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Freedom of the Press

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FREEDOM OF THE PRESS

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TO THOSE of us who value the personal liberties guaranteed by the constitutional democracy of the United States of America, one of the most priceless heritages is liberty of the press. To allow a free press to be fettered is to fetter our own free thinking; it is a personal loss.[1]

In the constant conflict between freedom and oppression, one which will never cease, and particularly in the face of unusual encroachments upon freedom of the press during a semi-wartime or wartime period such as we seem to be entering, let us keep in mind that the fundamental purpose of the First and Fourteenth Amendments was not to guarantee to publishers the right to print, but to guarantee the American people the right to read what is printed, to learn the facts concerning public affairs, to weigh conflicting opinions, and to form their own judgments, unhampered by the dictates of any one branch of a government.

Omitting here consideration of state constitutions, the law of liberty of the press in the United States of America emanates from the First and Fourteenth Amendments to the United States Constitution. The First Amendment provides that "Congress shall make no law . . . abridging the freedom . . . of the press . . . ." The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." It was not until 1925 that the Supreme Court of the United States finally determined what had previously, but uncertainly, been considered true, namely, that the Fourteenth Amendment prohibited the States from encroaching upon the liberty of the press with the same force and breadth as the First Amendment prohibited such encroachment on the part of Congress.[2] In the light of existing United States Supreme Court decisions, it can now be safely said that freedom of the press, as guaranteed in these two amendments, one by express provision, the other by interpretation of the word "liberty," one guarding against acts of Congress and the other guarding against acts of the various States, is synonymous and identical.

It was not until June 1, 1931, in the decision of Mr. Chief Justice Hughes, in the leading case of *Near* v. *State of Minnesota ex rel. Olsen,*[3] that a fairly complete and coherent statement of the scope of

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[1] Grosjean v. American Press Company, 297 U.S. 233, 56 Sup. Ct. 444, 80 L.Ed. 660 (1936).
[2] Gitlow v. New York, 268 U.S. 652, 45 Sup. Ct. 625, 69 L.Ed. 1138 (1925).
[3] 283 U.S. 697, 51 Sup. Ct. 625, 75 L.Ed. 1357 (1931).

freedom of the press was given us. Early decisions of the United States Supreme Court generally confined themselves to an interpretation of the First Amendment, and generally theorized that the First Amendment enacted Blackstone's statement that:

> "The liberty of the press . . . consists in laying no previous restraints upon publications and not in freedom from censure for criminal matter when published."[3a]

To Blackstone, legitimate suppression of the press began at the time of publication, limiting the government from interference by censorship or injunction before the words are printed; Blackstone, however, left the right of punishment after publication, no matter how harmless or essential to the public welfare such publication might be, to the limitless imagination of that government.[4] Finally, after an historic series of decisions, the United States Supreme Court, in 1919, under the able pen of Mr. Justice Holmes (reversing his earlier stand as a Massachusetts Judge), rejected the Blackstone theory and broadened the American concept of freedom of the press.[5]

As expressed in the *Schenck* case, and in subsequent decisions of the United States Supreme Court, freedom of the press is now a broader exemption from governmental encroachment—it is largely the right to publish with good motives and for justifiable ends, whether it respects government magistracy, or individuals, without previous censorship, and with security against laws enacted by the legislative department of governments or measures resorted to by the executive or judicial branches of governments, for the purpose of stifling just criticism or muzzling public opinion.[6]

The earlier Blackstonian theory has been disposed of in an unanswerable comment:

> "The mere exemption from previous restraints cannot be all that is secured by the constitutional provisions, inasmuch as . . . the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a byword, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications . . . the evils to be prevented were in the censorship of the press merely, by any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens."[6a]

[3a] 4 BL. COMM. *151.
[4] See Zechariah Chafee, Jr., *"Freedom of Speech in Wartime"* 32 HARV. L. REV. 938.
[5] Schenck v. United States, 249 U.S. 47, 39 Sup. Ct. 247, 63 L.Ed. 470 (1919).
[6] 11 Am. Jur. 1111.
[6a] COOLEY, CONSTITUTIONAL LIMITATIONS (7th ed) 603.

However, despite the rejection of the Blackstonian theory, and despite this enlargement of the concept of freedom of the press to include protection after publication, we must nevertheless admit that we are still left with a legal concept which has never received a definite boundary and which still continues to live in the glowing phrases of generality just set forth. Cases have been decided, but lines have not been drawn. The courts have done little more than place obvious cases on this side or that side of the line. As stated by the very droll Mr. Chafee, *supra,*:

> "To a Judge . . . these generalizations furnish as much help as a woman forced like Isabella in 'Measure for Measure,' to choose between her brother's death and loss of honor, might obtain from the pious maxim, 'Do right.' . . . Nearly every free speech decision, outside such hotly litigated portions as privilege and fair comment in defamation, appears to have been decided largely by intuition."

A brief summary of interesting cases will serve to illustrate the indecisiveness of judicial interpretation.

In the leading case of *Near* v. *State of Minnesota,*[7] the court held void, as an infringement of the liberty of the press guaranteed by the Fourteenth Amendment, a Minnesota statute authorizing suppression by injunction of a malicious, scandalous and defamatory newspaper, magazine or other periodical, even though the statute gave the publisher the right, before injunction issues, to show that the matter published was true and published with good motives. The court held that freedom from restraint did not depend upon proof of truth, although it admitted the authority of the State to enact laws to promote the health, safety, morals, and general welfare of its people, stating only that the balance of adjustment must be reached between this liberty of the individual and the right of the State. The court clearly pointed out that the liberty of the press is not an absolute right but its abuse is punishable by the State by means of libel laws and by contempt proceedings where there is an obstruction of justice. The court rejected the Blackstone theory on the ground that it is true as far as it goes, but that such immunity from previous restraint cannot be deemed to exhaust the concept of the liberty. By way of partial definition, the court insists that the liberty is not lost because the published material charges the commission of crimes, or because the statute would have been effective to prohibit the circulation of scandal tending to disturb the public peace and to provoke crimes. In his dissent, Mr. Justice Butler argues the Blackstonian theory and contends that the Minnesota statute should be valid because it does not impress a previous restraint but provides for an injunction which is previous only after one or more publications.

[7] 283 U.S. 697, 51 Sup. Ct. 625, 75 L.Ed. 1357 (1931).

The general rule of freedom of the press was again upheld by the United States Supreme Court in *Grosjean* v. *American Press Company*.[8] Here the court held void, under due process clause of the Fourteenth Amendment, a Louisiana statute levying a gross receipts license tax upon all newspapers having a circulation of more than 20,000 copies per week. Although the court might have considered the more obvious question of denial of the equal protection of the laws, it preferred to restate the more modern theory of freedom of the press by adopting the view that such freedom consists in privilege against governmental action "unduly deterring free expression or dissemination of opinion, as well as from censorship."[9]

In its latest important interpretation of this liberty in *Snyder* v. *City of Milwaukee*,[10] the Supreme Court held invalid as a violation of the Fourteenth Amendment, a Milwaukee ordinance making it unlawful for any person to circulate or distribute hand bills or other printed matter in any public place within the City of Milwaukee. To illustrate Mr. Chafee's theory that the Supreme Court of the United States has failed to limit the boundaries of freedom of the press, but rather has chosen to assume the responsibility of bringing up each case on its own merits and deciding whether the encroachment in question is "good" or "bad," Mr. Justice Roberts said for the court:

> "In every case, therefore, where the legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation and so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiability of the reasons advanced in support of the regulation of the free enjoyment of the right . . . we are of the opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it."

Without detailing further precedents, it is sufficient to state that liberty of the press is protected against judicial and executive restraint as well as legislative, and in an identical degree.

However, there are limitations upon freedom of the press. As previously observed in *Near* v. *Minnesota*,[11] the right is not an absolute one. Nevertheless, limitations are recognized only in exceptional cases. In a general way, again without definite boundaries, the Supreme Court has recognized reasonable restrictions on the liberty necessary to promote and preserve public welfare, preventing utterances which tend to

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[8] 297 U.S. 233, 56 Sup. Ct. 444, 80 L.Ed. 660 (1936).
[9] See 49 Harv. L. Rev. 998.
[10] 308 U.S. 147, 60 Sup. Ct. 146, 84 L.Ed. 155 (1939).
[11] *Supra*, note 7.

corrupt public morals, incite to crime, or to disturb the public peace. However, as observed from quoted *dicta* in this paper, leading cases are not entirely in harmony with this thought. But such limitations have been permitted as preventing the sale of magazines on streets in certain restricted districts of a city[12] within exceptions permitted under *Snyder* v. *Milwaukee*,[13] prohibiting by means of postal regulations established by Congress, the transmission through the mails of corrupting and injurious publications and articles,[14] preventing the publication of private letters or photographs of anyone, thereby, under such decisions, holding that the right of privacy frequently takes precedence over the liberty of the press,[15] prohibiting creditors or others from threatening to injure the credit or reputation of a debtor by publishing his name as a bad debtor in letters or circulars or by advertising a claim against him.[16]

Among the most interesting recent permissable restraints upon freedom of the press is that permitted in *Associated Press* v. *National Labor Relations Board*,[17] where the court held, over four dissents, that the National Labor Relations Act does not abridge the First Amendment by permitting newspaper employees to have the right to form labor organizations and to bargain collectively. In a recent Case Note, one of the editors of the Harvard Law Review upholds the decision by citing the analogous right to restrict freedom of the press by contempt for libelous statements, *Toledo Newspaper Company* v. *United States*,[18] to prohibit publication of items impeding the conduct of war, *Schenk* v. *United States*,[19] to impose non-discriminatory taxation on the publishing business, *Grosjean* v. *America Press Company*,[20] to subject newspapers to the anti-trust laws, *Indiana Farmers Guide Publishing Company* v. *Prairie Farmer Publishing Company*.[21]

The most interesting restraint on liberty of the press, particularly in view of the recently enacted peace time draft and conscription legislation by the United States Congress, and our proximity to war, lies in the sanctioned right of government to prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops or utterances which become a hindrance to the conduct of war by a government. Liberty of the press has an entirely different concept during wartime than during peacetime. American experience with the Sedition Acts of 1917 and 1918 should serve to reconstruct memories of the possible extent of such limitations.

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[12] Chicago v. Rhine, 363 Ill. 619, 2 N.E. (2d) 905 (1936).
[13] *Supra*, note 10.
[14] Horner v. United States, 143 U.S. 207, 12 Sup. Ct. 407, 36 L.Ed. 126 (1892).
[15] *Contra*, Corliss v. E. W. Walker Company, 64 Fed. 280 (C.C.D. of Mass.) (1894).
[16] State v. McCabe, 135 Mo. 450, 37 S.W. 123 (1896).
[17] 301 U.S. 103, 57 Sup. Ct. 650, 81 L.Ed. 953 (1937).
[18] 247 U.S. 402, 38 Sup. Ct. 560, 62 L.Ed. 1186 (1918).
[19] 249 U.S. 47, 39 Sup. Ct. 247, 63 L.Ed. 470 (1919).
[20] 297 U.S. 233, 56 Sup. Ct. 444, 80 L.Ed. 660 (1936).
[21] 293 U.S. 268, 55 Sup. Ct. 182, 79 L.Ed. 356 (1934).

Let it be sufficient to quote the court in the leading case of *Schenk* v. *United States, supra,* in this regard:

> "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no court could regard them as protected by any constitutional right."

Pending Congressional proposals to give the President power to conscript newspapers and radio stations should be examined in the light of this enlarged freedom.

Concluding, let it be remembered that each case in this field will go to the court for determination of whether the restriction is good or evil. Landmarks are few, and boundary lines are fewer. The most clearly defined rule of precedent which we have been able to discover was that handed down by the Judge to the man who was arrested for swinging his arms and hitting another in the nose, and who, when he asked the Judge if he did not have the right to swing his arms in a free country, received the reply, "Your right to swing your arms ends just where the other man's nose begins."