas Aquinas, and after World War II it was cogent to the audio-visual spread in compact communities of ranch-houses and housing projects in congested areas. Here too much free speech and free noise could disturb domestic tranquility more disastrously than in the scattered ranch-houses on the great wide open plains devoid of captive audiences. "To insure the well-being of a community," said St. Thomas in his *De Regimine Principum,* "three things are necessary. In the first place the community must be united in peaceful unity. In the second place, the community, thus united, must be directed toward well-doing. For just as a man could do no good if he were not an integral whole, so also a

[6] 339 U.S. 382 (1950).
[7] 127 Fed. Rep. 1111 (1942).

community of men which is disunited and at strife within itself, is hampered in well-doing. Thirdly and finally, it is necessary that there be, through the ruler's sagacity, a sufficiency of those material goods which are indispensable to well-being."[8] This could include quiet housing projects. Rulers of countries are appointed "that they may prosper the common welfare," wrote St. Thomas to the Duchess of Brabant in *De Regimine Judaeorum.*[9] Accordingly, in those matters "which concern the civil welfare, the temporal power should be obeyed rather than the spiritual,"[10] he averred in his *Commentary on the Sentences of Peter Lombard,* allowing for exceptions. This community-centered polity was to be implemented for the benefit of the individual person. For "life in a community further enables man to achieve a plentitude of life; not merely to exist, but to live fully, with all that is necessary to well-being,"[11] he essayed in his *Commentary on the Nicomachean Ethics.* Among communities of people "there are different grades and orders, the highest being the political community, which is so arranged as to satisfy all the needs of human life; and which is, in consequence, the most perfect," he observed in his *Commentary on the Politics of Aristotle,* and concluded that "The city is, in fact, the most important thing constituted by human reason."[12] Might it not also be the most important thing constituted by human spirit if it could build a city as congenial as the ideal city with which the Bible story culminates in the Book of Revelation—with no captive audiences?

Abuse of official judicial speech also had invited restraint. On October 6, 1917, Senator Robert M. La Follette presented a press release to the U.S. Senate stating that "Judge Walter T. Burns of the United States district court in charging a Federal grand jury at the beginning of the October term to-day, after calling by name Senators Stone of Missouri, Hardwicke of Georgia and La Follette of Wisconsin, said: "If I had a wish I would wish that you men had jurisdiction to return an indictment against these men. They ought to be tried, promptly and fairly, and I believe the court could administer the law fairly, but I have a conviction as strong as life, that this country should stand them up against an adobe wall tomorrow and give them what they deserve. If any man deserves death, it is a traitor. I wish that I could pay for the ammunition. I would like to attend the execution and if I were in the firing squad I would not want to be the marksman who had the blank shell."[13]

[8] Chapter XV., translated by J. G. Dawson, in D'ENTREVES, AQUINAS SELECTED POLITICAL WRITINGS, (Oxford: Basil Blockwell) 81, (1954). Unless otherwise indicated all of the words by St. Thomas Aquinas to which reference herein is made are included in this volume to which page references are given.
[9] *Ibid.* p. 91.
[10] *Ibid.* p. 187.
[11] *Ibid.* p. 191.
[12] *Ibid.* p. 197.
[13] 55 Congressional Record, 7878 (1917).

This judge apparently disapproved of the six Senators and 50 Representatives in Congress who voted against America's entry into World War I. But there was a suggestion from another Federal judge that Judge Burns might well be investigated due to his official speech in court.

In 1950, suggestions were rampant that investigations might well be made of another Wisconsin Senator—Joseph R. McCarthy—because of his liberty of Senatorial speech, which suggestions, however, became less acid after the Soviet—the object of his antipathy—did terrorize Hungary six years later and did mar summitry in 1960. More frivolous, perhaps, were insinuations in 1951, that even some public expressions of the President might be called to his attention for restraint or limitation in the World public interest. More serious was the suggestion in 1939, that Federal W.P.A. projects fostering alleged communistic sentiments should be curbed just as much as if they were produced by private agencies, because the sovereign is not above the law. So the limitation of free speech for the common good was to be no respector of persons whether private or official. Characteristically, St. Thomas in his *Summa Contra Gentiles* had noted that "Lack of order arises from the fact that somebody is in control, not because of his superior intelligence, but because he has seized power by physical violence or has been set up to rule through ties of sensible affection."[14]

Three theories of free speech merit attention in view of the Mid-Twentieth Century World situation: the Blackstone theory; the Story-Cooley theory; and, the Use-Abuse theory. The Blackstone theory as applied to the press would apply to free speech. Blackstone's liberty of the press "consists in laying no previous restraints upon publication and not in freedom from censure for criminal matter when published."[15] Similar expressions appear in most State Constitutions in the United States. Others carry expressions as in the First Amendment to the Federal Constitution. But Professor Zachariah Chafee, Jr., of Harvard Law School, felt that the Blackstone theory "ought to be knocked on the head once and for all."[16] And it did seem impractical for radio speech and the television. How could one prevent millions of children from being corrupted if there were no previous restraint—no prospectus of program available to censors or licensors? In 1950, during the Korean police action, should radio commentators looking for scoops have been allowed to broadcast to the world the number of American troops that were to be sent by airplane from San Francisco to Korea at a given zero hour? As early as 1914 Professor John H. Wigmore warned that "the punishment of the picture-panderer, for abuse of his privilege, after he has

[14] AQUINAS SELECTED POLITICAL WRITINGS, edited by A. P. D'Entreves, translated by J. G. Dawson, (Oxford: Basil Blackwell) 101 (1954).
[15] BLACKSTONE, COMMENTARIES, 151.
[16] Chafee, FREE SPEECH IN THE UNITED STATES, 9 (1946 ed.).

done harm is futile and ill-judged. . . . Stop the exhibition; save the rising generation; and thus prevent the harm before it is done. Such would seem the sensible plan. We, therefore, hold that the ancient and solid principles of liberty of speech, so far as it ignores our right to prevent beforehand whatever we should be entitled to punish afterwards, may well be reconsidered."[17]

The Story-Cooley theory is to the effect that anything that is not injurious or harmful may be spoken freely. The injury or harm element is the test. Justice Story's commentary on free speech holds that "every man shall have a right to speak, write and print his opinion upon any subject whatsoever, without any previous restraint, so always that he does not injure any other person in his rights, person, property or reputation; and so always that he does not thereby disturb the public peace, or attempt to subvert the Government."[18] Justice Cooley says that "we understand liberty of speech and of the press to imply not only liberty to punish but complete immunity from legal censure and punishment for the publication so long as it is not harmful in its character when tested by such standards as the law affords."[19] This Story-Cooley theory would seem to be adaptable to the 20th Century world situations and probably to future circumstances—better at least than the Blackstone theory of previous restraint. Story might allow previous restraint if necessary to the public interest—where Blackstone's would not. The common good as conceived by St. Thomas Aquinas, would be protected eventually under either theory, however.

The Use-Abuse theory, or if you like, the Liberty vs. License theory of free speech, is a further specification of the Story-Cooley standards and it provides for evaluation of speech in terms of liberty or of license. It was comprehended in 1900 in the Connecticut case of *State vs. McKee*.[20] It asserts that "every citizen has an equal right to use his mental endowments in any harmless occupation or manner, but he has no right to use them so as to injure his fellow citizen or to endanger the vital interest of society. . . . The liberty protected is not the right to perpetrate acts of licentiousness or any act inconsistent with the peace or safety of the state. Freedom of speech and of pen does not include the abuse of the power of tongue or of pen, any more than freedom of other action includes an injurious act of one's occupation, business, or property." Hence the evaluation of injuries and social interests—the common good. It would allow limitations very gracefully. As the Supreme Court in 1918 said in *Toledo Newspaper Co. vs. United States*—before which there had been but few free speech cases judicially determined with extended theorizing—every "right, enjoyed in human

[17] WIGMORE, *Moving Pictures and the Constitution*, 9 ILL. LAW REV. 132 (1914).
[18] STORY, COMMENTARIES ON THE CONSTITUTION, 1874.
[19] COOLEY, CONSTITUTIONAL LIMITATIONS, 517-518 (6 ed.).
[20] 73 Conn. 18, 46 A. 409 (1900).

society is subject to the restraints which separate right from wrongdoing." Free speech gives no license to impose on the right to freedom from annoyance. Likewise, in *Frohwerk vs. United States,*[21] the Court asserted that "we venture to believe that neither Hamilton nor Madison nor any other competent person, then or later, ever supposed that to make criminal the counselling of a murder—would be an unconstitutional interference with free speech." Likewise, Justice Holmes said in *Schenck vs. United States*[22] that "the most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." That would offend the common good. So to find a dead line between free speech and abuse one might apply the formula of Professor John G. Wigmore, thus:

> A statute does not abridge constitutional freedom of speech if it forbids A's exhortation of B to do a specific act which would have consequences defined by the legislature to be deleterious to the commonwealth. But a statute does abridge such freedom which forbids A's expression of opinion to B that a specific act and its consequences ought not to be prevented by law, or forbids A's exhortation to B to join in removing that legal obstacle by the usual legislative methods.[23]

Professor Wigmore could apply his own test to his own position in 1898 when he opposed America's entry into a war with Spain, but once having entered the war he would not hamper the war effort. Twenty years later in *Abrams vs. United States,* the court in 1918 decided that to attempt to induce residents of the United States to refuse aid in the war effort of World War I constituted a punishable offense—an abuse of freedom. There were two dissents: one by Mr. Justice Holmes who had been wounded four times in the Civil War, and the other by Mr. Justice Brandeis.[24]

To determine where the right of free speech is abused to the detriment of the public interest, the courts have applied the "clear and present danger test" as pronounced by Justice Holmes in 1919 in *Schenck vs. United States*: "The question in every case is whether the words used are used in such circumstances and of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."[25] Some jurists, however, consider that this test is inadequate. Justice Brandeis, in the *Whitney vs. California* case in 1926 expressed the difficulty that there was no standard "by which to determine when a danger should be deemed clear."[26] As regards danger to the Govern-

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[21] 249 U.S. 204 (1919).
[22] 249 U.S. 47 (1919).
[23] 14 Ill. 556-557 (1920).
[24] 250 U.S. 616 (1919).
[25] 249 U.S. 47 (1919).
[26] 274 U.S. 374 (1926).

ment, the Supreme Court in *Hamden vs. Lowry* declared that "the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension to organized government."[27] Under this criterion, Walter Walker, under Edward IV, might not have been executed. Also, in *Bridges vs. State of California,* the Court said that "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."[28] This same criterion might be applied when any element of the public interest is threatened as well as the organized government. As Judge Learned Hand said as early as 1917 in one of the earliest major American cases involving judicial discussion of liberty of expression: "Words are not only the key of permission, but the triggers of action, and those which have no purport but to counsel the violation of law cannot by any latitude of interpretation be a part of that public opinion which is the final source of government in a democratic state."[29] One week after the *Schenck Case,* which expressed the Clear and Present Danger Test, the same Court adjudged that a speech by Eugene Debs—a perennial candidate for the Presidency on a pacific Socialist platform—was punishable by Federal imprisonment. The *Abrams Case* was still standard.

Among the major cases scrutinizing the abuse of free speech that have withstood the Clear and Present Danger Test, the *Terminiello Case*[30] of 1949 seems to show some relaxation of the standard set in the *Abrams case.* The alleged danger was to the public peace rather than to the organized government. Here a Chicago Ordinance provided that "all persons who shall make . . . any improper noise, riot, disturbance, breach of the peace, or diversion tending to a breach of the peace . . . shall be guilty of disorderly conduct." Under it, one Terminiello had been convicted. The Court reversed the conviction by a 5 to 4 decision. Justice Douglas, speaking for the majority, said that "the statutory words 'breach of peace' were defined in instructions to the jury to include speech that 'stirs the public to anger, invite dispute, brings about a condition of unrest, or creates a disturbance.' . . . That construction of the ordinance is a ruling on a question of state law that is as binding on us as though the precise words had been written into the ordinance." Terminiello's words apparently were not a clear and present danger to the peace because, as Justice Douglas declared, "a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people

[27] 310 U.S. 258 (1939).
[28] 249 U.S. 47, 52 (1919).
[29] Masses Publ. Co. vs. Patten, 244 Fed. 535, 540 (1917).
[30] 337 U.S. 934 (1949).

to anger." Free speech is "protected against censorship or punishment when shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest," and "there is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political groups." So Justice Douglas was about as broad here as he was in *Look Magazine* in January, 1951, re a T.V.A. for Iraq. His doctrine would seem to throw the Court back to the Blackstone theory of no previous restraint. For it would seem that "fighting words" may not be restrained before the actual breach of peace thus relaxing the limitation noted in *Cantwell vs. Connecticut*[31] and in *Chaplinsky vs. New Hampshire.*[32] For Justice Jackson in a dissent, showed that "fighting words" were used and that there was a breach of peace according to American community standards —outside of Chicago. There were 28 windows broken. These resulted from agitation against the speaker Terminiello, and Justice Jackson considered that the speech did induce a breach of the peace.

One of the greatest potential sources for the limitation of free speech in the interest of the public weal is the State police power which is the power to insure the common good against abuse. This has developed steadily by implementation ever since 1827 when Chief Justice Marshall in *Brown vs. Maryland* said that "the power to direct the removal of gun powder is a branch of the police power, which unquestionably remains, and ought to remain with the States." Police power was judicially considered in *Commonwealth vs. Alger*[33] in 1851 when Justice Shaw said that "the power vested in the legislature by the Constitution, to make, ordain, and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth, and of the subjects of the same." This mentioned serious words for the interpretation of courts and for the appreciation of juries: wholesome, reasonable, welfare. But he was more specific in his application of his standards to the use of property which he opined is held by the owner "under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community." This would be applicable to loud speakers. "Sic utere tuo ut alienum non laedas." In *Atlantic Coast Line Ry. vs. Goldsboro,* Justice Pitney recognized the comparative constitutional position of the police power in saying that "neither the 'contract' clause nor the 'due process' clause has the effect

[31] 310 U.S. 296 (1939).
[32] 315 U.S. 568 (1941).
[33] 61 Mass. 53, 85 (1851).

of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that the power can neither be abdicated nor bargained away, and is unalienable even by express grant."[34] So no future radio corporations nor aviation institutions might buy the right to disturb the public comfort or the common good. The Vermont Supreme Court expanded the idea so as to include "the protection of the lives, limbs, health, comfort and quiet of all persons."[35] The "quiet" was important to Vermont. They were ready to control loud speakers and nuisances. Later, other Courts recognized police power as the right to protect morals. That prepared for radio and television control of programs. Eventually, public happiness and public welfare were considered attributes of the State which Federal government could not violate. This all was quite aside from the Federal police power which Justice Brandeis in 1919 thought extended to Federal subjects,[36] and quite aside from the existing provisions of the common law—all of which might be blended in support of the public weal against unwholesome noise.

Accordingly, the right to privacy in this machine age might include the right to enjoy a quiet home which would be afforded only in a quiet community. If so, the control of noisy speech would have for its auxiliary an old natural law principle. In *Bednarik v. Bednarik,* the New Jersey Court in 1940 said that "the right of privacy in matters purely private is derived from natural law" and that "The concept was developed under the Roman law whence it became incorporated in our Common law." The Court thought that "It seems strange that in none of the reported cases has the constitutional right to personal privacy and security been raised and debated. This inherent right is expressly secured by all of the state constitutions, as well as by the Federal Constitution. . . . The right of privacy has its foundation in the instincts of nature. It is recognized intuitively, consciousness being the witness to prove its existence."[37] "The natural law," the Court might have explained, according to St. Thomas, "is nothing else than the rational creature's participation of the eternal law."[38] Its function is to aid one in discerning what is good and what is evil—the point beyond which a good may become an evil.

Where an attempt is made to limit free speech under the police power the question whether a speech violates comfort or morals may be

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[34] 223 U.S. 548 (1911).
[35] 27 Vt. 149 (1854).
[36] Hamilton vs. Kentucky Distilleries and Warehouse Co., 251 U.S. 146 (1919).
[37] 18 N.J. Misc. 633 (1940).
[38] 8 SUMMA THEOLOGICA, Part II, First Part, Question 91, Article 2, translated by Fathers of the English Dominican Province, (London: Burns, Oates & Washburne Ltd.) 12 (1927).

a question for the jury and consequently the finding a bit unpredictable. Some juries may be composed of lovers of rude comforts and of collective racket. In 1949, however, the case of *Kovacs v. Cooper* held that sound trucks may be prohibited. Here a Trenton ordinance prohibited the playing on the city streets—"any device known as a sound truck . . . or any instrument of any kind which emits therefrom loud and raucous noises and is attached to or upon any vehicle." The ordinance was challenged on free speech principles in the U.S. Supreme Court. The ordinance was upheld by a 5-4 decision, but the reasons for the decision were about as various as the majority. So a clear cut doctrine as to right to stir up a community's peace and quiet under the right of free speech would still be welcomed. The theory of previous restraint entered it, so did the element of time and place. Yet it was observed that "On the business streets . . . such distraction would be dangerous to traffic at all hours useful for the dissemination of information, and in the residential thoroughfares the quiet and tranquility so desirable for city dwellers would likewise be at the mercy of an advocator of particular religion, social or political persuasions."[39] One needs only to spend a day in some cities to feel the force of this statement—where one may not escape anyone's amplified speeches or "music." Thus the common good may be relative to the nature of a given community, unless the "good" is identified with morals, rather than uncouth concepts of "good time."

This progress in judicial interpretation of the limitations on freedom of speech was not universal. In some jurisdictions the Use-Abuse theory had not prevailed always. Public speech and public demonstration had been allowed to dominate a jury in the *Leo Frank Case* in 1915 in Georgia. The United States Supreme Court decided not to remedy the situation despite the dissent of Justices Holmes and Hughes, the dissent asserting that the trial "was carried on in a court packed with spectators and surrounded by a crowd outside all strongly hostile to the petitioner" and "when the Solicitor General entered the Court he was greeted with applause, stamping of feet and clapping of hands," and the judge privately told Leo Frank's counsel "that it would be safer for not only the petitioner but his counsel to be absent from Court when the verdict was brought in."[40] Eventually the jail was broken into and Leo Frank, the Cornell University graduate, was lynched with less refined decorum than was observed at the execution of Walter Walker in Fifteenth Century England. Lynchings followed in other states. Complaints were audible that the right of free speech had been an obstacle in fixing criminal or civil responsibility for defamation in some cases such as *Detroit Dailey Post v. McArthur*,[41] and that this sacred right had per-

[39] 336 U.S. 77 (1949).
[40] Frank v. Mangum, 237 U.S. 309 (1915).
[41] 16 Mich. 447 (1868).

mitted unjustifiable abuse of the judiciary in cases like that of *In re Hayes*,[42] and that it has rendered void a statute constituting public profanity an offense in *State v. Warren*.[43] The courts need not have done so. Under their own State Constitution courts could have sustained almost any limitation of free speech within wide ranges of their police power—which is the guardian of their own local public interests.

Both the Federal Congress and many State legislatures, however, had been looking to greater control of public address. Professor Chafee observed that the Federal statutes affecting freedom of speech applied to words relating to treason, inviting to insurrection, interference with the draft, inciting to mutiny, desertion, and threats to kill the President. State statutes or the common law in states likewise restricted speech. Legislation against incitement to violence obtained in eight states; against conspiracy in 37; criminal syndicalism in 18; and against unlawful assembly in 42 commonwealths. Other less important limitations prevailed.[44] Refinements and actualization of these legal theories, judicial precedents, and legislation were needed to cope with the Continent-wide problem of public speech. This refinement became directed to radio program control as regards its content, its relation to the feelings of the people, the public morals and the public happiness.

This is afforded through a system of censorship, licensees, permits and the enforcement of standards of service—policies and practices offensive to the Blackstone theory. In 1940, in the *Federal Communication Commission vs. Pottsville Broadcasting Company* case, Justice Frankfurter said that "Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcast field. To avoid this, Congress provided for a system of permits and licenses."[45] Three years later, the Supreme Court in the momentous *Networks cases*[46] recognized and upheld the power of the Federal Communications Commission to regulate the standards of service and business practices of radio networks. So the Blackstone theory had gotten its Chafeean "knock on the head." The F.C.C. carried on its supervision of radio to the extent that eventually all of the classified 50-complaints-a-week against radio program content had been met by regulations or decisions. They condemned some language as against public health and safety quite as readily as if they had been exerting a State police power for a State. They acted against a program used in advertising contraceptives. But they did allow free speech concerning venereal diseases in deference to

[42] 72 Fla. 558, 73 S. 362 (1916).
[43] 113 N.C. 683, 18 S.E. 498 (1893).
[44] CHAFEE, FREE SPEECH IN AMERICA, 572-77 (1946).
[45] 309 U.S. 134, 137 (1939).
[46] National Broadcasting Co. v. United States (F.C.C.) and other cases, 319 U.S. 190 (1943).

the Federal Government's campaign against such diseases. Apparently, the F.C.C. has followed precedent in limiting discussion where the interest of the common good of millions is concerned—following the Use-Abuse doctrine of *Schenck v. United States* and of *Abrams v. United States* of years long before. And in times of world emergency it may be expected to shield the organized Government by following *Gitlow v. New York*,[47] and *Near v. Minnesota*.[48]

In post-war America, the State police power likewise was asserted. In Pennsylvania in 1948, it was held that motion pictures included television in the case of *Philadelphia Retail Dealers Assn. v. Pennsylvania Liquor Control Board*.[49] Six states and many cities maintained motion picture film censorship. The Pennsylvania State Board of Censors required censorship of reels for television for approval before public exhibition, thereby proceeding far from the Blackstone theory.

In both Federal and State censorship, after the advent of television, there has been a trend toward the original purpose of free speech—free speech as a means of protecting the common weal—not as a means of pure commercialism with personal oppression. The elements of truth, motives, and ends have been considered even as they were in *State v. Junkin* when the Court said that "The privilege of speaking and publishing the truth with good motives and for justifiable ends was not asserted in the Bill of Rights by accident."[50] The radio and television are really more than free speech. Time may place its free speech relationships on the same level as labor picketing as analyzed by Justice Douglas in the *Bakery and Pastry Drivers Case* in 1942, when he observed that "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated."[51]

In drafting policies for the control of free speech via mechanical devices, legislators may resort to various means of limitations that are purely incidental to free speech though none the less effective as to its restraint. Such are zoning laws in which no loud speakers might intrude during certain hours, traffic regulations, and regulations common to other enterprises. Radio corporations might be denied time because their programs are of limited appeal. This is because the networks cannot meet the demand for time releases. So the authorities in the public interest would grant time to operators having the greater number of fans. Here the principle is comparable to that of public necessity and convenience in public utilities—and to the economic law of supply and

[47] 268 U.S. 652 (1925).
[48] 283 U.S. 697 (1931).
[49] 360 Pa. 269, 62 A. 2d 53 (1948).
[50] 85 Neb. 1, 122 N.W. 473 (1909).
[51] 315 U.S. 769, 776 (1942).

demand. This, of course, is quite aside from the matter of censorship of program. It is strictly a limitation in the public interest from the service motives. Too great a progress in such restraint might defeat its objectives and the administration itself might be legislatively restrained. But further analysis of such policies would take us far from the general theory of free speech law and into the technical routine procedure of public administration. It is seen that this limitation of free speech for the common good in the Thomist sense is a problem of perpetual balance between personal liberty and the public weal. There need be no conflict between them. But should one over-balance the other, both eventually could be lost. In this Urban Age of T.V.'s and super-megaphonics—five centuries after Walter Walker and King Edward the Fourth—it often may be an increasingly complex question of both fact and law as to what can maintain the necessary balance between the rights of the Walter Walkers and the Sovereign Common Good.