CHAPTER-V

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If there is one right prized above all others in a democratic society, it is freedom of speech. The ability to speak one's mind, to challenge the political orthodoxies of the times, to criticize the policies of the government without fear of recrimination by the state is the essential distinction between life in a free country and in a dictatorship. In the pantheon of the rights of the people, Supreme Court Justice Benjamin Cardozo, who served from 1932 to 1938, wrote of free speech that it is "the matrix . . . the indispensable condition of nearly every other freedom".

The First Amendment of American Constitution provides that "The Freedom of Speech" shall not be abridged by law made by the Congress. Communication by speech is by definition a social experience, which must involves the interaction of at least two persons. The beginning of a community interest in the speech process, suppose two persons are discussing politics in a private home. Certainly there is no case for Governmental restraint here, but a case for restraint arises, if the discussion becomes an argument and voices are raised to the annoyance of the neighbour or if the persons
discussing apply offensive language to the other and a fighting between them ensues. As the number of discussant increase and they move from a private to a public location, the opportunities for public interventions are multiplied. If a group of people encroach upon a public road or demonstrate in a public park or parade upon a public street, thereby creating traffic and other problems by which the general public face inconvenience, they may be tempted to display their opposition. Likewise loud speakers being used at an outdoor meeting will annoy the public and affect the tranquility of the area. There may be hundreds of examples of such situations where the intervention of the State may become necessary. Therefore, in spite of the First Amendment in America, situations have arisen and the amendment has become controversial. Taking in to the consideration of a speech, which will be constitutionally protected as well as acceptable by the public, has been discussed in *Kunz vs. New York* (1951). In this case Justice Jackson observed "the vulnerability of various forms of communication to community controlled must be proportioned to their impact upon other community interests", it will be helpful to distinguish three different communication situations – Pure Speech (speech without conduct), Speech plus conduct, Symbolic Speech (conduct without speech). Let us discuss each one individually.
(a) Pure Speech

"Pure Speech" is a concept created by the Supreme Court. It was first developed in the Court's labour picketing decisions to take account of the fact that picketing is more than speech. In 1940 the case of *Thornhill vs. Alabama* the Court broadly assimilated peaceful picketing to freedom of speech, and so protected it by the First Amendment against abridgement but very soon the Court concluded that this was a partially incorrect conception of picketing, and began to qualify this position. As Justice Douglas opined in *Bakery and Pastry Drivers Local vs. Wohl* (1942) that "picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since 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". In *Cox vs. Louisiana* (1965) Justice Goldberg held that "who communicate ideas by pure speech", as contrasted with those "who would communicate ideas by conduct such as patrolling, marching and picketing on streets and highways". Again in the same opinion he refers to "speech in its pristine form", pure speech would include, was can assume, communication taking place by the spoken word in face to face contacts addresses or remarks.
at meetings, speech amplified by mechanical means or on the channels of the various communications media.

Pure speech can range from dull expositions to the most emotional harangues. The distinctive qualities of pure speech are that it relies for its effect only power of the ideas or emotions that are communicated by a speech and that the audience is a voluntary one, which chooses to listen to the speaker’s message. Pure Speech situations generally cause no interference with or inconvenience to those not involved in the communication process, justification for community control is at an absolute minimum. In fact, legislation permitting the restriction or punishment of pure speech is generally regarded as invalid on its face, for example, in *Street vs. New York* (1969) the Court dealt with a New York statute making it a misdemeanor to mutilate or cast contempt on the American Flag “by words or act”, and it held that punishment “merely for speaking defiant or contemptuous words” was unconstitutional.

There are, however, many borderline situations where exception may be taken to the general rule, in the case *Chaplinsky vs. New Hampshire* (1942) it was held that “fighting words” to be unprotected by the First Amendment, since they were so likely to cause a breach of the peace. The fighting words holding though never
overruled, has been narrowly interpreted\textsuperscript{1}. In \textit{Gooding vs. Wilson} (1972) a Georgia statute punishing “opprobrious words or abusive language, tending to cause a breach of the peace”, was invoked to convict a black man who had called a white police officer a “son of a bitch” and had threatened to kill him, choke him or cut him to pieces. The Supreme Court reversed conviction because Georgia Courts had not narrowed the statutory language to apply only to “fighting words”. The Federal statute punishing threats to kill the President was involved in the case of \textit{Watts vs. US} (1969). A speaker at a public rally at the Washington Monument grounds said that if he was drafted for the Vietnam War and given a rifle “the first man I want to get in my sights is L.B.J.”. The Supreme Court reversed his conviction on the ground that any statute making criminal “a form of pure speech” must be strictly interpreted and this “political hyperbole was not regarded as a true threat but only as “a very crude offensive method of stating a political opposition to the President”.

Statutes punishing public use of “offensive language or public swearing have like wise been held to strict standards”. It has been held in a case\textsuperscript{2} when the witness referred the assailant as “chicken shit” that such statement is a “single, isolated use of street

\textsuperscript{2} Eaton vs. City of Tulsa (1974).
vernacular is not directed at the judge or any officer of the Court” hence does not constitute contempt of the Court. In another case a young man who had expressed his opinion of the Vietnam War by wearing in public a jacket bearing the words “Fuck the Draft”, he was convicted of disturbing the peace by “offensive conduct”. Justice Harlan for the Court held that he had engaged in pure speech, not conduct, and reversed on the ground that use of this four letter word was unlikely to cause “violent reaction” and that the State lacked authority as a guardian of public morality to try to remove the word from the public vocabulary. In this later connection Harlan took issue with Murphy’s assumption. In Chaplinsky case that only speech which is an essential part of an “exposition of ideas” and of “social value as a step to truth” is entitled to Constitutional protection. In this context Harlan wrote a very perceptive passage:

“...much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We can not sanction the view that the Court, while solicitous of the cognitive intent of individual speech has little or no regard for that emotive function which practically

speaking may often be the more important element of the overall message sought to be communicated”.

Further, in Schenck vs. US (1919) while deciding the case Justice Holms by way of analogy opined that “shouting ‘fire’ in a theatre” would be regarded as a classic type of punishable speech. Serious limitation on the political speech of Government employees were imposed by the Hatch Act, which forbade civil servants to take an active part in political management and campaigns. The Supreme Court upheld the law by a four to three votes⁴. Citing long-standing concern with the spoils system, Justice Reed said, “To declare that the present supposed evils of political activity are beyond the power of Congress to redress would leave the Nation impotent to deal with many sincere men believe is a material threat to the democratic system”. In a latter test case⁵, the Supreme Court by a six to three margin reiterated its support for the statute⁶ and upheld a State statute similar to the Hatch Act. A Bill repealing many of the Hatch Act restrictions was vetoed by President Ford in 1976. In a decision⁷, the Court went further and by a ‘five to three votes’ declared the spoils system unconstitutional. Firing public employees because they belong

⁴ United Public Workers vs. Mitchell (1947).
to the wrong party, said Brennan, penalizes political beliefs and “clearly infringes First Amendment interests”. An exception was made for those in policy making or confidential positions. This ruling seemed to other wide vistas for lawsuits by discharged public employees. Following the scandalous use of funds in 1972 Nixon campaign, Congress adopted a new Campaign Finance Law, 1974 which limited both contributions and expenditures, required disclosure of campaign contributions, and provided for public financing of Presidential elections. In a case the Court invalidated a New York “Fair Campaign” law designed to curb smear tactics, on the ground that it was so broad it could “chill” legitimate political speech\(^8\). The statute was attacked on the ground that limitations on contributions and expenditures curbed the First Amendment freedom of contributors and candidates to express themselves in the political market place\(^9\). The Court upheld the limitations on direct contributions to political candidates as representing “only a marginal restriction upon the contributor’s ability to engage in free communication”. The Court did not conclude that expenditure limitations would seriously limit access to the expensive mass media which are “indispensable instruments of effective political speech”, and so were unconstitutional. The statute

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\(^8\) Schwartz vs. Vanasco (1976).

\(^9\) Buckley vs. Valeo (1976).
also violated the First Amendment by forbidding individuals or groups to make expenditures 'relative to a particular candidate's, such as buying newspaper or television advertising so long as expenditures were made independently of the candidate or his agents.

(b) **Speech Plus Conduct**

"Speech plus conduct", as the Court sometimes refers to speech plus conduct, involves the communication of ideas by patrolling, marching, and picketing of sidewalks, streets, or other public areas. "Speech plus" is a constitutional hybrid. In so far as it is speech, it is protected. In so far as it is conduct, it is subject to regulation where good cause is shown. Picketing and demonstrating involve physical movement of the participant, who rely less upon the persuasive influence of speech to achieve their purposes and more upon the public impact of assembling, marching and patrolling. Their purpose is bring a point of view by signs, slogans, singing or their mere presence to the attention of the widest possible public, including those uninterested or even hostile. Demonstrators are likely to seek maximum exposure by going where they will be seen and heard by the most people, which increases the possibility of traffic problems, inconvenience to the public and breach of the peace. Communication by
use of streets or other public areas is guaranteed by the concept of the "public forum"\textsuperscript{10}.

\textbf{(c) Picketing in Labour Disputes}

Picketing in labour disputes has a long history and presents special problems. Initially all labour picketing was regarded by the Courts as tortuous conduct and illegal. Gradually the view develop that peaceful picketing by strikers who had a direct economic interest to serve might be permitted by the State, but "stranger picketing" remained outside the law. In 1921 the Supreme Court cautiously admitted that "strikers and their sympathizers" might maintain one picket "for each point of ingress and egress" at a plant or place of business. Unless severely limited in this way, the concluded picketing "indicated a militant purpose, inconsistent with peaceable persuasion"\textsuperscript{11}. It is a long jump from 1921 to 1940 when in the case of \textit{Thornhill vs. Alabama}. Justice Murphy put peaceful picketing of all kinds under the protection of free speech clause, saying "in the circumstances of our times the dissemination of information concerning the factors of labour disputes must be regarded as within that area of free discussion that guaranteed by the Constitution". This case closely followed the opinion of Justice Brandeis in \textit{Senn vs. Tile Layers' Protective Union}, (1937). Picketing is


\textsuperscript{11} American Steel Foundries vs. Tri-City Central Traders Council (1921).
more than a form of communication. It is likely that many people respect picket lines simply to avoid trouble or charges of being antiunion rather than because they are intellectually persuaded by the signs pickets carry. On many picket lines the purpose is not so much publicity, as it is economic coercion. Moreover, picketing in labour disputes often results in violence. Almost immediately after *Thornhill* the Court had to begin qualifying the right to picket. In *Milk Wagon Drivers Union vs. Meadowmoor Dairies* (1941), the Court held that the Illinois Courts were justified in enjoining all picketing in a labour dispute which had been so marred by past violence that it was believed impossible for future picketing to be maintained on a peaceful basis. But the likelihood of violence was not the only ground on which the Court proved willing to support restrictions on picketing. In *Carpenters and Joiners Union vs. Ritter's Café* (1942), Ritter was having a residence built by nonunion labour, but the pickets were operating around his café, a mile away, where the pressure would hurt him more. By five to four votes the Court ruled that Texas had the right to restrict picketing to the area within which a labour dispute arises.

The conflict between rights of communication and other lawful social interests was a series of illustrious cases started beginning in 1949. *Giboney vs. Empire Storage and Ice Co.* (1949)
upheld an injunction against a union that was picketing to force an employer to agree to a restraint of trade that was illegal under state law. *Hughes vs. Superior Court of California* (1950) approved an injunction against a citizen group that was demanding that a store's employees be in proportion to the racial origin of its customers.

In *International Brotherhood of Teamsters vs. Hanke* (1950), the injunction, which the Court approved, had been issued simply to prevent a union from dictating business policy to self-employed used-car dealers. An effort by pickets to force an employer to coerce his employees into joining the union was successfully enjoined in *International Brotherhood of Teamsters, Local 695 vs. Vogt* (1957). Thus it appears that legislatures and judges are largely free to define public purposes and protect public interests, which may override picketing rights. As Justice Frankfurter said in the *Hughes* case: "Picketing, not being the equivalent of speech as a matter of fact, is not its inevitable legal equivalent. Picketing is not beyond the control of a State if manner in which picketing is conducted or the purpose, which it seeks to effectuate gives ground for its disallowance".

(d) Obscenity

Those who want society to protect itself from unbridled immorality and violent sexism have favoured censorship and the suppression of certain sexually oriented material considered obscene. But this has also meant that First Amendment questions are ultimately raised because censorship and the suppression of ideas run counter to the philosophy of the First Amendment, which values complete freedom of thought and the free trade in ideas with the faith that in the contest of ideas the vile and the hateful ultimately be rejected.

Traditionally, "obscenity" (leaving aside the problem of definition) was a crime and not considered an exercise of freedom of expression. With motion pictures, whether a film was obscene or not was not even an issue because the Supreme Court in the 1915 decision of Mutual Film Corporation vs. Ohio Industrial Commission, 236 US. 230, ruled that motion pictures were not part of the press and thus were not entitled to First Amendment protection. Movie censorship was upheld in that case. Not until 1952 with Burstyn vs. Wilson did the Court extend the scope of the First Amendment to cover motion pictures. But although the Court dealt with a censorship law that included obscenity, the particular case concerned a violation of the "sacrilegious" provision of
the New York law; thus the Court did not specifically grapple with obscenity. In *Roth vs United States* the Court explicitly noted that obscenity was not protected by the First Amendment, but the Court also sought to define it in a way that would not unduly inhibit legitimate artistic expression in the sexual realm. Obscene material, said the Court, is "utterly without freedoming social importance". A work may be considered obscene if "to the average person, the dominant theme of the material taken as a whole appeals to prurient interest". In a subsequent case, *Jacobellis vs. Ohio*, 378 US 184 (1964), a plurality ruled that a *national* standard is to be used in determining "contemporary community standards".

The 1960s was a decade of massive social change and part of that change included the liberalization of artistic standards in terms of representation of ex, sexual behavior, and language. The strict privately enforced codes that governed motion pictures were abandoned and replaced by a movie rating system in which R-rated films could have uncensored language and some nudity along with simulated sex acts. Books no longer were self-censored or subject to prosecution as written descriptions of sex and sexual behaviour met with what appeared to be absolute constitutional protection.
(e) Libel

First some definition and distinctions are in order. Libel is the defamation of character by print or other visual presentation such as television. Slander is defamation by oral presentation. Defamation itself needs definition. The Sedition Act of 1798 spelled out the concept as "false, scandalous and malicious writing. . . with the intent . . . to bring into contempt or disrepute: or to excite ... the hatred of the good people of the United States".

Prosecutions for libel can be civil or criminal. The theory of a criminal prosecution is that libel is an offense against the peace and good order of the community likely to incite acts of physical relations. Criminal punishment for libel provides a lawful means of redress and is designed to avert the possibility that libelous utterances will provoke an enraged victim to breach of the peace. Libels of the government of public officials may be made criminally punishable, as by the Sedition Act of 1798. Criminal libel statutes provide for fines and sentences of imprisonment within defined limits. The act of 1798 specified maximum sentences of $5,000 fine and five years of prison.

A civil prosecution for libel is a suit for monetary damages brought by the victim against the publisher of the libel. The civil suit has generally tended to supplant criminal prosecutions for
libel in the area of private defamation. As Justice Brennan said in *Garrison vs. Louisiana* (1964), the civil remedy "enabled the frustrated victim to trade chivalrous satisfaction for damage [and] substantially eroded the breach of the peace justification for criminal libel laws".

**Symbolic Speech and Expression**

Symbolic speech involves the communicating of ideas or protests by conduct, such as burning a draft card or pouring blood over draft files to express opposition to the Vietnam War. Such action serves as a surrogate for speech. The Supreme Court had an early encounter with this question in *Stromberg vs. California* (1931), involving a state law which made it a felony to display a red flag as an "emblem of opposition to organized government". Conviction of the director of a children's summer camp for raising a red flag every morning was reversed by the Supreme Court on the ground that the statutory language was so loose as to threaten free political discussion.

A much more significant form of symbolic speech was the sit-in movement, which developed in the early 1960s to protest racial discrimination primarily in Southern eating places. As a protest, blacks would take seats at lunch counters and if refused service,
continue to sit there until arrested or ousted by force. They were customarily charged either with breach of the peace resulting from trespass, or criminal trespass (that is, remaining on private property after being requested to leave).

The clearest instance of Court approval for symbolic speech came in *Tinker vs. Des Moines School District* (1969), School officials had forbidden pupils to wear black armbands as a protest against Vietnam on the ground that this gesture might cause controversy in the school. The Court, however, upheld the students, saying that “apprehension of disturbance is not enough to overcome the right to freedom of expression”. By contrast, the Court refused in *United States vs. O'Brien* (1968) to grant the legitimacy of symbolic draft card burning. Chief Justice Warren wrote: “We cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea”12.

Another, and rather common, form of protest against the Vietnam War involved mutilation or unconventional treatment of the American flag. Various federal and state statutes make such conduct punishable. The Supreme Court has appeared to assume that abuse of

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the flag can be made illegal, but it has nevertheless usually found grounds for reversing convictions by strict interpretation of the status involved. While public nudity has in some instances been regarded as a form of expression entitled to constitutional protection in *California vs. La Rue* (1972) regulations of the state Alcoholic Beverage Control Department forbidding nude entertainment in bars and other licensed establishments were upheld. Justice Rehnquist concluding that the activity in question partook “more of gross sexuality than of communication”.

(g) **Commercial Free Speech**

The decision of *Valentine vs. Chrestensen* (1942) gave rise to the concept that the First Amendment did not apply to “commercial speech” which was furthered by the Court’s decision in *Pittsburgh Press Co. vs. Pittsburgh Commission on Human Relations* (1973). A human rights relations ordinance was considered in this case to forbid local newspapers from carrying help-wanted advertisements in sex-designated columns. Such advertisements, the Court said, are “classic examples of commercial speech”. But Stewart, one of four dissenters, was alarmed: he thought that if “a government agency can force a newspaper publisher to print his classified advertising pages in a certain way in order to carry out
governmental policy . . . I see no reason why Government cannot force a newspaper publisher to conform in the same way in order to achieve other goals thought socially desirable”.

In Bigelow vs. Virginia (1975) where a newspaper had published, contrary to Virginia law, an advertisement for a legal abortion service in New York. Justice Blackmun, upholding the paper, distinguished the Pittsburgh case. Here the ad, “conveyed information of potential interest and value to a diverse audience – not only to readers possibly in need of the services offered, but also to those with a general curiosity about, or genuine interest in, the subject matter of the law of another State... and to readers seeking reform in Virginia. “Going even further, Virginia Pharmacy Board vs. Virginia Consumer Council (1976) ruled that states could not forbid pharmacists to advertise the prices of prescription drugs, for even “purely commercial” advertising was entitled to some First Amendment protection in a “free enterprise economy”.

(h) Freedom of Press

The right of the news media to publish or broadcast goes to the heart of an open society. Without a free and independent press, it is impossible for democracy to flourish. Total control of
information and state control of the media are the hallmarks of a totalitarian political system. Americans traditionally pride themselves on the freedoms they enjoy, particularly a free press. But the press in the United States has grown so powerful and influential, with control of the national media in relatively few hands, that the press itself and the uses of its power have become issues in recent years. The power of the press is such that it is sometimes referred to as the fourth branch of government. But these are not issues that have faced the Supreme Court nor are we concerned with them here outside of mentioning them at the outset. Rather, what the Court has dealt with, particularly in the twentieth century, is the constitutional nature and extensiveness of the press's freedom.

The First Amendment states unequivocally that congress may not abridge freedom of the press. This has been interpreted by the Court as meaning that only in extraordinary circumstances (such as wartime when a newspaper is about to publish top secret troop movements) may government literally stop the presses. The freedom to publish free from censorship is almost, but not quite, absolute. There is a heavy burden on government to demonstrate that a newspaper cannot publish or a news program cannot be broadcast. This is what the Supreme Court, in the landmark 1931 decision in
Near vs. Minnesota, referred to as the guarantee against prior restraint or preventing publication. On the other hand, if the press publishes or broadcasts something and by so doing violates a law, such as obscenity or libel, it may be subject to what is known as subsequent punishment. That is, the editor or publisher may, if found guilty, be heavily fined and/or sent to prison. But the presses may not be stopped. In Near the Court applied the First Amendment’s guarantee of freedom of the press to the states as part of the liberty that may not be denied without due process of law as provided by the Fourteenth Amendment. Forty years later, in the famous Pentagon Papers case, New York Times Co. vs. United States, the Court reaffirmed Near vs Minnesota’s presumption against prior restraint. The federal government unsuccessfully tried to stop publication of newspaper Articles that included excerpts from the Pentagon’s massive history of American involvement in Vietnam.

The prior restraint doctrine announced in Near has subsequently been very important. It is based on the rationale that preventing speech before it can be uttered is a far greater danger to freedom of speech than punishing the speaker after he has spoken. Prior restraint is worse than subsequent punishment because where the state seeks to prosecute a speaker, at least the public finds out from
the trial what kind of speech is being suppressed, and the state has to get a jury to go along with the suppression. Under a system of prior restraint, where a government censor privately decides what can be published and what cannot, the public does not even know what kinds of things it is forbidden to see or hear.

Although the Court has stated that the prohibition on prior restraint is not absolute, it has struck down a number of such restraints on the grounds that only the most compelling state interests should justify a prior restraint.

Another aspect of the press being able to publish concerns editorial control of the content of newspapers. In 1973, the Court ruled in Pittsburgh Press Company vs. Pittsburgh Commission on Human Relations, 413 US 376, that the order to the paper by the Pittsburgh Commission on Human Relations to classify its help-wanted advertisements without reference to gender did not violate the First Amendment. The Court majority took the position that no editorial judgment or public policy views of the newspaper were involved and that all that was concerned was pure commercial speech.

The freedom of the press obviously includes the freedom of circulation and distribution of printed matter. Freedom of the press
has also been held not to be confined to newspapers but to embrace pamphlets and leaflets\textsuperscript{13}. It would follow that:-

(i) Any prior restraint or requirement of a licence or permit for the distribution of any literature would, in general, be unconstitutional. Though a municipality may punish persons for littering the streets and other public places, it cannot forbid the distribution of any literature on the streets or public places.

(ii) A distinction has been drawn between distribution amongst the public and sending an unwanted material to a particular individual. Distribution amongst the public of literature relating to the public conduct of an individual cannot be suppressed, but if any individual does not like the sending of any commercial material to his home, its circulation, by personal intrusion or even by post may be prohibited at his instance, for the protection of his right of privacy\textsuperscript{14}.

(iii) A distinction has also been made between commercial and religious literature. As regards religious literature, even door to door solicitation has been upheld as constitutionally protected under the freedom of religion. But this freedom

\textsuperscript{13} Lovell vs. Griffin, (1938) 303 US 444.
\textsuperscript{14} Breard vs. Alexandria, (1951) 341 US 622.
would not be available in the case of commercial advertising\(^{15}\).

(i) Clear and Present Danger

The first congressional limitation on freedom of speech was made in the Sedition Act of 1798, only seven years after the adoption of the First Amendment. But the Sedition Act never came directly before the Supreme Court. In fact, no important case involving freedom of speech or press was decided by the Supreme Court prior to World War I. After that war, an important group of cases came before the Court as the result of convictions obtained under the Espionage Act of 1917 and the amendments to that law enacted in 1918 and known as the Sedition Act. These statutes were enacted because of the fears engendered by the war with Germany and by the Russian Revolution of 1917.

The first Supreme Court decision growing out of these prosecutions was *Schenck* *vs. United States*. In this case, Justice Holmes enunciated the famous "clear and present danger" test for determining the boundary between speech that can be protected by the Constitution and speech that can be punished. He stated:

\(^{15}\) *Ibid.*
The question in every case is whether the words used are used in such circumstances and are 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. 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.

The clear and present danger test was used subsequently to justify convictions under the Espionage Act for the publication of twelve newspaper Articles attacking the war and for a speech attacking American participation in the war. In three subsequent cases in which the Court upheld the convictions of speakers, Justices Holmes and Brandeis dissented because they felt that the words used by the defendants had not created a clear and present danger to the United States [Abrams vs. United States, 250 US 616 (1919), Schaefer vs. United States, 251 US 466 (1920); and Pierce vs. United States, 252 US 239 (1920)].

Although the clear and present danger test retains some of its vitality, it had been criticized severely by judges and scholars. The

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16 Frohweek vs. United States, 249 US 204 (1919).
17 Debs vs. United States, 249 US 211 (1919).
reasons for Justice Frankfurter’s rejection of clear and present danger are outlined in his concurring opinion in *Dennis vs. United States*.

Perhaps the most severe critic of the clear and present danger doctrine – from a quite different point of view – has been the distinguished educator and philosopher, Alexander Meiklejohn. He criticized the Holmes test as a “peculiarly inept and unsuccessful attempt to formulate an exception to the principle of the freedom of speech”18. This criticism was premised on Meiklejohn’s conviction that freedom of speech on public issues is an *absolute* concept admitting no exceptions. Nevertheless, even Meiklejohn felt that incitement to riot statutes would be constitutional when applied to language that directly and immediately caused serious violence.

The clear-and-present-danger test would be used in one way or another by the Courts for nearly 50 years, and it seemed a handy and straightforward test to determine when the boundaries of speech had been overstepped. But there were problems with the test from the start, and the tradition of free speech in the United States was so strong that critics challenged the government’s campaign against antiwar critics as well as the Court’s approval of it.

In punishing contempt of Court, the State has to secure a balance between two equally important principles need for freedom of expression and that for the independence and dignity of the judiciary and the due administration of justice.

The American Supreme Court has applied the 'clear and present danger' test in this sphere also held that punishment for contempt of Court is constitutionally permissible only where it constitutes:

(a) An imminent danger to the administrations of justice, according to the facts and circumstances involved in the particular case.

(b) An interference with the judicial proceedings in the immediate presence of the Court.

(c) Comments on a pending proceeding which would tend to provoke public resistance to the order sought for the proceeding, or to influence the Judge and the Jury before they have made up their minds, publicizing by television a pre-trial investigation against the accused.

(j) Police Power

Absolute or unrestricted individual rights do not, and cannot exist, in any modern State. As the American Supreme Court said:-
"The liberty of the individual to do as the pleases even in innocent matters, is not absolute. It most frequently yield to the common good"\textsuperscript{19}.

In the United States there was no limitation imposed upon any of the fundamental rights added to the Constitution by the first Ten Amendments of 1791. But it was soon realized that for the maintenance of public order for the prevention of corruption of the public morals, incitement to crime and the like, some limitations must of necessity be imposed upon the liberty of the individual. The Supreme Court, in interpreting the Constitution, had, therefore, to invent the doctrine of \textit{Police Power} of the State, under which States have the \textit{inherent} power to impose such restrictions upon the fundamental rights as are necessary to protect the common good, e.g. public health, safety and morals\textsuperscript{20}. In other words, the police power is founded on the theory that, "the whole is greater than the sum total of all the parts, and when the individual health, safety and welfare are sacrificed or neglected, the State shall suffer"\textsuperscript{21}. In an organized society – without which there cannot be any safeguard of individual rights – there cannot be any right which is injurious to the community as a whole. The police power is thus the authority to establish those

\textsuperscript{19} Adkins vs. Children's Hospital, (1923) 261 US. 525.
\textsuperscript{21} Holden vs. Hardy, (1896) 169 US 366 569 (574).
rules of good conduct and neighbourliness which are calculated to prevent a conflict of rights and to insure to each the uninterrupted enjoyment of his own, so far as that is reasonably consistent with a corresponding enjoyment by other\textsuperscript{22}.

Police power is the governmental power of self-protection and permits reasonable regulation of rights and property to particulars essential to the preservation of the community from injury. The police power of a State extends beyond health, morals and safety and comprehends the duty, within constitutional limitation, to protect the well-being and tranquility of a community\textsuperscript{23}.

The police power is not confined to narrow category but extends to ‘all the great public needs’ including even political well-being. The police power does not confer upon the State an “unrestricted authority to accomplish whatever the public may presently desire. It is the governmental power of self-protection and permits reasonable regulation of rights and property in particular essential to the preservation of the community from injury”, which of course, includes general welfare\textsuperscript{24}. The regulations which are imposed in the exercise of the Police power must have (a) a real and substantial relation to the above and (b) must not be arbitrary to oppressive. In

\textsuperscript{22} Cooley, \textit{Constitutional Law}, p.289.
\textsuperscript{23} Vele vs. Sixth Word Building Assn, (1940) 310 US 32.
\textsuperscript{24} Berman vs. Parker, (1954) 348 US 26.
other words, the police power must be exercised subject to constitutional limitations, including 'Due Process' (14th Amendment). But the burden of showing its unreasonableness is on the person who complains.

Both in the United States as well as in India it has been held that the presumption is always in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles.

The restrictions referred to in Clause (2) to (6) of Article 19 of the Constitution of India may be imposed by any of the authorities that come within the comprehensive definition of "the State", in Article 12, who are competent to make a 'law' as defined in Article 13(3)(a). The authority to impose limitations on the freedoms is thus wider in the Indian Constitution than in the United States, where the 'police power' is regarded as an attribute of sovereignty of the States. Even the federal government has not got this power since it is supposed that the States did not delegate this power to the Union at the time of the federal compact. The Union has, therefore, to derive regulatory powers as an incident of its powers over inter-State and foreign commerce. It is only the State Legislature which can exercise
the police power. Municipal or other local authorities may exercise it only if it is delegated by the State Legislature. In India, the power of imposing limitations has been conferred not only on the State and the Union, but also on local and other authorities, who have the power to make 'laws' including within that term all forms of subordinate legislation, such as bye-laws. From the language of clause (2)-(6) it is clear that the restrictions referred to in these clauses can be imposed only by law, including of course valid subordinate legislation. But without legislative authority, the Executive cannot impose any restriction upon any of the fundamental rights guaranteed by Article 19(1). In order to justify a restriction under clause (2)-(6), the law which imposes the restriction must be otherwise valid. A restriction which is not authorized by a valid law cannot be saved by any of these clauses.

In the United States "determination by the Legislature of what constitutes proper exercise of Police power is not that the Courts". Of course, the Court is not concerned with question of policy or the expediency of the legislation but it is bound to interfere if it finds the legislation to be in excess of the powers of the Legislature:

"If there existed a condition of affairs concerning the legislature of the State, exercising its conceded right to enact laws for the protection of the health, safety or welfare of the people, might pass the law, it must be sustained if such action was arbitrary interference ... and having so just relation to the protection of the public within the scope of legislative power, the act must fall"26.

It is the business of the Court to see that in restricting the abuses of the exercise of a fundamental right in the collective interests, the Legislature does not go to the length of abridging the right itself. In *De Jonge vs. Oregon*27, the Supreme Court observed:

"The fundamental rights of freedom of speech, of the press and the assembly, guaranteed by the Constitution may be abused by using speech or press or assembly in order to incite violence or crime. The people through their legislatures may protect themselves against that abuse. But the 'legislative intervention' can find constitutional justification only by dealing with the abuse. The rights themselves cannot be curtailed...".

The Fourteenth Amendment to the American Constitution says "No person shall be ... deprived of his life, liberty or property, is without due process of law". By a process of liberal interpretation.

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26 ibid.
the word 'liberty' has been interpreted to include practically all the fundamental rights, e.g.

(i) Freedom of speech,
(ii) Freedom of press
(iii) Freedom of religion
(iv) Freedom of assembly
(v) Freedom of movement and residence
(vi) Freedom of profession, business or calling.

In the result, a State cannot make any law imposing restrictions upon any of these fundamental rights, without conforming to the requirements of 'due process'. 'Due process' is a dynamic concept and the Supreme Court has refused to give it any static definition. Broadly speaking, it negatives anything which is 'arbitrary' or 'shocking' to the universal sense of 'justice', having regard to the circumstances of each case. Under this power, thus, the American Judiciary claims to nullify any legislation, which may be otherwise valid, on the ground that there is something which seems to be arbitrary or opposed to the 'fundamental principles of liberty and justice to the Bench of Judges which tries the particular case in relation to which the statute comes to Court. Any State action,
legislative, administrative or judicial, which violates 'due process', either directly or indirectly, is void.

'Due process' has both a procedural and a substantive meaning. The meaning originally attributed to the phrase was *procedural*, namely, a fair and established procedure, subject to which only the deprivation of life, liberty or property could be effected by the State. It was towards the end of the 19th century that the Supreme Court imparted a *substantive* content to the clause and assumed the power to review legislation, not on the ground that the procedure prescribed by the State was unfair, but that the legislation itself was an arbitrary or improper interference with the freedom of life, liberty or property. Inspired by the *laissez faire* doctrine, the Court applied the armament of substantive due process to annul legislation regulating conditions of labour, rates and wages. It will also be seen presently, that the trend of the Supreme Court in recent years has been towards a sparing use of substantive due process at least the realm of social and economic legislation.

Procedural due process, speaking shortly, requires that a person must be given an opportunity of being heard in the defence before he is deprived of his life, liberty or property.
Substantive due process, on the other hand, means that not only the proper procedure should be followed, but the law itself must be reasonable. The tests of reasonableness of a restriction upon a fundamental right, according to the doctrine of substantive 'due process' are:

(i) It must have a just relation to the protection of the public within the scope of the 'police power'. In other words, the restriction must be reasonably necessary in the interests of public health, morals, safety or welfare. It must have a real and substantial relation to the object sought to be attained by the restriction or regulation, and such object must be one in the interest of which the State is entitled to exercise its police power. This is also referred to as the rational basis, test for the validity of a law imposing a restriction upon a freedom guaranteed by the Bill of Rights.

(ii) In order to restrict a fundamental right, the need for the protection of the relevant State interest must be compelling\(^28\). Thus, freedom of speech cannot be curtailed in the interest of insuring a high professional standard\(^29\).

\(^{29}\) Ibid.
(iii) The restriction must not be in excess of the requirement. In other words, the freedom must not be abridged or curtailed unduly or arbitrarily.

"Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative achievement must be viewed in the right of less drastic means for achieving the same basic purposes". Regulatory measures ... no matter how sophisticated, cannot be employed in purpose or in effect to stifle, penalize, or curb the exercise of First Amendment Rights.30

Thus, the State cannot 'under the guise of protecting the public', 'arbitrarily interfere with private business...Where the Legislature imposes a restriction upon a fundamental right secured by the First Amendment without making any attempt to strike a balance between the need for the individual right and the need for social control of its abuse, the legislation is invalid on its face. What degree of control or restriction is reasonable depends upon the circumstances of each case, e.g., the nature of the business, or character of the right, the nature and importance of the social interest to be safeguarded.

The Supreme Court of India has laid down the following principles for determining the reasonableness of a restriction imposed by law upon the exercise of a fundamental right, broadly following the line of American decisions, even though we have no 'due process' clause in our Constitution.31

I. In the expression 'reasonable restriction' in clause (2)-(6) of Article 19, the objective 'reasonable' is predicated to the 'restrictions' that the imposed by the law and of the law itself. The issue to be decided by the Court is whether the restrictions imposed by the impugned legislation on the exercise of the right are reasonable (both from the substantive and procedural points of view. The question whether the provisions of the Act provide reasonable safeguards against the abuse of the power given to the executive authority to administer the law is not relevant for the true interpretation of the clause.32 It also follows that the Court is not concerned with the necessity of the impugned legislation or the wisdom of the policy underlying it, but only whether the restriction is in excess of the requirement and whether it is imposed in an arbitrary manner. If the law

has not overstepped the constitutional limitations, the Court will have to uphold the law, whether it likes the law or not”.

II. It is the effect of a law which constitutes the test of its reasonableness, its object, whether good or bad, is immaterial for this purpose.

III. The expression ‘reasonable restriction’ seeks to strike a balance between the freedom guaranteed by any of the sub-clause of clause (I) of Article 19 and the social control permitted by any of the clause (2) to (6). It connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. In order to be reasonable the restriction must have a reasonable relation to the object which the legislation seeks to achieve, and must not go in excess of that object.

IV. It follows that the reasonableness of a restriction has to be determined in an objective manner and from the standpoint of the interests of the general public and not from the point of view of the persons upon whom the restrictions are imposed or upon abstract considerations.
The test of reasonableness, wherever prescribed, should be applied in each individual statute impugned and no standard or general pattern of reasonableness can be laid down as applicable to all cases. To the same effect are the pronouncements of the American Supreme Court: “A regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, and the same business under other circumstances, for each regulation depends upon the relevant facts”. In short, in determining the reasonableness of a law challenged as an unreasonable restriction upon a fundamental right guaranteed by Article 19, the Court has to balance the need for individual liberty with the need for social control and the magnitude of the evil which it is the purpose of the restrictions to curb or eliminate – so that the freedom guaranteed to the individual subserves the larger public interests.

The standard of reasonableness must also vary from age to age and be related to the adjustments necessary to solve the problems which communities face from time to time.

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33 Jyoti Pershad vs. Union Territory of Delhi, AIR 1961 SC 1602 (1613).
VII. Similarly, a restriction which may be reasonable in relation to one fundamental right may not be reasonable in relation to another right, though enumerated in the same clause (1) of Article 19.

VIII. In judging the reasonableness of a law, the Court will necessarily see, not only the surrounding circumstances but all contemporaneous legislation passed as part of a single scheme. It is the reasonableness of the restriction and not of the law that has to be found out, and if the Legislature imposes a restriction by one law but creates countervailing advantages by another law passed as part of the same legislative plan, the Court should not refuse to take that other law into account. The Courts can take judicial notice of such Acts forming part of the same legislative plan, under which restrictions are imposed by one Act and countervailing advantages are created by another.

IX. The restriction must be reasonable from the substantive as well as procedural standpoints. It is not possible to formulate an effective test which would enable the Court to pronounce any particular restriction to be reasonable or unreasonable per se.

34 Krishna Sugar Mills vs. Union of India, AIR 1959 SC 1124 (1132).
all the attendant circumstances must be taken into
consideration and one cannot dissociate the actual contents of
the restrictions from the manner of their imposition or the
mode of putting them into practice. The Court must take into
consideration not only the nature of the restriction itself, but
also its territorial and temporal extent, as well as the
circumstances under which or the manner in which the
restrictions have been imposed\textsuperscript{35}.

X. Whether a restriction on a fundamental right by a piece of
legislation is reasonable or not must depend upon the
circumstances existing when that piece of legislation was
enacted.

XI. The business of the Court is to determine if a Legislature, in
enacting a law, transgressed the constitutional limitations
imposed upon its powers, and, if so, to annul it is ultra vires or
unconstitutional. Anything that takes place subsequently
cannot save the law which was ultra vires \textit{ab initio}.

XII. The constitutional validity of a statute is to be determined on
the basis of its provisions and on the ambit of its operation as
reasonably construed. If so judged it passes the test of

\textsuperscript{35} \textit{Ibid.}
reasonableness, mere possibility of the powers conferred being abused is no ground for pronouncing it invalid, just as a statute which is otherwise unreasonable cannot be saved by its being administered reasonably, or by making reasonable Rules.

XIII. In determining the reasonableness of a restriction, the Court may take into consideration what is enjoined by other provisions of the Constitution, e.g. the Directive Principles.

(k) Applicability of American Decisions in determining ‘reasonableness’ of a restriction under Article 19

Though the American expression ‘due process’ was avoided by the makers of our Constitution because of its vagueness, Dr. D.D. Basu has always entertained the view that the word ‘reasonable’ in Clause (2)-(6) of our Constitution gives to our Courts similar power of judicial review of laws as is conferred on the American Courts by the expression ‘due process’ and that in determining this reasonableness, our Courts have to apply their minds both to the subsistantive and procedural contents of the impugned law in the same manner as the American Courts have in applying the test of ‘due process’, even though the extent of interference in the United States may be wider on account of the flexibility and vagueness of the expression ‘due process’. In the result, though our Courts are not necessarily bound by a particular decision of the Supreme Court as to whether a particular measure satisfies ‘due
process', American precedents are of great value and should be considered before taking a different view unless the other provisions of the Constitution of India or other special circumstances exclude their application.\textsuperscript{36}

What is a reasonable restriction of the freedom guaranteed by the various Clauses (1) (b) to (g) in a matter to be decided by the Court, when a case comes before it, in the light of the circumstances attending the case, and it is obvious that there being no fixed standard of reasonableness, the "judges" who constitute the particular Court would be largely guided by their own economic and social philosophy, subject, of course, to precedents. Of these the American precedents would be of particular value to our Courts at least so long as our body of case-law does not build up. The concept of reasonableness is nothing but that of harmonizing individual rights with collective matters.

When our Supreme Court was first called upon to interpret Article 19, it at once laid down that the reasonableness of a restriction was to be judged by the Court both from the substantive and procedural aspect, and that the determination by the Legislature on this point was not final.\textsuperscript{37} The stage was thus set for reference to the American precedents in determining the substantive or procedural reasonableness.


\textsuperscript{37} Chintamanrao vs. State of M.P. (1952) SCR 759: AIR 1951 SC, 118.
of a particular type of restriction as held by the American Supreme Court under the doctrine of 'due process'.

The indebtedness of our Supreme Court to American decisions on 'due process' would be demonstrated, beyond a shred of doubt. In 1972, in *Bernett Coleman's Case*, the Court had followed the American decisions in interpreting Article 19(2). Both in India and in the U.S.A., the Court has to determine the constitutionality of a restriction imposed upon the exercise of a fundamental right both from the substantive and procedural aspects.

In the United States the Court reviews a law imposing a restriction upon a fundamental right not only from the standpoint of the degree or extent of the restriction from the standpoint of the means which the Legislature adopts for combating the evil aimed at by the impugned legislation. Thus, speaking of restrictions imposed upon the rights guaranteed by the First Amendment (freedom of speech, press, assembly and religion), the Supreme Court observed: "Mere legislative preference for one rather than another means for combating substantive evils may well prove an inadequate foundation upon which to rest regulations which are aimed at or in their operation diminish the effective exercise of right so necessary to the maintenance of democratic institutions. It is imperative that, when the effective exercise of these
rights is claimed to be abridged, the Courts should weight the circumstances and 'appraise the substantiality of the reasons advanced' in support of the challenged regulations".38

An exercise of the 'police power' of the State against the exercise of a fundamental right by an individual is 'unconstitutional' if the restriction or abridgement of the right is in excess of the requirement, having regard to the circumstances of each case. Thus, the Supreme Court has invalidated a statute under which a person could be punished for having sold to an adult a book which contained obscene matter "tending to the corruption of the morals of the youth", with these words – "we have before us legislation not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population ... to reading only what was fit for children. It thereby arbitrarily curtails one of those liberties of the individual ... that history has attested as the indispensable condition for the maintenance and progress of a free society".39

(1) Difference between 'restriction' and 'prohibition'

In the U.S.A., it has been held that restriction does not exclude the idea of prohibition. It is for the Courts to consider, having regard to the circumstances of each case, whether restriction or

38 Thombill vs. Alabama (1940) 310 US 88.
prohibition was a reasonable exercise of the 'police power'. Of course, ordinarily, 'restriction' will simply require 'regulation', e.g. the regulation of the practice of medicine to protect the health of the community or the regulation of movements to prevent the spread of contagious diseases. But in more serious cases, it may require 'prohibition', e.g. of the sale of adulterated food or drugs, prohibition of brickyards in thickly populated cities. In short, the extent to which regulation may reasonably go varies with different kinds of business.

The State is thus entitled to totally prohibit certain business which are inherently injurious to the health, morals or economic interests of the society. But an absolute prohibition of a business which is not so injurious may be held to be arbitrary.

(m) Public Order

(a) In the interests of public order, the State may prohibit and punish the causing of 'loud and raucous noise' in streets and public places by means of sound amplifying instruments, regulate the hours and place of public discussion, and the use of public streets for the purpose of exercising freedom of speech: provide for the expulsion of hecklers from meetings and assembles, punish utterances tending to incite an immediate breach of the peace or riot (as distinguished from utterances causing mere 'public
inconvenience, annoyance or unrest'), e.g., insulting or 'fighting' words, libels against an individual or a definite group of people\textsuperscript{40}.

(b) Even where it is not attended with violence, the State may restrict the freedom of speech where it is used as an integral part of \textit{unlawful conduct} or the commission of acts in violation of the law, or where the speech incites the audience in such manner that there is a likelihood of \textit{imminent} breach of the peace which the Police cannot prevent without stopping the speaker. In other words, in the interests of 'public order' the State may not only punish actual disturbances but also prevent threatened disorders\textsuperscript{41}.

\textsuperscript{40} Beauharnis vs. Illinois, (1952) 343 US. 250.

\textsuperscript{41} Cantwell vs. Connecticut, (1940) 310 US 296 (308).