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In this article Professor Leflar discusses the freedom of speech requirement of the first amendment and determines that this constitutional guarantee is not absolute. The author concludes that the courts should weigh the conflicting societal values of the present day in reaching a decision as to whether the particular speech in issue is protected.

Freedom of speech under Anglo-American law has never been an absolute right, and numerous exercises of free speech (and of free press) have been subjected to inhibiting legal sanctions, both criminal and civil, almost from the beginning of our common law heritage. It is true that the Blackstonian rule prohibiting "previous restraints upon publications"[1] purported to protect absolutely the initial right to publish. But an absolute right to publish what one may thereafter be criminally punished or forced to pay civil damages for publishing is obviously illusory in its absoluteness. It is not an absolute right in any real sense of the term. Laws dealing with libel and slander, obscenity and blasphemy, contempt of court, treason, deceit and false advertising, among others, impose substantial limitations upon speech and publication in our society.

Recently Mr. Justice Hugo L. Black of the United States Supreme Court in an informal interview[2] stated that it is his belief that the words "Congress shall make no law . . . abridging the freedom of speech, or of the press" in the first amendment of the Constitution of the United States mean exactly what they say, which he understands to be that there must be no congressional legislation whatever in the proscribed area. Though such an absolute prohibition is contrary to traditional legal thinking, there would be nothing truly earth-shaking about it if it affected only what Congress may do. It would operate primarily to preserve state's rights, leaving the states free to do by their law what the federal Congress was barred from doing. But today the due process clause of the fourteenth

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1. 4 BLACKSTONE, COMMENTARIES *151. See also Near v. Minnesota, 283 U.S. 697 (1931); Talley v. California, 362 U.S. 60 (1960). Compare Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961), 14 VAND. L. REV. 1525 (1961).

2. *Justice Black and the First Amendment "Absolutes": A Public Interview*, 37 N.Y.U.L. REV. 549 (1962). Compare Meiklejohn, *The First Amendment Is an Absolute*, in THE SUPREME COURT REVIEW 245 (1961); Kalven, *The Law of Defamation and the First Amendment*, Conference on the Arts, Publishing, and the Law, 10 U. CHI. CONF. SERIES 3 (1952).

amendment incorporates much of the Bill of Rights as a limitation upon state power also. In the same interview Mr. Justice Black said:

> My belief is that the First Amendment was made applicable to the states by the Fourteenth. I do not hesitate, so far as my own view is concerned, as to what should be and what I hope will sometime be the constitutional doctrine that just as it was not intended to authorize damage suits for mere words as distinguished from conduct as far as the federal government is concerned, the same rule should apply to the states.[3]

Since the due process clause declares that "No state shall deprive any person of . . ." and not merely that "No state *legislature* shall . . . ," its prohibition is against all state action, including action by state courts under authority of judge-made law,[4] and not merely against state legislative enactments comparable to those of Congress. Mr. Justice Black is telling us that in his opinion all law—not just all legislative enactments—*all law* imposing legal sanctions upon freedom of speech and freedom of the press ought to be held unconstitutional today—or tomorrow. The right to freedom of speech and of the press is an "absolute" one.

When asked in the interview about someone who shouts "fire" in a crowded theatre, Mr. Justice Black pointed out that this involved not only the speaking of a word but conduct that was disorderly, also that private property owners have some legal right to limit speech, including the making of speeches, on their premises. The property point may be accepted without argument, within its inherent limits which make it relevant only to a small fraction of the speakings and publications against which legal sanctions have at times been imposed. The point which correlates the shout of "fire" with the shouter's conduct, classifying it as disorderly conduct or breach of the peace, has much greater breadth. It suggests that the lawfulness of using words is to be determined by the circumstances under which they are used including the time, place and manner of their use. To this the traditional law agrees; it has always made a difference whether particular words were spoken in a public speech, or in a play, or by a hermit alone in the desert. Speech is seldom in a social vacuum, and when it is it raises few legal problems. It is the surrounding circumstances that give rise to our problems.

Furthermore, a word or group of words is not only part of the totality of conduct that accompanies enunciation; the very fact of enunciation is conduct. The speaking of words is of course an act, as much the product of a deliberate, or thoughtless, engagement upon a course of conduct as is the swinging of a fist or the exertion of pressure on the gas pedal of a motor car. Some of our most troublesome interferences with free speech by legal authority have been supported by a pretence that it was not the

3. *Interview, supra* note 2, at 558.
4. Shelley v. Kraemer, 334 U.S. 1 (1947).

speaking but the tendency to produce public disturbance, or the unlicensed assembly, or the blaring loudspeaker, that was penalized.[5] Such pretences violate the spirit of the Constitution, and perhaps its letter.

Yet few will deny that these and like grounds for silencing speakers are at least sometimes legitimate, even though they actually prevent the effective conveying of messages deemed urgent by those who would convey them. The dissenter's inevitable saving clause is illustrated by Justice Black in *Kovacs v. Cooper*:[6]

> I am aware that the "blare" of this new method of carrying ideas is susceptible of abuse and may under certain circumstances constitute an intolerable nuisance. . . . I would agree without reservation . . . that "unrestrained use throughout a municipality of all sound amplifying devices would be intolerable. . . ." A city ordinance that reasonably restricts the volume of sound, or the hours during which an amplifier may be used, does not, in my mind, infringe the constitutionally protected area of free speech.

The difficulty is in deciding which is more important—the speaking as free speech, or as an interference with public order. Once we accept this as a matter for decision, one that can be decided either way, we recognize that free speech is not all-important, not an absolute under the particular circumstances.

There are some kinds of utterances, both oral and written, that the free speech guaranty was never designed to protect. It was not intended to protect perjuries, for example. This cannot be because perjuries are not speech; they are speech. It cannot be because the perjurer has no real interest in conveying the ideas contained in his perjured speech; usually he does have. The same is true of fraudulent speech. The gnaranty leaves the law free to penalize fraud, and the law does so by criminally punishing the crime of obtaining property by false pretences, by allowing tort recovery for deceit, by awarding equitable relief in a number of forms, and by administrative remedies. The law has made a start toward imposing sanctions against false advertising, and interference with free speech is not successfully urged today as an objection to laws regulating the free use of misleading language in the registration of securities offered for sale to the public.[7] The misbranding of food and drugs is merely a form of the use

5. The difficulty of deciding cases in this area is illustrated by Kovacs v. Cooper, 336 U.S. 77 (1949) (Black, J., dissenting) (conviction sustained for unauthorized loudspeaker speech); Feiner v. New York, 340 U.S. 315 (1951) (Black, J., dissenting) (disorderly conduct conviction sustained, for public speech to mixed audience urging Negroes to rise against whites); Beauharnais v. Illinois, 343 U.S. 250 (1952) (Black, J., dissenting) (criminal libel conviction sustained, for scurrilous anti-Negro leaflet).

6. 366 U.S. at 104.

7. *Cf.* SEC v. Ralston Purina Co., 346 U.S. 119 (1953) (sustains registration requirements for sale of corporate stock under Securities Act); Donaldson v. Read Magazine, Inc., 333 U.S. 178 (1948) (denial of mailing privileges for scheme to defraud).

of words, yet it is punishable.[8] It is easy to say that speech such as this, perjured or fraudulent, serves no public interest that is worth protecting, and that the private interests it serves are evil. In the mass of clear cases this is obviously true. But it must be borne in mind that private interest and public interest shade into each other. In a free enterprise society some of the society's major concerns are promoted by private interests, often for private gain, and differences of opinion can exist not only concerning values but concerning asserted facts as well. There can at least conceivably be instances in which laws against false swearing and other lying may be used to stifle truth or social doctrine. And laws against false advertising could be employed to discourage economic advances in a society organized as ours is.

What about punishment for contempt of court, or for contempt of any organ of government? Almost any contempt includes an expression of opinion or point of view, normally directed toward a public agency. That on its face is the sort of expression with which the free speech guaranty is genuinely concerned. The truth of this is evidenced by the modern judicial tendency to bring so-called "outdoor contempts" within the constitutional protection,[9] but contempts in the presence of a court are still punished[10] despite the fact that they often involve the expression of opinions about the conduct of public business that would be protected if they were uttered outside the courtroom or under other circumstances. Again, it is easy to point out, and entirely true, that contemptuous utterances in the courtroom affect directly the administration of justice, which is a matter of vast social concern. Yet the law of contempt is a powerful tool for silencing dissent at the time and place that dissent could be most meaningful. Here, the law deliberately puts the values inherent in free speech into second place, behind the values inherent in the free and untrammelled administration of justice. The question for decision is apt to be whether the latter values are in fact substantially threatened by the contemptuous expressions employed in the particular circumstances.

There are situations too in which the exercise of free speech may lawfully be limited or controlled because the circumstances would make the speech inordinately and unfairly potent in the very areas in which it is most important that free speech be maintained. Illustrations include lobbying before legislative bodies,[11] political activity by presumably impartial government employees,[12] electioneering within a certain distance of the polls during

8. Seven Cases of Eckman's Alternative v. United States, 239 U.S. 510 (1916).

9. Pennekamp v. Florida, 328 U.S. 331 (1946); Wood v. Georgia, 370 U.S. 375 (1962).

10. See Nye v. United States, 313 U.S. 33 (1941); Note, 15 VAND. L. REV. 241 (1961).

11. See United States v. Harriss, 347 U.S. 612 (1954) (Black, J., dissenting on ground that Act was ambiguous) (violation of Federal Lobbying Act).

12. See CIO v. Mitchell, 330 U.S. 75 (1947) (Black, J., dissenting) (sustaining

elections and publications by employers or unions constituting an "unfair labor practice" within the provisions of the National Labor Relations Act.[13] For these situations the constitutional guaranty becomes something like one of "free and equal speech" or "freedom only for equal speech." That may or may not be a preferable guaranty, but it is in any event something other that absolute freedom of speech.

Interferences with privacy often, or usually, are achieved by the use of words, so that legal sanctions in this area too are limitations upon free speech, yet more and more American states are permitting such recoveries.[14]

If one were merely arguing the present state of the law as to this absoluteness, he wonld go on and cite the whole mass of common law defamation cases which had their beginnings well before the first amendment, let alone the fourteenth, was written, and which have developed down to the present day almost without judicial reference to freedom of speech as a constitutional limitation upon them. He would also cite the obscenity cases,[15] and the subversive publication cases in which free speech issues definitely were mentioned and in which the "clear and present danger" test or some variant of it[16] emerged as a supposedly authoritative limitation upon the constitutional guaranty. The present state of the law is not what Mr. Justice Black is talking about, however. He knows the present state of the law concerning the "defamation family" as well as anyone, but he believes that it is wrong, that it improperly disregards the constitutional guaranty. The consistency of his position is confirmed by his record of dissent in the cases in which United States Supreme Court majorities have upheld punishments for assertedly obnoxious or subversive free speakings. All that these cases prove is that others more numerous than he hold views contrary to his.

But the perjury and fraud cases, the disorderly conduct and breach of the peace cases, the contempt of court cases, the lobbying, Hatch Act and unfair labor practices cases, the interference with privacy cases, and others in which the law imposes inhibiting legal consequences upon the free use of words, do prove something more. Unless one chooses simply to disagree with *all* of them, they prove that there are at least *some* circumstances in which the first amendment does not preclude legal sanctions against the

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discipline of federal employees for violations of Hatch Act prohibition against political activity).

13. 73 Stat. 525 (1959), as amended, 29 U.S.C. § 158 (Supp. III, 1959-61). See International Bhd. of Elec. Workers v. NLRB, 341 U.S. 694, 705 (1951).

14. *Cf.* Pound, *The Fourteenth Amendment and the Right of Privacy*, 13 W. Res. L. Rev. 34 (1961).

15. Roth v. United States, 354 U.S. 476 (1957). See also Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962). And see Kalven, *The Metaphysics of the Law of Obscenity*, in The Supreme Court Review 1 (1960).

16. Schenck v. United States, 249 U.S. 47 (1919); Dennis v. United States, 341 U.S. 494 (1951).

exercise of completely free speech.[17]

It can quite properly be pointed out that laws designed to achieve orderliness in, therefore maximum enjoyment of, the free speaking that the Constitution guarantees are not really interferences with free speech but are rather, in a sophisticated and realistic sense, further protections of it.[18] They are like the rules of order in a parliamentary body, providing that only one person may speak at one time so that each may ultimately be heard in turn. A speech-regulating law that has for its purpose the more complete effectuation of the totality of relevant speech is by its nature not just a permissible abridgement of the right of speech. It can fairly be called no abridgement at all. It affirmatively aids the constitutional gnaranty.

Not many of the law's limitations on free speech listed two paragraphs back are of that protective sort. The limitations there cited are designed to prevent or penalize the kinds of speech with which they deal, not to facilitate them. They are based on the lack of social value inherent in the kind of speech that they proscribe, on the legislative or judicial determination (not always clearly correct) that the social badness in the speech substantially outweighs whatever good it has in it, either intrinsically or as free expression. The orderliness they help to achieve is the general orderliness in society that regulatory law as a whole seeks to achieve; it is not an orderliness in absolute freedom of speech as such.

Absolute freedom of speech is an ideal not yet realized in human society. No state organized by mankind has been willing to permit the completely free and untrammelled communication of every idea that might emerge through the lips or pens of those who seek for one reason or another to affect their fellows by the use of words.[19] There is much room for difference of opinion as to how far the law in practice should depart from the philosophical ideal of absolute freedom. Probably the degree of variation from the ideal depends upon how firmly the law-giving state is established as a civilized and democratic legal entity. The less firmly it is established in

17. See Holmes, J., in Frohwerk v. United States, 249 U.S. 204, 206 (1919): "[T]he First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language. We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counseling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech"; and Harlan, J., in Konigsberg v. State Bar, 366 U.S. 36 (1961) (referring to the view that freedom of speech and association under the first and fourteenth amendments are "absolutes"): "That view, which of course cannot be reconciled with the law relating to libel, slander, misrepresentation, obscenity, perjury, false advertising, solicitation of crime, complicity by encouragement, conspiracy, and the like . . . ."

18. On this point, see Meiklejohn, *The First Amendment Is an Absolute*, in THE SUPREME COURT REVIEW 245, 252 (1961).

19. A study of the extent to whieh speech is not free under the law of one state (Arkansas) appears in Leflar, *Legal Liability for the Exercise of Free Speech*, 10 ARK. L. REV. 155 (1956).

that desirable condition, the more likely it is to try to prevent the free expression of ideas.

It may be hoped that the United States is better established today as a civilized democracy than it was 173 years ago, when the first amendment was drafted, but it must be admitted that the evidence available from the free speech segment of federal and state judicial action is in conflict. There have been bits of spasmodic progress, mostly in recent years. Literature is more free than it once was.[20] The concept of obscenity has been narrowed.[21] Punishment of "outdoor contempts" has been restricted.[22] Closely related academic freedoms have begun to receive recognition.[23] Criminal prosecutions for libel and slander have almost dropped out of the legal picture.[24] The current emphasis on values inherent in free speech and its corollaries does not necessarily mean that these values are only newly recognized; the emphasis could be a consequence of new attacks on values previously taken for granted. At any rate there are some protections being afforded to freedom of speech today that were not previously afforded it, and probably would not have been had the questions first come to the courts a century or even a half-century ago. There is room for the belief that advances in our cultural civilization are somewhat reflected in our law concerning human freedoms in the same area. It appears, further, that other and greater advances are worth working for.

But the technique of gradual advances toward an ideal in the law is not the one to be used if the ideal exists already as a completely promulgated absolute in the nation's basic law. The technique to implement that theory would be a single long leap to perfection (or near-perfection as the best that human judges can achieve) with contradicting precedents all rejected at once. If the absolute is a constitutional guaranty against all legal interference with completely free speech and publication, then this pre-existent law of the land should be explicitly announced by the United States Supreme Court at the first fair opportunity. That is what Mr. Justice Black, consistently supported by his own long line of dissents, *almost* asks for. The "almost" must be inserted, because he agrees that peace-breaking loudspeakers may be curbed and he undoubtedly would agree with Holmes that even whispered counselings of murder are punishable.[25] He might agree too that to say falsely of another man that he has committed rape on a

20. *Cf.* Kingsley Intl. Pictures Corp. v. Regents of the Univ. of New York, 360 U.S. 684 (1959) (motion picture "Lady Chatterley's Lover"); United States v. One Book called "Ulysses," 5 F. Supp. 182 (S.D.N.Y. 1934), *aff'd*, 72 F.2d 705 (2d Cir. 1934).

21. See Manuel Enterprises, Inc. v. Day, *supra* note 15.

22. *Supra* note 9.

23. See Shelton v. Tucker, 364 U.S. 479 (1960) (Arkansas teachers' loyalty oath invalidated).

24. See Leflar, *The Social Utility of the Criminal Law of Defamation*, 34 TEXAS L. REV. 984 (1956).

25. *Supra* note 17.

ten-year-old girl should be civilly actionable, at least under some circumstances.

This is the troubling difficulty. Mr. Justice Black finds the absolute in the simple meaning of the words in the first amendment; these words need no learned interpretation because they mean what they say: "I believe that 'no law' means no law,"[26] no law interfering with free speech at all. That proves too much. It would protect speakings which Mr. Justice Black and probably everyone else agree do not deserve protection. To leave out these speakings requires *some* interpretation, some inquiry into a partially hidden meaning of the amendment's language. Once we get into a process of interpretation, excluding some parts of the "single plain meaning" which is said to inhere in the words, the main virtues of this "means what it says" approach are lost. Once we admit that the words are ambiguous and start looking beyond their face for their meaning, we need to look at everything that may shed light on their meaning, and particularly at their 1789 social and historical context. Once we do that, we are led far away from any absolutism.

Before we give up on the "means what it says" approach, however, it is fair to suggest that the words of the amendment may not actually say that there must be no interference whatever with completely free speech and press. The words are "no law . . . abridging the freedom of speech, or of the press." The framers did not say no law "respecting" freedom of speech, "or prohibiting the free exercise thereof"—words used in the same amendment with regard to laws about religion. They said no law "*abridging the* freedom of speech," thus identifying "the" freedom of speech as an existent concept, that is, one existent in the social and legal mores of the time, and declaring that there should be no law "abridging," that is, curtailing, diminishing, narrowing or shortening the content of this concept as it then existed. That is very different from the comprehensive language used in the part of the amendment that deals with religion, but it is the same language that is used in the rest of the amendment with respect to (abridging) "the right" of assembly and of petition, both already existent concepts in Anglo-American law. The amendment does not forbid "prohibiting the free exercise of" speech; it only forbids "abridging the freedom of speech."

No one by reading English words today can know with certainty what men who used the words 173 years ago meant by them. Contemporary records and memoranda would help,[27] but this writer has not read them.

26. By way of contrasting emphasis, Mr. Justice Black says that he knows of no law professor, with some exceptions, "who could not write one hundred pages to show that the Amendment does not mean what it says." *Interview, supra* note 2, at 553. The present writer insists upon thinking that the brevity of this writing is not his only defense against that friendly gibe.

27. The recent study by Leonard W. Levy, Dean of the Graduate School of Brandeis University, entitled LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN

All that is now suggested is that the "single plain meaning" approach does not inevitably establish an absolute in the first amendment against all laws, or law, limiting free speech, because the language of the amendment simply does not have the single plain meaning which has to be assumed for it if that interpretation is to follow.

If the amendment does not absolutely bar all law that regulates any speaking whatever, what then is the standard for judgment? What speaking may be penalized, civilly or criminally, and what may not be? What guides do we have, other than today's majority decisions, to tell us where the Congress and the states are to call a halt to regulation of speech?

The start on an answer to such inquiries must be in terms of social values: Has our society identified the qualities and the virtues that it values in free speech—those that it values highly, as against those that it values lightly or not at all? To be significant, this identification must be discovered as of today—as of today looking toward the future as well as toward the past—and not as of 1789, because today is the time as of which our United States Supreme Court and most of our other American appellate courts read meaning into the clauses of our constitutions.[28]

To say that any such identification exists in precise form, like a definition, would be preposterous; philosophers and social scientists and lawyers and men in the street do not all agree with each other that readily. Many of them have not thought about the matter very seriously. Some would put the integrity of status quo so high in their scale of values that speech proposing change would be rated low. But their views do not help us. The identification to be useful must be one made by people in our society who have thought seriously and discriminatingly about freedom of speech, who value it highly, who put it in their scale of values above almost everything else that our society holds dear. If free speech as an ideal is to be something short of an absolute, that is the way it needs to be measured.

Dean Leon Green has identified the significant values in terms of "the protection of the group—the social order,"[29] "the group's welfare."[30] This is of course the social order in the long run, not just its status quo. The "protection" valued is of the group's interest in communicating and in having communicated to it every idea which anyone thinks may improve

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AMERICAN HISTORY (1960), evaluates these contemporary materials rather pessimistically. If his evaluation is correct, or anywhere nearly correct, the meaning suggested above for the constitutional language is more likely to have been the one in the minds of the framers than is the interpretation that the amendment is an absolute bar against all regulatory law.

28. Perhaps this statement calls for documentation, since it is one on which there is violent disagreement. Many books have been written, and more will be, on whether our federal Constitution is a "living" document. This writer believes, with the courts, that it is.

29. Green, *The Right to Communicate*, 35 N.Y.U.L. REV. 903, 916 (1960).

30. *Id.* at 928.

the condition of the group—the social order—in any way. "The group's peril from a denial of the right (of free speech) to its members only arises in the area of abstract cultural ideas and beliefs—in religion, morality, politics, economics and education."[31] These can broadly be called "community affairs."[32] Professor Edmond Cahn clarifies the identification by referring to the community audience's "indefinitely continuing right to be exposed to an ideological variety."[33] The group's interest will have to be protected largely by claims presented by individuals who wish to hear or be heard. But to come within the significant value, the individual's claim must be to say or hear something that affects, or that he thinks should affect, group interests. It will not be enough if his claim is to speak for the purpose of obtaining his hearer's goods by false pretences or to destroy the reputation of his neighbor's wife by lying about her chastity.

Dr. Alexander Meiklejohn makes a similar identification in language that on its face seems considerably narrower, though in fact it is fairly broad. He concludes that the first amendment protects speech which relates to the "governing of the nation."[34] The word "governing" apparently limits itself to the processes of formal government, but Dr. Meiklejohn uses it comprehensively. He points out that:

> [T]here are many forms of thought and expression within the range of human communications from which the voter derives the knowledge, intelligence, sensitivity to human values: the capacity for sane and objective judgment which, so far as possible, a ballot should express. These, too, must suffer no abridgment of their freedom.[35]

He then lists four of these forms of thought and expression: (1) education, in all its phases; (2) the achievements of philosophy and the sciences in creating knowledge and understanding; (3) literature and the arts; (4) public discussion of public issues. Illustrating, he explains that literature and the arts must be protected because:

> they lead the way toward sensitive and informed appreciation and response to the values out of which the riches of the general welfare are created . . . they have a "social importance" which I have called a "governing" importance.[36]

Despite Meiklejohn's broad listing of the types of speech which relate to the "governing of the nation," his analysis is one that deals primarily

31. *Ibid.*
32. *Id.* at 924. This is quite close to Kalven's suggested test: "touches on matters of public concern," Kalven, *supra* note 2, at 17.
33. Cahn, *The Firstness of the First Amendment*, 65 YALE L.J. 464, 480 (1956).
34. Meiklejohn, *The First Amendment Is an Absolute*, in THE SUPREME COURT REVIEW 245, at 256, 258, 259 (1961).
35. *Id.* at 256.
36. *Id.* at 257, 262.

with government in the political sense, hence is narrower than Green's "the group's welfare."[37]

It may be that in 1789 the evaluation of free speech by the philosophers and political thinkers of the time was largely or altogether in terms of "governing" and government, the wise use of the ballot. We do not really know today whether that was so or not. We do know, though, that in this last half of the twentieth century the values which the freedom represents to those of us who value it highly are more all-embracing than the issues which we pass upon even most indirectly at the ballot box. They include freedom to speak on every controversial issue that can arise concerning human conduct and thought, every issue affecting mankind about which there is room for difference of opinion among men. They include freedom to talk about religious issues which we are forbidden to pass upon at the ballot box, matters of morals, social conduct and business behavior which our society has never regulated politically, ethical beliefs and artistic tastes that are not conceivably susceptible to regulation by law in America. By our ideal, the values inherent in the right to free speech are as broad as all the concerns of our American society.

How then do we, or should we, make our specific judgments? How do we while effectuating our ideal, or perhaps only pretending to effectuate it, pick out the situations in which free speaking will be penalized?

One mass of cases is easy. Neither frauds nor perjuries nor most defamations have within them any of the social values for whieh our ideal demands protection. The libel or slander which seeks acceptance of no cultural, political, social or ethical attitude, which urges upon the group no controversial idea or opinion, which seeks nothing beyond private benefit to the speaker or harm to others, does not come within the ideal at all. It deserves no constitutional protection, and receives none.

But what about legal sanctions imposed against so-called subversive publications which state the strongly held societal views of the publishers, against defamations which appear in a political or social context, obscenities for which literary or cultural quality is claimed, contempts and lobbyings and efforts at persuasion when competing interests assert some possibly superior claim to the law's protection? In these cases the ideal of free speech is truly involved. Any speaking which seeks overthrow of established order and system, attacks it or its spokesmen in their representative character, comes clearly within the ideal of free speech deserving the law's protection. Yet speech in these areas has often been penalized.

What the courts have done in these hard cases has been essentially the same as they have done in the easy mass of cases. They have weighed the social values inherent in the particular free speech, as they saw those values, against the competing interests, and have concluded that the values

37. Note 30 *supra.*

inherent in the competing interests were the weightier. They have concluded, for example, that maintenance of our established form of American government is more important than the virtues inherent in free speech when the speech creates a "clear and present danger" of Communist effort to overthrow the government by force and violence.[38] They have held that the reputation of a state governor was more important than free speech which was interpreted as charging the governor with crime in connection with a celebrated criminal-political prosecution,[39] and that prevention of public obscenity may be more important than free speech in the form of completely uncensored moving picture exhibitions.[40]

There are many who believe that wrong weights were given to the competing values in these cases or in some of them. Comparable differences of opinion exist as to a thousand other cases that might be cited, holding either one way or the other on the free speech issue. Some think the ideal of free expression is so important that it outweighs all others when the words spoken have any genuine societal significance; others give it less weight. Judges, like the rest of us, hold variant views.[41] The Constitution does not tell us what view is right nor what weights to give the competing values. The courts decide, as they must.

And, consciously or subconsciously, they decide by balancing[42] the values as they see them at the time they do the balancing job. That is the only way a court can decide between competing social values when there is no clear basic law nor precedent to guide it.

As to free speech, we are likely to have at any given time that measure of it guaranteed to us that the prevailing judicial philosophy thinks is good. If the state and its institutions are firmly established in the ways of civilized democracy, the law announced by the judges is likely to mirror the demand for a correspondingly large measure of free societal expression. The ideal of speech altogether free where societally significant expression is concerned may never be completely realized, but it will approach realization as rapidly and as closely as civilized democracy accepts its values. Judicial advance toward this realization can only be slowed, not aided, by burdening the ideal with an assumed necessity for protecting speech such as purely private defamations which lack societal significance.

38. Dennis v. United States, 341 U.S. 494 (1951).

39. Commonwealth v. Canter, 269 Mass. 359, 168 N.E. 790 (1929) (aftermath of the Sacco-Vanzetti case).

40. Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961), 14 VAND. L. REV. 1525 (1961).

41. "We cannot give some constitutional rights a preferred position without relegating others to a deferred position; we can establish no firsts without thereby establishing seconds." Jackson, J., in Brinegar v. United States, 338 U.S. 160, 180 (1949).

42. Is it possible that juridical scholars who, scoffing at the "balancers," are able to find absolutes in the law to govern such situations, do so by taking over the balancing process themselves, instead of leaving it to the courts? When they do this, their own "balancing" produces the answer they believe is right, which they can then hand over readymade to the courts as an absolute which they have discovered in "the law."