ARTICLES

THE PENNSYLVANIA CONSTITUTION'S PROTECTION OF FREE EXPRESSION

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INTRODUCTION

Freedom of expression is the paradigmatic right of the information age. As opportunities for communication grow exponentially, and a larger and larger proportion of commercial activity consists of the transfer of knowledge and information, constitutional guarantees of freedom of speech and freedom of the press cast an ever-expanding shadow. During the last decade, hardly a term has passed in the United States Supreme Court which has not seen the vindication of federal constitutional protection of free expression against two or three federal statutes and a half dozen state and local constraints. The United States Supreme Court's activism on behalf of free expression is rivaled only by its exertions on behalf of states' rights.[1]

As Justice Brennan reminded us a quarter century ago,[2] and others have regularly reiterated, however, the work of the United States Supreme Court does not comprise the entire fabric of American constitutional freedom. Each of the fifty states has both historical and legal warrant to provide protections independent of federal norms. The Pennsylvania Supreme Court has for over a decade self-consciously grasped that opportunity to elaborate an independent

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[1] *See, e.g.*, Seth F. Kreimer, *Exploring the Dark Matter of Judicial Review: A Constitutional Census of the 1990s*, 5 WM. & MARY BILL RTS. J. 427 (1997).

[2] William Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

constitutional jurisprudence in light of the text, history, structure and traditions of Pennsylvania's constitution.[3]

This article is an effort to provide the materials with which to engage in that elaboration in the area of free expression. It is the first sustained examination of Pennsylvania's constitutional guarantees of free speech and press since the dawn of the twentieth century,[4] and to my knowledge, the first comprehensive study to synthesize the two and a quarter century history of Pennsylvania's protection of free expression.[5]

[3] *See* Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991) (analyzing and announcing structure for inquiry to guide development of independent Pennsylvania jurisprudence). *Edmunds* was preceded by a decade of cases construing some protections of the Pennsylvania constitution independently from their federal counterparts. *See, e.g.*, Commonwealth v. Melilli, 555 A.2d 1254 (Pa. 1989); Commonwealth v. Blystone, 549 A.2d 81 (Pa. 1988); Commonwealth v. Miller 518 A.2d 1187 (Pa. 1986); Commonwealth v. Sell 470 A.2d 457, 460 (Pa. 1983) (observing that the Pennsylvania Supreme Court had interpreted the state constitution as affording greater protection to defendants than the federal constitution); Commonwealth v. DeJohn, 403 A.2d 1283 (Pa. 1979) (declining to follow the United States Supreme Court's reasoning when analyzing the state constitutional protection against unreasonable searches and seizures); and Commonwealth v. Platou, 312 A.2d 29 (Pa. 1973) (noting the difference in wording in the Pennsylvania constitution's search and seizure protection). One of the first self-conscious efforts along this line was the free expression decision of *William Goldman Theatres, Inc. v. Dana*, 173 A.2d 59 (Pa. 1961).

[4] The task was last undertaken by Thomas Raeburn White in COMMENTARIES ON THE CONSTITUTION OF PENNSYLVANIA 82-97 (1907). *Cf.* CHARLES L. BUCKALEW, AN EXAMINATION OF THE CONSTITUTION OF PENNSYLVANIA 12-13, 23 (1883). Robert Woodside's treatise, PENNSYLVANIA CONSTITUTIONAL LAW (1985) contains no discussion of the free expression provisions.

[5] Each of the 50 state constitutions, of course, contains free expression protections. A useful overview can be found in 1 JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES 5-1 to 5-96 (3d ed. 2000); *see also id.* at 9-1 to 9-37 (discussing application of state free expression guarantees to non-public actors); ROBERT F. WILLIAMS, STATE CONSTITUTIONAL LAW, CASES AND MATERIALS 270-84 (3d ed. 1999) (also discussing application of state free expression guarantees to non-public actors); Susan King, *State Constitutional Law Bibliography: 1989-1999*, 31 RUTGERS L.J. 1623, 1691 (2000) (collecting recent articles on state free speech jurisprudence). The free expression opinions of the Pennsylvania Supreme Court on occasion make mention of parallel discussion in other courts. *See, e.g.*, W. Pa. Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co., 515 A.2d 1331, 1338 (Pa. 1986) (distinguishing California cases on shopping center access, noting "[t]he highest courts of other jurisdictions are divided on this issue"); Commonwealth v. Tate, 432 A.2d 1382, 1389 (Pa. 1981) (making reference to New Jersey and California cases regarding access to shopping centers by protestors); Commonwealth v. Nelson, 104 A.2d 133, 135 (Pa. 1954), *aff'd sub nom.* Pennsylvania v. Nelson, 350 U.S. 497 (1956) (dicta citing New Jersey case regarding vagueness of "incitement to hatred" statutes); Commonwealth v. Geuss, 76 A.2d 500 (Pa. Super. Ct. 1950), *aff'd*, 81 A.2d 553 (Pa. 1951) (making reference to New Jersey case regarding loudspeakers). For the most part, however, analysis of Pennsylvania free expression issues has proceeded without reference to the jurisprudence of other states.

I. PENNSYLVANIA'S HERITAGE

A. *The Framing of the Pennsylvania Free Expression Clauses*

In its current form, Pennsylvania's constitution extends protection to free expression in two sections.

Article I, Section 7 provides:

> [a]The printing press shall be free to every person who may undertake to examine the proceedings of the Legislature or any branch of government, and no law shall ever be made to restrain the right thereof. [b] The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty. [c] No conviction shall be had in any prosecution for the publication of papers relating to the official conduct of officers or men in public capacity, or to any other matter proper for public investigation or information, where the fact that such publication was not maliciously or negligently made shall be established to the satisfaction of the jury; and in all indictments for libels the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.[6]

Article I, Section 20 adds: "The citizens have a right in a peaceable manner to assemble together for their common good, and to apply to those invested with the powers of government for redress of grievances or other proper purposes by petition, address or remonstrance."

These provisions are hardly recent innovations. In 1776, a decade and a half before the adoption of the federal Bill of Rights, the Constitution of the Commonwealth of Pennsylvania embodied the protection of free expression in three separate provisions. Pennsylvania's 1776 Declaration of Rights identified rights of speech, press,

[6] The official constitutional language is a single uninterrupted paragraph. I have taken the liberty of adding bracketed subsections to facilitate discussion of the separate elements of the section. The language of Article I, Section 7[c] was said to be "repugnant to" federal First Amendment standards, but severable from the remainder of Article I, Section 7 in *Commonwealth v. Armao*, 286 A.2d 626 (Pa. 1972). Although the Pennsylvania Supreme Court has said that *Armao* "invalidated a portion of Article 1, Section 7," Commonwealth v. Wadzinski, 422 A.2d 124, 127 n.6 (Pa. 1980), the better reading of *Armao* seems to be that these provisons were not sufficient to save Pennsylvania's criminal libel statute from unconstitutionality under the federal requirements of "actual malice" for libel judgments in matters of public interest. *See* Garrison v. Louisiana, 379 U.S. 64 (1964). There is nothing in the protections provided by Article 1, Section 7 that is inconsistent with federal mandates; they are simply insufficient. One would think that if the Pennsylvania legislature sought to impose criminal liability on a basis other than defamation (*e.g.*, intellectual property or campaign finance provisions) for publications "proper for public investigation or information," such prosecutions would still require a showing of "malice or negligence" under Article 1, Section 7, even if unconstrained by federal standards.

assembly, and petition in two of its provisions,[7] while the Frame of Government added that "[t]he printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any part of government."[8]

Taken together these provisions made Pennsylvania the flagship of free expression in the early Republic. The protection of freedom of the press in Pennsylvania's constitution was mirrored by the contemporaneous provisions of the constitutions of seven other states.[9] Pennsylvania's, however, was the first constitution to protect "freedom of speech and of writing."[10] Vermont's constitution of 1777 adopted language identical to that of Pennsylvania.[11] But these protections of "speech" stood alone until the adoption of the First Amendment in 1791. Unlike its protection of freedom of the press, the Virginia Declaration of Rights, which preceded Pennsylvania's Declaration, provided no recognition of any right to assemble.[12] Although the rights to petition and assembly had been claimed by the Continental Congress in 1774,[13] until the adoption of the First

[7] The first, Article XII, provided: "That the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained." PA. CONST. of 1776, Declaration of Rights, art. XII (1776). The second Pennsylvania provision, Article XVI of Pennsylvania's 1776 Declaration of Rights, recognized: "[t]hat the people have a right to assemble together, to consult for their common good, to instruct their representatives, and to apply to the legislature for redress of grievances, by address, petition, or remonstrance."

[8] *Id.*, Frame of Government, § 35. This freedom to examine the proceedings of the legislature was a concomitant of the participation-enhancing innovations of Sections 13, 14 and 15 of the 1776 Frame of Government, which guaranteed public access to legislative debates, publication of legislative records and of proposed statutes. *See* WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS 249-50 (Rita & Robert Kimber trans., 1980) (describing confidentiality of debate in Pennsylvania assembly debates through 1764, and innovation of public access to the legislative process in the 1776 constitution). The constitutional mandates of open legislative debates and records was retained in modified form in the 1790 Constitution, PA CONST. of 1790, Frame of Government §§ 14-15 (1790), and preserved unchanged to the present 1968 Constitution. PA CONST. of 1968, art. II, §§ 12-13 (1968).

[9] *See* Georgia, GA. CONST. of 1777, art. LXI (1777); Massachusetts, MASS. CONST. Declaration of Rights, pt. 1, art. XVI (1780); Maryland, MD. CONST. of 1776, art. XXXVII (1776); New Hampshire, N.H. CONST, pt. 1, art. XXII (1784); North Carolina, N.C. CONST. of 1776, art. XV (1776); South Carolina, S.C. CONST. of 1778, art. XLIII (1778); and Virginia, VA. CONST. of 1776, Bill of Rights § 12 (1776). *See also* LIVINGSTON ROWE SCHUYLER, THE LIBERTY OF THE PRESS IN THE AMERICAN COLONIES BEFORE THE REVOLUTIONARY WAR 77 (1905).

[10] SCHUYLER, *supra* note 9, at 77.

[11] VT. CONST. of 1777, art. XIV (1793).

[12] J. PAUL SELSAM, THE PENNSYLVANIA CONSTITUTION OF 1776 178 (1936).

[13] Continental Cong., N.C. D. 8 Oct 14, 1774, *reprinted in* JACK N. RAKOVE, DECLARING RIGHTS 63-68 (1998); 1 Annals of Cong., 731-45, reproduced, The Founders' Constitution Volume 5, Amendment I (Petition and Assembly), Document 13, *available at* http://press-pubs.uchicago.edu/founders/documents/amendI_assemblys13.html (last visited Oct. 16, 2002) ("That they have a right peaceably to assemble, consider of their grievances, and petition the king; and that all prosecutions, prohibitory proclamations, and commitments for the same, are illegal.").

Amendment, Pennsylvania's freedom of assembly provision was mirrored only by Vermont[14] and North Carolina.[15]

Under its first constitution, the Commonwealth experienced both a profusion of what would today be called "uninhibited robust wide-open debate,"[16] and sporadic, largely unsuccessful efforts by officials to curb criticism.[17]

These efforts climaxed in 1788 with *Republica v. Oswald.*[18] Contentious newspaper editor Eleazer Oswald had found himself subject to civil arrest in the course of a libel suit brought by Andrew Browne, the "master of a female academy in the city of Philadelphia," and a

[14] VT. CONST. of 1777, art. XVIII (1793).

[15] N.C. CONST. of 1776, art. XVIII (1776).

[16] New York Times v. Sullivan, 376 U.S. 254, 270 (1964). *See* SELSAM, *supra* note 12, at 181 (quoting a contemporary observer as commenting "[i]t arouses the sympathies to see how often the Congress is mishandled in these sheets"). Similarly, Dwight L. Teeter's study, A Legacy of Expression: Philadelphia Newspapers and Congress During the War for Independence 1775-1783 (1967) (unpublished Ph.D. dissertation, University of Wisconsin) is replete with accounts of the vituperative press skirmishes in Philadelphia during the period after the adoption of Pennsylvania's first constitution. *See id.* at 258-62 (explaining that newspaper publishers "acted as if they had little to fear from publishing severe criticism of the Constitution and government of Pennsylvania;" "printers apparently held the courts in little awe"); *see also* NORMAN L. ROSENBERG, PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL 60 (1986) (remarking on "the almost total absence of political libel suits" during the 1780s and 1790s); Dwight L. Teeter, *Press Freedom and the Public Printing: Pennsylvania, 1775-83*, 45 JOURNALISM Q. 445, 446-47 (1968) (recounting "choice bits of vituperation," officials "peddling official blunders by the groce [sic]," officials accused of profiteering, one judge characterized as "Judge Grinner, or 'The Excrescence,'" published by Philadelphia printers "beyond the reach of effective governmental retaliation"); ROBERT L. BRUNHOUSE, THE COUNTER-REVOLUTION IN PENNSYLVANIA 1776-1790 5 (1971) ("In the 1780s the press descended to unbelievable depths of repulsive muckraking."); *see id.* at 125 (describing vituperation "that descended to such depths as to approach the obscene"); *see also id.* at 289 n.11 (describing cartoons and "filthy attacks").

[17] Libel prosecutions were brought to suppress political criticism with only sporadic effect. *See* JOHN K. ALEXANDER, PENNSYLVANIA, PIONEER IN SAFEGUARDING PERSONAL RIGHTS IN THE BILL OF RIGHTS AND THE STATES 325-27 (Patrick T. Conley & John P. Kaminski eds., 1992) (describing events of 1782 during which publisher Eleazer Oswald attacked Pennsylvania's Chief Justice Thomas McKean as biased and unfair, was arrested at McKean's orders for seditious libel, and was ultimately saved from prosecution by the repeated refusal of a grand jury to indict him); Teeter, *supra* note 16, at 79-80, 110 (describing the seditious libel law adopted by Pennsylvania's Provisional Constitutional Convention); *id.* at 229-31 (describing repeated unsuccessful efforts by Justice McKean to induce the grand jury to indict Eleazer Oswald for libel). For other accounts of the conflict between McKean and Oswald, see Teeter's *The Printer and the Chief Justice: Seditious Libel in 1782-83*, 45 JOURNALISM Q. 235 (1968) and ROSENBERG, *supra* note 16, at 60. The public commitment to liberty of expression in this early period, however, fell considerably short of modern standards in other areas. *See, e.g.*, ROBERT L. BRUNHOUSE, THE COUNTER-REVOLUTION IN PENNSYLVANIA 1776-1790 16-21 (1971) (describing loyalty oath of 1776 prerequisite to voting that was interpreted to prevent working for changes in the constitution); *id.* at 40-41 (describing loyalty oath of 1777 prerequisite to voting, suing for debts, and transferring real estate); *id.* at 77-79 (describing 1779 abolition of College of Philadelphia because of political opposition of Trustees); *id.* at 127 (describing 1782 statute mandating death penalty for adherents of secessionist movement); *id.* at 147 (describing 1783 refusal to legalize theatrical entertainment in Philadelphia).

[18] 1 U.S. (1 Dall.) 319 (1788). *See* Teeter, *supra* note 16, at 237-39.

friend of Oswald's political opponents. In response, Oswald published a bitter attack on all of the parties to the libel action, alleging that both the plaintiff and the court had sought to exact political retribution against him, making the claim that "the doctrine of libels" was incompatible with Pennsylvania's constitutional protection of free communication and free press, and voicing the hope that his "fellow citizens" would vindicate him in the impending jury trial. Oswald thereupon found himself hailed before the Pennsylvania Supreme Court to defend against charges of contempt of court.

The opinion of Justice McKean, who had previously attempted without success to punish Oswald for his criticism of McKean himself,[19] began by affirming the "doctrine of libels" that Oswald denied: "libeling is a great crime, whatever sentiments may be entertained by those who live by it," announced Justice McKean, "the heart of the libeler . . . is more dark and base than that of the assassin."[20] Pennsylvania's protection of freedom of the press, according to the opinion, "[precludes] any attempt to fetter the press by the institution of a licenser" and gives "every citizen a right of investigating the conduct of those who are intrusted [sic] with the public business."[21] But while the constitution authorized "candid commentary" and "permits every man to publish his opinion," once publication occurred an individual was protected against subsequent legal action in only the case of "[publications] meant for use and reformation . . . with an eye solely to the public good." Publications meant to "delude and defame" were unprotected, and since in the view of Justice McKean, the evident "object and tendency" of Oswald's publications was to "raise a prejudice against his antagonist, in the minds of those that must ultimately determine the dispute between them" and to "dishonor the administration of justice," Oswald's publications were subject to punishment as contempts of court.[22]

The Constitutional Convention of 1790 rewrote Pennsylvania's free expression provisions into the lineal ancestors of their current form. All of the provisions were consolidated in the Declaration of Rights, which was promulgated as the final article (Article IX) of the

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[19] McKean endeavored to have Oswald indicted for criticizing him seven years earlier. *See supra* note 17.

[20] *Oswald*, 1 U.S. (1 Dall.) at 324. McKean was an enthusiast for the law of libel. In addition to his prior efforts regarding Mr. Oswald, he successfully obtained a £5700 libel verdict against another printer. Teeter, *supra* note 16, at 125. *See* Commonwealth v. Duane, 1 Binn. 97 (Pa. 1804) (libel prosecution for statements regarding McKean as governor of Pennsylvania); Respublica v. Cobbet, 3 Yeates 93 (1800) (McKean as Supreme Court Justice imposed $2000 bond conditioned on good behavior of publisher).

[21] *Oswald*, 1 U.S. (1 Dall.) at 326.

[22] *Id.* Oswald was fined £10 and imprisoned for one month. *Id.* at 328. His effort to obtain relief in Pennsylvania's unicameral legislature failed after several days of discussion by a vote of 34-23. *Id.*

1790 constitution. Introduced by the new admonition "[t]hat the general, great, and essential principles of liberty and free Government may be recognized and unalterably established, WE DECLARE," Article IX concluded (Section XXVI): "Everything in this article is excepted out of the general powers of government, and shall for ever remain inviolate."[23]

Protections of press and speech which had previously appeared in both the Frame of Government and the Declaration of Rights were consolidated in a new section of the Declaration of Rights (Section-VII), "Of the liberty of the press," which read (as revised):

> [a] That the printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any branch of government: And no law shall ever be made to restrain the right thereof. [b] The free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty. [c]In prosecutions for the publication of papers, investigating the official conduct of officers, or men in a public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence: And, in all indictments for libels, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases.[24]

The right to assemble and petition was retained in Article IX, Section 20 of the 1790 constitution in wording that has remained unchanged to the present constitution (Article I, Section 20). Finally, the 1790 constitution added reputation to the "inherent and indefeasible" rights recognized in Section 1 of the Declaration of Rights.[25]

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[23] Both the introductory and concluding language were retained unchanged by subsequent constitutions.

[24] Sections [a] and [b] were retained unchanged in the constitutions of 1838, 1874 and 1968, and are now contained in Article I, Section 7. Section 7[c] was retained in the constitution of 1838, but amended in 1874 to read:

> No conviction shall be had in any prosecution for the publication of papers relating to the official conduct of officers or men in public capacity, or to any other matter proper for public investigation or information, *where the fact that such publication was not maliciously or negligently made shall be established to the satisfaction of the jury*; and in all indictments for libels the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.

Article I, Section 7[c] (emphasis added). This substitution of a requirement of negligence or malice, both of which required a showing of both falsehood and a state of mind, for a simple right to introduce truth for jury consideration was regarded as a more protective standard. *See* ROSALIND L. BRANNING, PENNSYLVANIA CONSTITUTIONAL DEVELOPMENT 107 (1960).

This language was retained in the 1968 constitution.

[25] PA. CONST., art. I, § 1 (2001). Section 1 of the Declaration of Rights had previously announced "that all men have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety." As revised in 1790, the Declaration of Rights recognized "inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property *and reputation*, and

In this final form, the free expression provisions of Pennsylvania's constitution manifests three overlapping commitments: political, epistemic, and libertarian.

B. The Political Functions of Free Speech

It is clear from the Pennsylvania constitution's text and heritage that free expression serves crucial political functions. Freedom of the press—originally a part of the Frame of Government—is guaranteed to "every person who may undertake to examine the proceedings of the Legislature or any branch of government" (Article I, Section 7[a]); protections against criminal prosecution are provided to publications investigating "the official conduct of officers or men in public capacity" (Article I, Section 7[c]); citizens are protected in their right to assemble and "to apply to those invested with the powers of government" for relief (Article I, Section 20).

1. *Remonstrance and Criticism: The Checking Function*

Pennsylvania's constitutional heritage from the beginning has viewed freedom of expression, in the words of Philadelphia lawyer Andrew Hamilton, as a

> bulwark against lawless power . . . a right which all freemen claim, and are entitled to complain when they are hurt . . . to remonstrate the abuses of power in the strongest terms, to put their neighbors upon their guard against the craft or open violence of men in authority.[26]

Shortly before the framing of the Declaration of Rights, the Continental Congress wrote in Philadelphia in 1774,

> [t]he importance of [freedom of the press] consists . . . in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promo-

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of pursuing their own happiness." (emphasis added). It is not directly relevant to this essay to explore the alterations that omitted the proposition that the rights in question were "natural," or that there is a right of "pursuing . . . safety" or the elimination of the right of "obtaining . . . happiness and safety." The wording of this provision has again been retained unchanged in the constitutions of 1838, 1874 and 1968. It currently comprises Article I, Section 1.

[26] Andrew Hamilton, *Defense of John Peter Zenger on Charge of Seditious Libel* (1735), *available at* http://www.uark.edu:80/depts/comminfo/cambridge/zenger.html (last visited Oct. 16, 2002). *See id.* ("[T]hat to which nature and the laws of our country have given us a right—the liberty—both of exposing and opposing arbitrary power (in these parts of the world, at least) by speaking and writing truth."). Hamilton's address in the *Zenger* trial in New York has long been cited in Pennsylvania's Supreme Court as a part of Pennsylvania's constitutional heritage. *See* Kane v. Commonwealth, 89 Pa. 522, 526-27 (1879); *see also* Bodack v. Law Enforcement Alliance of America, 790 A.2d 277, 279 (Pa. 2001) (Castille, J., dissenting); Mack Appeal, 126 A.2d 679, 683 (Pa. 1956) (Bell, concurring and dissenting); O'Donnell v. Philadelphia Record Co., 51 A.2d 775, 790 n.3 (Pa. 1947) (Maxey, J., dissenting); Commonwealth v. McManus, 21 A. 1018, 1020 (Pa. 1891) (Mitchell, J., concurring).

> tion of union among them, whereby oppressive officers are shamed or intimidated into more honourable and just modes of conducting affairs.[27]

So, too, the framers of the 1874 Constitution, though they ultimately limited their work to a relatively minor expansion of the protections against criminal libel prosecutions, articulated a high regard for the political functions of the press when they reenacted the Declaration of Rights.[28]

The Pennsylvania Supreme Court has repeatedly recognized the constitutional importance of expression which brings to light the potential or actual wrongdoing of government officials, and the constitutional problems raised by official efforts to stifle criticism. Thus, in the 1835 *Case of Austin*, the court reversed the disbarment of attorneys who had criticized a common pleas court judge, commenting that

> [t]he conduct of a judge, like that of every other functionary, is a legitimate subject of scrutiny, and where the public good is the aim, such scrutiny is as open to an attorney of his court as to any other citizen . . . . [An attorney] is not professionally answerable for a scrutiny into the official conduct of the judges, which would not expose him to legal animadversion as a citizen.[29]

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[27] ADDRESS TO THE INHABITANTS OF QUEBEC, 1774, *reprinted in* 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 222 (Bernard Schwartz ed., 1971) (1974). *See also* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 (1977) (discussing the value of free expression as a check on the abuse of power); *The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents*, *in* THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 665-68 (objecting to the "omission" of "the stipulations heretofore made" by state constitutions "in favour of" "the liberty of the press, that scourge of tyrants and the grand bulwark of every other liberty").

[28] *E.g.*, IV DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA 716-17 (1873) (Mr. Smith) ("Give me but liberty of the press . . . and I will shake down from its height corruption and bury it under the ruins of the abuses it was meant to shelter . . . ."); (Mr. Sharpe):

> It is the duty of the press to educate the public mind upon the affairs of State, to drag from its concealment the malfeasance of public officials, to watch and denounce all arbitrary acts of government . . . the newspaper ought to be the wide awake sentinel and guardian which stands upon the watch towers of the State to protect the liberties of the people.

Id. at 726; V DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA 586 (1873) (Mr. Dallas) ("[B]ut for that single paper, the man Tweed and his subordinates . . . would still revolve in the heaven of political power."); (Mr. Landis):

> Does any one doubt that it is the duty of the press to keep the people fully posted upon matters of pubic interest, and to discuss fully and freely the character and conduct of public men? If so he lives too late . . . . No people could exercise the elective franchise intelligently unless the newspapers kept them informed on such subjects . . . .

Id. at 596-97; *id.* at 598-99 ("[The press are] public instructors, the pointers-out of that which requires redress, the advocates of that which ought to be introduced."); VII DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA 266 (1873) (Mr. M'Camant) ("As faithful sentinels upon the watchtowers of liberty, they could more effectually warn us of danger, and being forewarned we could be forearmed.").

[29] 5 Rawle 191, 205-06 (Pa. 1835).

So, too, *In Re Taylor and Selby Appeals* interpreted Pennsylvania's Newspaper Shield Law broadly in light of the observation that "independent newspapers are today the principal watch-dogs and protectors of honest, as well as good, Government."[30] Again, in *Commonwealth v. Contakos*, the prevailing opinion observed, in sustaining constitutionally mandated access to trials, "the public and the media together counterbalance the possible emergence of a corrupt or biased judiciary."[31]

The election of public officials ceases to be democratic if criticism of their actions or their candidacy is legally sanctionable. Thus, in construing the 1874 revision of Article I, Section 7 to its current form, the court reversed a judgment disbarring attorneys for publishing criticism of a sitting judge in light of the newly-established status of judges as elected officials. The Court observed:

> [I]t is now the right and the duty of a lawyer to bring to the notice of the people who elect the judges every instance of what he believes to be corruption or partisanship. No class of the community ought to be allowed freer scope in the expression or publication of opinions as to the capacity, impartiality or integrity of judges than members of the bar . . . . To say that an attorney can only act or speak on this subject under liability to be called to account and to be deprived of his profession and livelihood by the very judge or judges whom he may consider it his duty to attack and expose, is a position too monstrous to be entertained for a moment under our present system.[32]

Shortly thereafter, notwithstanding Pennsylvania's constitutional protection of reputation, the court in *Briggs v. Garrett* recognized a

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[30] 193 A.2d 181, 185 (Pa. 1963). *See id.* at 185 ("[The Shield Law's] spiritual father is the revered Constitutionally ordained freedom of the press."); *see also* Magazine Publishers of Am. v. Dep't of Revenue, 654 A.2d 519, 524 (Pa. 1995) ("The press plays a unique role as a check on government abuse, and a tax limited to the press raises concerns about censorship of critical information and opinion.") (quoting Leathers v. Medlock, 499 U.S. 439, 447 (1991)); *id.* at 527 (Flaherty, J., dissenting) ("The tax restrains the crucial function of the press as government watchdog . . . .").

[31] 453 A.2d 578, 580 (Pa. 1982). The *Contakos* plurality was accepted as controlling in *Commonwealth v. Fenstermaker*, 530 A.2d 414 (Pa. 1987). For other accounts of the importance of value of public discourse as a means of checking the possible abuse of power by courts, see *Commonwealth v. Hayes*, 414 A.2d 318, 322 (Pa. 1980) (opinion of Nix, J.) ("It was thought the presence of the public generally would constrain a court, otherwise predisposed, to accord the witness a fair trial.") (quoting Commonwealth v. Trinkle, 124 A. 191, 192 (Pa. 1924)); *id.* at 331 (opinion of Kaufman, J.) (praising publicity as "check on judicial power"). *See also id.*:

> [E]vidence is to be publicly allowed or disallowed, in the face of the country; which must curb any secret bias or partiality that might arise in his own breast . . . Wigmore noted that public proceedings serve a vital societal function in that they move the court, the parties and the witnesses more strongly . . . to a strict conscientiousness in the performance of duty.

(citations omitted); *In re* Johnson, 359 A.2d 739, 748 (Pa. 1976) (Pomeroy, J., dissenting) ("Criticism by the press is in the nature of public debate: it protects the integrity of the court by exposing its processes to robust public review.").

[32] *Ex parte* Steinman, 95 Pa. 220, 238-39 (1880).

privilege to criticize candidates for public office with probable cause, even if the criticism was in fact a falsehood:

> [H]ave the voters whose suffrages [a candidate] solicits, the right to canvass and discuss his qualifications, openly and freely, without subjecting themselves to fine or imprisonment, or a ruinous suit for damages? If the voters may not speak, write or print anything but such facts as they can establish with judicial certainty, the right does not exist, unless in such form that a prudent man would hesitate to exercise it . . . . If not, we have indeed fallen upon evil times, and our boasted freedom is but a delusion. The principle contended for here, if sustained by this court, would put a padlock upon the mouth of every voter, and intelligent free discussion of the fitness of public men for office would cease.[33]

The sum of the matter, for the Pennsylvania Supreme Court, is that "[t]here is practically universal agreement that free discussion of candidates for political office is essential to the functioning of a democratic society."[34]

2. *Self Government, Deliberation and Political Truth*

The protection of free expression under Pennsylvania's constitution is not limited to a right to remonstrate with and criticize officials and candidates for office. It undergirds a broader right of self government: the right of the citizens of Pennsylvania to inform themselves in order to deliberate on the issues of the day. The text of the constitution protects not only criticism of public officials, but all publications "proper for public information" (Article I, Section 7[c]) as well as the right of citizens to assemble "for the common good" (Article I, Section 20) and to seek responses to their concerns from the holders of political power.[35]

The Pennsylvania Supreme Court has recognized that, under Pennsylvania's structure of government, citizens have both the right and the "solemn duty" to consult with each other "to work out the public weal," as well as to address their conclusions to the constituted

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[33] 2 A. 513, 523-24 (Pa. 1886).

[34] Commonwealth v. Wadzinski, 422 A.2d 124, 129 (Pa. 1980).

[35] At least one commentator viewed the original protection of free expression in Pennsylvania as a part of the "[t]he determination to establish participatory politics" that characterized the constitution of 1776. John K. Alexander, *Pennsylvania, Pioneer in Safeguarding Personal Rights*, *in* THE BILL OF RIGHTS AND THE STATES 323 (Patrick T. Conley & John P. Kaminski eds., 1992); *see also* Wells v. Bain, 75 Pa. 39, 47 (1873):

> The people, having reserved the right to alter or abolish their form of government, have, in the same declaration of their rights, reserved the means of procuring a law as the instrumental process of so doing. The twentieth section is as follows [quoting current Article I, Section 20] . . . . If the legislature, possessing these powers of government, be unwilling to pass a law to take the sense of the people, or to delegate to a convention all the powers the people desire to confer upon their delegates, the remedy is still in their own hands; they can elect new representatives that will.

authorities.[36] Thus, in *Kirmse v. Adler*, the court held that the right of labor unions "to present their cause to the public by circulars calculated to induce others to stand with them" found protection under the Pennsylvania constitution.[37] Again, in *Boettger v. Loverro*, in the course of holding that Pennsylvania's wiretap law could not be applied to punish newspaper publication of lawfully obtained material, the court observed, "[i]t is the freedom of dissemination of information and ideas of public importance that is the bonding agent in a democracy."[38] And in *Commonwealth v. Tate*, in affirming the independent Pennsylvania protection of free speech and assembly, the court announced,

> [t]he 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open' has special meaning for this Commonwealth, whose founder, William Penn, was prosecuted in England for the 'crime' of preaching to an unlawful assembly and persecuted by the court for daring to proclaim his right to a trial by an uncoerced jury.[39]

Penn himself and the colonial Quakers of Pennsylvania were less than unwavering in their commitment to freedom of speech and press, as the experience of William Bradford, the first printer in Pennsylvania, illustrates.[40] In 1687 the Friend's Meeting ordered

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[36] Spayd v. Ringing Rock Lodge, 113 A. 70, 72 (Pa. 1921). *See also* Commonwealth v. Tate, 432 A.2d 1382, 1388 (Pa. 1981) ("[P]rotection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.") (quoting Roth v. United States, 354 U.S. 476, 484 (1957)); Parker v. Commonwealth, 6 Pa. 507, 514 (1847) (declaring that the people of Pennsylvania, by vesting power in the General Assembly, "solemnly and emphatically divested themselves of all right, directly, to make or declare the law, or to interfere with the ordinary legislation of the state, otherwise than in the manner pointed out in art. ix., sect. 20").

[37] 166 A. 566, 569 (Pa. 1933).

[38] 587 A.2d 712, 720 (Pa. 1991). *Boettger* construed the First Amendment, but the court has been equally emphatic when directly addressing the Pennsylvania constitution that Pennsylvania's free expression guaranties protect discourse which "disseminates political knowledge, and by adding to the common stock of freedom, gives a just confidence to every individual." Respublica v. Dennie, 4 Yeates 266, 269 (1805). *See* Clark v. Allen 204 A.2d 42, 47 (Pa. 1964) (holding accusation of "communistic tendencies" was not libelous and if considered so "would realistically and practically put an effective stop to searching and illuminating discussion and debate").

[39] 432 A.2d 1382, 1388 (Pa. 1981) (citations omitted); *see also* Bodack v. Law Enforcement Alliance, 790 A.2d 277, 279 (Pa. 2002) (Castille, J., dissenting) (quoting *Tate*, 432 A.2d at 1388). As the court recounted in *Commonwealth v. Contakos*, 453 A.2d 578, 580-81 (Pa. 1982):

> In 1670 William Penn and William Mead were tried before a jury at the Old Bailey in London on an indictment of unlawful assembly, disturbing the peace, and "causing a great concourse and tumult." Penn had addressed a group of three hundred Quakers in Grace Church Street, London, after the Quakers had found their meeting house locked by order of the crown . . . . He considered the charges against him to be in violation of the Great Charter of 1225 and the earlier version, the Magna Carta.

(citations omitted)

[40] *See* SCHUYLER, *supra* note 9, at 23-28.

Bradford to obtain prior approval from them before printing any material that "Concerns Friends or Truth." In 1689, Bradford printed Penn's charter, was summoned before Pennsylvania's Governor and Council, and was bound on £500 security not to print anything without Governor's permission. The Governor invoked both the interest and orders of William Penn. In 1692, Bradford was arrested for seditious libel; although the jury "could not agree" on his conviction Bradford was held over until next term and his tools and letters were released only when Penn was deprived of the colony in 1693.[41] In 1721, Andrew Bradford (William's son) was interrogated by Governor Sir William Keith, warned not to publish comments on his conduct without official consent but Bradford continued to publish.[42] During the period 1756-59, the Pennsylvania Assembly sought to silence critics by arresting and trying them for libel; the English Privy Council ordered their discharge on procedural grounds.[43]

Nonetheless, in construing Pennsylvania's "great heritage of freedom,"[44] one must take account, as Justice Harlan put it with regard to federal constitutional traditions, of "what history teaches are the traditions from which it developed as well as the traditions from which it broke."[45] By the time of the revolution, the press in Pennsylvania was typified by robust and indeed vituperative public debate.[46] The Pennsylvania Supreme Court has viewed the earlier colonial excursions into the suppression of free expression as vices against which Pennsylvania's constitution sought to guard.[47]

C. Free Expression and The Search for Knowledge

When the Continental Congress praised the virtues of a free press in Philadelphia in 1774, it highlighted the importance of a free press to the "advancement of truth, science, morality."[48] So, too, in 1824, *Updegraph v. Commonwealth* acknowledged the protected status of communications which sought to "prove any supposed truths" or "de-

[41] For discussion of the 1692 prosecution, see Alexander, *supra* note 35, at 317-319 (describing Bradford's trial). *See also William Goldman Theatres v. Dana*, 173 A.2d 59, 67 (Pa. 1961); *The Proprietor v. George Keith* (1692), *reported in* PENNSYLVANIA COLONIAL CASES 117 (Samuel W. Pennypacker ed., 1892).

[42] Alexander, *supra* note 35.

[43] *Id.*; SCHUYLER, *supra* note 9, at 27-28.

[44] Commonwealth v. Tate, 432 A.2d 1382, 1389 (Pa. 1981).

[45] Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

[46] *See supra* note 16.

[47] *See* William Goldman Theatres v. Dana, 173 A.2d 59 72 (Pa. 1961) ("The members of the Constitutional Convention of 1790 were undoubtedly fully cognizant of the vicissitudes and outright suppressions to which printing had theretofore been subjected in this very colony.").

[48] 1 JOURNALS OF THE CONTINENTAL CONGRESS 108 (Worthington Chambers Ford ed., 1904) (1774).

tect supposed error."[49] The constitutional heritage of Pennsylvania acknowledges that governmental censorship is a bar to the advancement of knowledge. As Justice Holmes maintained on the federal level,

> the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.[50]

D. Free Expression and Freedom of Thought

The political and epistemic roles of free expression are essentially consequentialist; they rest on the utility of free expression as a means of attaining other goals. Yet Pennsylvania's constitutional values encompass as well an intrinsic regard for liberty of expression as an element of human dignity. In 1790 Pennsylvania amended its constitution specifically to announce that "the free communication of thoughts and opinions is one of the invaluable rights of man." It has retained this declaration unchanged through three constitutional revisions over the last two hundred years. This commitment points to a third and complementary grounding for freedom of expression in Pennsylvania's constitutional heritage: free expression is an element of personal autonomy of thought that underpins the freedoms guaranteed by the rest of the constitution.

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[49] 11 Serg. & Rawle 394, 409 (1824). *See id.* at 405 ("Upon the whole, it may not be going too far to infer, from the decisions, that no author or printer, who fairly and conscientiously promulgates the opinions with whose truths he is impressed, for the benefit of others, is answerable as a criminal."). *Updegraph* stated that an indictment for blasphemy against statements it regarded as directed toward ridiculing religion rather than "proving truth" or "defeating error" was indictable, notwithstanding constitutional protections, but dismissed the indictment because it was improperly drawn.

[50] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). In *In re Chalk*, 272 A.2d 457 (Pa. 1971), the court sustained a challenge under Article I, Section 7 to the dismissal of a welfare caseworker because:

> Whether his statements were true, or false, need not concern us, for this is a question which could not meaningfully be answered by either the York County Board, or the Civil Service Commission. Appellant was addressing himself to matters of public policy, where, the best test of truth is the power of the thought to get itself accepted in the competition of the market.

272 A.2d at 461 (quoting *Abrams*, 250 U.S. at 630). *See also In re* Schlesinger, 172 A.2d 835, 843 (Pa. 1961) (invoking "Jefferson's classic admonition in his First Inaugural Address that, 'If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it'"); Kraemer Hosiery Co. v. Am. Fed'n of Full Fashioned Hosiery Workers, 157 A. 588, 603 (Pa. 1931) (Maxey, J., dissenting):

> [I]deas are not subject to injunction. Ideas have far-reaching effects. Some of these effects may be good and some may be evil, but it is opposed to progress and contrary to the spirit of our institutions to intrust [sic] any official with the arbitrary power to say what ideas shall be liberated and what ideas shall be suppressed.

Pennsylvania's heritage of liberty of conscience found its most prominent recognition in the sphere of religious freedom.[51] But in this respect the regard for religious conscience is congruent with a regard for freedom of thought, belief, and inquiry more generally.[52] The root of Blackstone's special disapprobation of prior restraints, invoked by the Pennsylvania Supreme Court in *William Goldman Theaters, Inc. v. Dana*, is that if prior restraints are prohibited, "the will of individuals is still left free . . . . Neither is any restraint hereby laid upon freedom of thought or inquiry: liberty of private sentiment is still left."[53] So, too, the court has observed that, "direct restraints upon expression impose restrictions on human thought and strike at the core of liberty in a way which limitations on access to information do not."[54]

More recently, in *Commonwealth v. Bricker*,[55] the Pennsylvania Supreme Court held that, even absent an effort to participate in politi-

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[51] *See, e.g.*, Judicial Inquiry and Review Bd. v. Fink, 532 A.2d 358, 369 (Pa. 1987) (quoting Commonwealth v. Eubanks, 512 A.2d 619 (Pa. 1986)):

> Pennsylvania, more than any other sovereignty in history, traces its origins directly to the principle that the fundamental right of conscience is inviolate . . . . A citizen of this Commonwealth is free, of longstanding right, to practice a religion or not, as he sees fit, and whether he practices a religion is strictly and exclusively a private matter, not a matter for inquiry by the state.

(citations omitted)

See also Updegraph v. Commonwealth, 11 Serg. & Rawle 394, 409 (1824):

> When our ancestors emigrated from England, they took with them such of the English principles as were convenient for the situation in which they were about to be placed. It required time and experience to ascertain how much of the English law would be suitable to this country. The minds of William Penn and his followers, would have revolted at the idea of an established church. Liberty to all, preference to none; equal privilege is extended to the mitred Bishop and the unadorned Friend.

(emphasis omitted)

For discussions of the background of Pennsylvania's commitment to freedom of conscience, see, for example, J. WILLIAM FROST, A PERFECT FREEDOM: RELIGIOUS LIBERTY IN PENNSYLVANIA (1990); SALLY SCHWARTZ, A MIXED MULTITUDE: THE STRUGGLE FOR TOLERATION IN COLONIAL PENNSYLVANIA (1987); DIETMAR ROTHERMUND, THE LAYMAN'S PROGRESS: RELIGIOUS AND POLITICAL EXPERIENCE IN COLONIAL PENNSYLVANIA (1961); PATRICIA U. BONOMI, UNDER THE COPE OF HEAVEN: RELIGION, SOCIETY, AND POLITICS IN COLONIAL AMERICA (1986) 168-81; Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559 (1989).

[52] *See* Duffy v. Cooke, 86 A. 1076, 1077-78 (Pa. 1913):

> The Constitution of 1790 provided against discrimination on account of religious sentiments . . . . The opinion was widely disseminated that routine offices and employments were conferred because the appointee held certain political sentiments . . . . Such a state of facts, if it existed, would have . . . amounted not to a legal, but to an actual, disqualification on account of political sentiments . . . . There is everything in the spirit of the Constitution to prohibit such proscription . . . .

[53] 173 A.2d 59, 62 (Pa. 1961) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *151-52) (footnote omitted).

[54] Philadelphia Newspapers, Inc. v. Jerome, 387 A.2d 425, 433 n.16 (Pa. 1978).

[55] 666 A.2d 257 (Pa. 1995).

cal dialogue, the use of a flag for interior decoration was constitutionally protected expression. It declared:

> There are few forms of self-expression as personal and important as the manner in which we decorate our homes. We have long recognized the sanctity of the home in this Commonwealth as we have repeatedly stated that "upon closing the door to one's home to the outside world, a person may legitimately expect the highest degree of privacy known to our society." Clearly, there is no precise constitutional calculus as to what constitutes constitutionally protected expression. However, we believe that the government must satisfy constitutional scrutiny before it can tell the citizens of this Commonwealth what pictures they may hang on their walls or what symbols they may display in the sanctity of their homes.[56]

The grounding of Pennsylvania's right to free communication of thoughts and opinions in intellectual autonomy is manifest as well in the protection of the right to decline to communicate. As long as the citizen remains free to disavow statements she is forced to adopt, the arguments from a "marketplace of ideas" or a "right to remonstrate" against compelled communications are difficult to maintain, since any compelled expression can be remedied by the citizen's right to communicate affirmatively. By contrast, if intellectual autonomy is at the root of the rights of communication, being required to speak what one does not believe is constitutionally offensive even if one is not barred from speaking one's true beliefs.

In 1967, the Pennsylvania Supreme Court held in *Dudek v. Pittsburgh City Fire Fighters, Local No. 1*[57] that the guarantees of the Pennsylvania constitution barred an effort to compel the plaintiff to engage in speech to which he objected. The Court observed,

> [i]t is just as illegal to compel one to speak when he prefers to remain silent as it is to gag one when he wishes to talk . . . The liberty to write or speak includes the corresponding right to be silent and also the liberty to decline to write . . . .[58]

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[56] *Id.* at 261 (quoting Commonwealth v. Brian 656 A.2d 287, 289 (Pa. 1994)).

[57] 228 A.2d 752 (Pa. 1967).

[58] *Id.* at 755 (citation omitted). *See id.* at 758 (Roberts, J., concurring) ("[T]he principle of free speech is deeply rooted in our law and in our vision of a free society. That principle is as much violated by requiring a man to speak what he does not believe, as it is by prohibiting him from expressing what he does believe."). The parallel case in First Amendment jurisprudence makes even clearer the link to Pennsylvania's heritage. In *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943), the court observed that a mandatory flag salute "requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks. Objection to this form of communication when coerced is an old one, well known to the framers of the Bill of Rights." The court recalls that "[t]he Quakers, William Penn included, suffered punishment rather than uncover their heads in deference to any civil authority." *Id.* at 633 n.13. *See also* 6 HOWELL'S STATE TRIALS 951, 956 (1661-1678) (account by William Penn and William Mead of their trial at the Old Bailey in 1670 in which Penn was fined for refusing to remove his hat).

It is this intellectual and spiritual autonomy which the Pennsylvania constitution recognizes as the precondition for a free society. As the court commented in *Commonwealth v. Tate,*

> The observation of the Supreme Court of the United States with regard to the First Amendment to the United States Constitution applies equally to the Pennsylvania Constitution: "freedom of speech . . . [is] protected against censorship or punishment . . . . For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups."[59]

II. THE STRUCTURE OF PROTECTION

A. Prior Restraint

Unlike the federal constitution, where the strictures against prior restraint are a matter of inference from a relatively opaque provision,[60] the clearest principle to emerge from Pennsylvania's constitutional text is that, as the court put it in *Respublica v. Dennie* in 1805, a citizen is free to "[p]ublish as you please in the first instance without control . . . ."[61]

Pennsylvania's original protections of free expression adjured, "freedom of the press ought not be restrained."[62] As noted above, in *Respublica v. Oswald,* Justice McKean equated the "restraint" prohibited by the 1776 constitution with the licensing schemes of prior restraint which had been overturned in the British struggle for freedom of the press during the seventeenth century. According to Justice McKean, the protections 1776 gave

> to every citizen a right of investigating the conduct of those who are intrusted [sic] with the public business; and they effectually preclude any attempt to fetter the press by the institution of a licenser . . . . The true

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[59] 432 A.2d 1382, 1388 (Pa. 1981) (citations omitted). *See also* Duggan v. 807 Liberty Ave. Inc., 288 A.2d 750, 754 (Pa. 1972) ("[F]reedom of thought and speech . . . is the matrix, the indispensable condition, of nearly every other form of freedom. With rare aberrations a pervasive recognition of that truth can be traced in our history, political and legal.") (quoting Palko v. Connecticut, 302 U.S. 319, 326-27 (1937)).

[60] *See* New York Times Co. v. United States, 403 U.S. 713 (1971); Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971); Shuttlesworth v. Birmingham, 394 U.S. 147 (1969); Near v. Minnesota, 283 U.S. 697, 712-21 (1931); Patterson v. Colorado, 205 U.S. 454, 461 (1907) (relying on Respublica v. Oswald, 1 U.S. (1 Dall.) 319 (1788)).

[61] 4 Yeates 267, 269 (1805). *See also* William Goldman Theatres, Inc. v. Dana, 173 A.2d 59, 62 (Pa. 1961) ("[I]t is clear enough that what [the provision of Article I, § 7] was designed to do was to prohibit the imposition of prior restraints upon the communication of thoughts and opinions, leaving the utterer liable only for an abuse of the privilege. History supports this view."), *quoted with approval in* Western Pennsylvania Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co., 515 A.2d 1331, 1335 (Pa. 1986) and Commonwealth v. Tate, 432 A.2d 1382, 1388 (Pa. 1981).

[62] PA. CONST. of 1776, Declaration of Rights, art. XII (1776).

> liberty of the press is amply secured by permitting every man to publish his opinion; but [once published] it is due to the peace and dignity of society, to inquire into the motives of such publications, and to distinguish between those which are meant for use and reformation, and with an eye solely to the public good, and those which are intended merely to delude and defame.[63]

In amending the provisions to their current form in 1790, the Pennsylvania Convention retained the proviso that, "no law shall ever be made to restrain the right" of examining any branch of government in the press, and added that "every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty."[64] The text of the constitution thus establishes a right to "write, speak and print" without prior restraint, leaving harms caused by free expression to subsequent "responsibility for abuse."[65]

This clear commitment provided the basis for the Pennsylvania Supreme Court's 1961 decision in *William Goldman Theatres, Inc. v. Dana*,[66] invalidating Pennsylvania's regime of motion picture regulation, which required that an exhibitor register with the Board of Motion Picture Control forty-eight hours in advance of any initial showing, and empowered the board to disapprove a film as "obscene" or "unsuitable for children" by majority vote. The Court held that procedure to be an invalid "pre-censorship" inconsistent with Article I, Section 7, notwithstanding the facts that obscenity was punishable at common law, and that the United States Supreme Court had upheld a film censorship regime under First Amendment analysis earlier the same year.[67]

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[63] *Oswald*, 1 U.S. at 325. *See id.* at 329 (addressing the General Assembly, one of its members, Mr. Lewis, supported McKean's opinion through the following statement: "[h]ere then, is to be discerned the genuine meaning of this section in the bill of rights . . . . Every man may publish what he pleases; but, it is at his peril, if he publishes any thing which violates the rights of another, or interrupts the peace and order of society . . . .").

[64] PA. CONST. of 1790, art. IX, § 7 (1790). This wording was retained unaltered to the present constitution. *See* PA. CONST. art. I, § 7 (2001).

[65] *See Dennie*, 4 Yeates at 267; Commonwealth v. Duane, 1 Binn. 98, 100 (Pa. 1806) (Tilghman, C.J.) ("[T]his provision was intended to prevent men's writings from being subject to the previous examination and control of an officer appointed by the government, as is the practice in many parts of Europe, and was once the practice in England . . . .").

[66] 173 A.2d 59 (Pa. 1961).

[67] Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961). The Pennsylvania Court commented: "[t]hat case in no way involved the rights guaranteed the individual by the Pennsylvania Constitution." *Dana*, 173 A.2d at 65. The Pennsylvania Court had upheld an earlier film censorship statute against challenge under the Pennsylvania's free speech protections without substantial discussion in *Buffalo Branch, Mut. Film Corp. v. Breitinger*, 95 A. 433 (Pa. 1915) (per curiam), relying on an opaque opinion by the common pleas court. The Pennsylvania Court referred to the United States Supreme Court's opinion in *Mutual Film*, 236 U.S. 230, 244 (1915), which held that motion pictures were not "part of the press of the country or . . . organs of public opinion" protected by the Ohio constitution. According to the Pennsylvania Supreme

There is some debate as to exactly which legal regimes or interferences transgress Pennsylvania's constitutional hostility to prior restraints. On one side of the spectrum, administrative regimes which give officials discretion to block entirely the publication of materials without their prior authorization are impermissible. They fall clearly afoul of Blackstone's admonition that "[t]o subject the press to the restrictive power of a licenser . . . is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government."[68]

On the other hand, not every reduction in the flow of information is a "prior restraint." If the prior restraint doctrine were rooted solely in the proposition that government should not be able to exercise discretion over the information available to the public, then any action which prevents the news media from obtaining information would constitute a prior restraint. Although the position has been advanced by news media seeking access to information,[69] this is not the law under Pennsylvania's free expression guarantees. The right to "freely speak, write and print" prevents the government from imposing prior censorship on the "communication" of "thoughts and opinions," but provides no untrammeled right to obtain information in order to form those opinions. Thus, the court's 1978 decision in *Philadelphia Newspapers, Inc. v. Jerome*[70] rejected the proposition that orders limiting public access to pre-trial suppression hearings criminal proceedings were prior restraints:

> A prior restraint prevents publication of information or material in the possession of the press and is presumed unconstitutional. These orders, however, issued in compliance with the Rules of Criminal Procedure, did not prevent petitioners from publishing any information in their possession or from writing whatever they pleased and therefore did not constitute a prior restraint upon publication.[71]

Court, *Mutual Film* was "in accord with that of the learned Common Pleas in these cases." *Mutual Film*, 95 A. at 440.

[68] 4 WILLIAM BLACKSTONE, COMMENTARIES *151-52, *quoted with approval in Dana*, 173 A.2d at 62. *See also* Willing v. Mazzocone, 393 A.2d 1155, 1157 (Pa. 1978) (Mandarino, J.) (quoting with approval).

[69] *Cf.* McLaughlin v. Philadelphia Newspapers, Inc., 348 A.2d 376, 384 (Pa. 1975) (Roberts, J., dissenting) ("Silence imposed by refusing to inform is indistinguishable in effect from silence imposed by curtailing the speech of those already informed.").

[70] 387 A.2d 425 (Pa. 1978).

[71] *Id.* at 432-33 (citations omitted). *See McLaughlin*, 348 A.2d at 378 (rejecting newspaper's claim of right of access to attorney at disciplinary records, and denying relevance of prior restraint precedents through the assertion that "this is not a case which calls into question the right of the press to print, publish and distribute information which it has already acquired"); McMullan v. Wohlgemuth, 308 A.2d 888 (Pa. 1973) (rejecting newspaper's claim of right of access to records of identity of welfare recipients under Article I, Section 7); *see also id.* at 895 ("[T]his is *not* a case involving the right of the press to print, publish and distribute informa-

And although every legal sanction has some deterrent effect, not every statute announcing an ex ante prohibition on speech is a prior restraint. The "responsibility for abuse" contemplated by Article I, Section 7 clearly encompassed criminal as well as civil liability.[72]

The two intermediate cases addressed by Pennsylvania's high court have involved the issuance of injunctions against communicative activities which are said to violate applicable law and situations in which administrative officials exercise discretion over some but not all opportunities to engage in free communications.

1. *Injunctions*

Injunctions, unlike prior licensing schemes, generally restrain speech only after notice and hearing, and are usually subject to immediate appeal. On the other hand, injunctions share with licensing schemes an orientation towards preventing rather than punishing allegedly illegal communications. Like a press license, injunctions turn on the determination of a single official; they can be granted with the stroke of a pen. Injunctions interfere with the dissemination of information on the basis of potentially exaggerated threats of possible future harm, rather than on the basis of the results of abuse proven before a jury.

Historically, the record on judicially imposed ex ante restraints on free expression has been mixed in Pennsylvania. In the first years after the adoption of the 1790 constitution, it was not uncommon for courts to require authors and editors to post bonds or recognizances which were subject to forfeiture in the case of a published libel.[73]

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tion. If it were, the result we reach would be quite different . . . . Here, no impermissible prior restraint is involved."); *In re* Mack, 126 A.2d 679 (Pa. 1956) (upholding a court order barring photographing of criminal defendant against challenge under Article I, Section 7).

[72] While there are statements in *Ins. Adjustment Bureau v. Ins. Comm'r*, 542 A.2d 1317 (Pa. 1988) that appear to characterize the statutory prohibition of solicitations by insurance adjusters within 24 hours of an accident as "prior restraints," they are best understood as loose dicta. Such a characterization would be inconsistent with both the constitutional text, and prior restraint doctrine. The standard the court actually used in *Insurance Adjustment Bureau* falls considerably short of the unyielding hostility to prior restraints that usually applies under Article I, Section 7. And the rule the case announces applies impartially to any restriction of commercial speech. *See id.* at 1324 ("Article I, Section 7 will not allow the prior restraint *or other restriction of commercial speech* . . . where the legitimate important interests of the government may be accomplished practicably in another, less intrusive manner.") (emphasis added).

[73] *See* Respublica v. Davis, 3 Yeates 128 (1801) (reporting a verdict against guarantor for violation of Cobbet's recognizance); Respublica v. Cobbet, 3 Yeates 93 (1800) (affirming the right of the Supreme Court to require recognizance against libel and the right of a jury to determine the law and facts in libel suits); *id.* at 99 (stating counsel's argument that "[t]o effect the purposes of preventive justice, a discretion must necessarily be lodged with the magistrate" adducing right of President under the Alien Act to remove aliens); Respublica v. Cobbet, 2 Yeates 352 (1798) (refusing removal to federal court of forfeiture action on recognizance bond imposed

This practice was said to be consistent with the constitutional prohibition on prior restraints on the ground that before forfeiture, a jury was required to find that a libel had occurred, and "a man though bound to his good behavior, may still publish what he pleases, and if he publishes nothing unlawful, his recognizance will not be forfeited."[74] The rule after 1806 was that surety could not be demanded for good behavior before conviction.[75]

In the context of labor struggles during the end of the nineteenth and the first half of the twentieth century, the Pennsylvania Supreme Court regularly upheld injunctions issued against parades, pickets, boycotts, and efforts to persuade employees to withdraw their labor. Many of these labor injunctions were phrased as prohibitions against particular modes of expression that were regarded as coercive.[76] These instances accord with the constitutional text. A prohibition against the assembly of a violent mob might well be seen as no infringement of the proposition that "every citizen may freely speak, write or print on any subject." Mob violence is not "speaking writing or printing;" indeed, the protection of the right to assembly in Article I, Section 20 was specifically limited in 1790 to "the right *in a peaceable manner* to assemble together." So long as the injunction leaves open ample opportunity to exercise the constitutional right of "free communication of thoughts and opinions" identified by Article I, Section 7, it might well be viewed as no prior restraint.

Other labor injunctions issued in the late nineteenth century and early twentieth, however, were directed not at the manner of speech but at its substance; the constitutionally protected "communication of thoughts and opinions" was enjoined because of its unlawful tenden-

by Justice McKean on publisher William Cobbett); Respublica v. Askew, 1 Yeates 186 (1792) (reporting a fine and security for good behavior for one year imposed in libel case).

[74] Commonwealth v. Duane, 1 Binn. 98 (Pa. 1806) (Tilghman, J.) (granting writ of habeas corpus).

[75] *Id.*

[76] *See* Logan Valley Plaza v. Amalgamated Food Employees Union Local 950, 227 A.2d 874 (Pa. 1967) (upholding an injunction against labor picketing in shopping mall); Westinghouse Elec. Corp. v. United Elec. Radio and Mach. Workers, 118 A.2d 180 (Pa. 1955) (enjoining mass picketing that prevented access to plant); Wortex Mills Inc. v. Textile Workers, 85 A.2d 851 (Pa. 1952) (reversing an injunction issued against mass picketing through a prohibition on "loitering or being unnecessarily in the vicinity"); Westinghouse Elec. Corp. v. United Elec. Radio Mach. Workers, 46 A.2d 16 (Pa. 1946) (issuing an injunction against forcible interference with access to struck plant); Carnegie-Illinois Steel Corp. v. United Steelworkers, 45 A.2d 857, 861 (Pa. 1946) (issuing an injunction against steelworkers forcibly interfering with maintenance employees entering struck plants stating that "[w]hen a 'picket line' becomes a picket *fence* it is time for government to act"). *Cf.* Jefferson & Indiana Coal Co. v. Marks, 134 A. 430, 432-33 (Pa. 1926) (issuing an injunction against parades and picketing where "it was a demonstration aimed at the fears rather than the judgment of those who desired to work . . . . [T]he very fact of parading at the time and place constituted intimidation and was properly enjoined . . . . Persuasion, too long and persistently continued, becomes a nuisance and an unlawful form of coercion").

cies, an approach in substantial tension with the constitutional hostility to prior restraints.[77]

By the middle of the twentieth century, however, the Pennsylvania Supreme Court had announced the proposition that no equitable jurisdiction existed to enjoin the communications of organized labor in the absence of disorder, intimidation or threats.[78] In the last fifty years, the issuance of injunctions against speech has withered.

The Pennsylvania Supreme Court regularly invalidated the issuance of injunctions proscribing exercises of free expression where the issuing courts failed to comply with the procedural mandates of notice, hearing, and prompt final judicial determination imposed as a matter of First Amendment doctrine by the United States Supreme Court.[79] As amended in 1973, in light of those cases, Pennsylvania Rule of Civil Procedure 1531(f)(1) now provides:

> When a preliminary or special injunction involving freedom of expression is issued, either without notice or after notice and hearing, the court shall hold a final hearing within three (3) days after demand by the defendant. A final decree shall be filed in the office of the prothonotary within twenty-four (24) hours after the close of the hearing. If the final hearing is not held within the three (3) day period, or if the final decree

[77] The early cases were the most extreme. *See* Kraemer Hosiery Co. v. Am. Fed'n of Full Fashioned Hosiery Workers, 157 A. 588 (Pa. 1931) (enjoining efforts to recruit employees who signed agreements not to join a union); Purvis v. Local 500, United Bhd. of Carpenters, 63 A. 585 (Pa. 1906) (upholding issuance of an injunction against boycotting, encouraging a boycott and forbidding work on non-union material); Flaccus v. Smith, 48 A. 894, 895 (Pa. 1901) (issuing an injunction against "seeking to induce the apprentices of the employer to violate the terms of their indentures" by joining a union); O'Neill v. Behanna, 37 A. 843 (Pa. 1897) (issuing an injunction based on "annoyance, intimidation, ridicule and coercion" which extended to denial of the "right to talk to new men" on their way to work). But even after the heyday of the labor injunction, the Pennsylvania Supreme Court occasionally upheld the issuance of injunctions against picketing for "unlawful" purposes. Grimaldi v. Local No. 9, 153 A.2d 214 (Pa. 1959) (enjoining a union from picketing a one-man barbershop); Sansom House Enter. Inc. v. Waiters & Waitresses Union, Local 301, 115 A.2d 746 (Pa. 1955) (holding that the trial court should have issued injunction against picketing where object of picketing was to force employees to join a union); Baderak v. Bldg. and Constr. Trades Council, 112 A.2d 170 (Pa. 1955) (upholding an injunction against non-employees who stopped trucks making deliveries to a building site, convincing them not to fulfill their deliveries); Phillips v. United Bhd. of Carpenters, 66 A.2d 227 (Pa. 1949); Wilbank v. Chester and Delaware Counties Bartenders, 60 A.2d 21 (Pa. 1948) (issuing an injunction against picketing where "[d]efendants purpose in picketing was to require plaintiffs to force their employees to join the union . . . Such a purpose is clearly unlawful . . . .").

[78] Kirmse v. Adler, 166 A. 566 (Pa. 1933).

[79] *See, e.g.*, Duggan v. 807 Liberty Ave., Inc., 288 A.2d 750 (Pa. 1972) (citing Freedman v. Maryland, 380 U.S. 51 (1965)); Commonwealth v. Guild Theatre, Inc., 248 A.2d 45 (Pa. 1968); *see also* Ranck v. Bonal Enterprises, Inc., 359 A.2d 748 (Pa. 1976) (condemning ex parte grant of a preliminary injunction against the exhibition or sale of allegedly obscene periodicals); Commonwealth *ex rel.* Davis v. Van Emberg, 347 A.2d 712 (Pa. 1975) (reversing an ex parte injunction closing a bookstore); Apple Storage Co., v. Consumers Educ. & Protective Assoc., 272 A.2d 496 (Pa. 1971) (reversing grant of ex parte injunction against consumer picketing).

> is not filed within twenty-four (24) hours after the close of the hearing, the injunction shall be deemed dissolved.[80]

These rules themselves suggest that viewed as a procedural matter, not all injunctions "involving freedom of expression" are impermissible.[81] On the other hand, neither the cases enunciating the procedural requirements nor the comments to Rule 1531(f) make reference to the words and history of Article I, Section 7 or the holding of *Dana* that Pennsylvania's hostility to prior restraints is more severe than that of the Federal constitution.

Willing v. Mazzocone[82] provides the most recent discussion of the constraints of Article I, Section 7 on the issuance of injunctions, treat-

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[80] PA. R. CIV. P. 1531(f)(1). In *Sch. Dist. of Pittsburgh v. Pittsburgh Fed'n of Teachers*, 406 A.2d 324 (Pa. 1979), the court held that since part of a preliminary injunction prohibiting a teachers' strike "prohibits certain communications by and between appellants and prohibits certain picketing," the entire injunction was dissolved on refusal to grant a final hearing, although parts of the injunction "arguably did not involve freedom of expression."

[81] The current state of parallel federal law is set forth in *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 763 n.2 (1994):

> Prior restraints do often take the form of injunctions. *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713, 29 L. Ed. 2d 822, 91 S. Ct. 2140 (1971) (refusing to enjoin publications of the "Pentagon Papers"); Vance v. Universal Amusement Co., 445 U.S. 308, 63 L. Ed. 2d 413, 100 S. Ct. 1156 (1980) (*per curiam*) (holding that Texas public nuisance statute which authorized state judges, on the basis of a showing that a theater had exhibited obscene films in the past, to enjoin its future exhibition of films not yet found to be obscene was unconstitutional as authorizing an invalid prior restraint). Not all injunctions that may incidentally affect expression, however, are "prior restraints" in the sense that that term was used in *New York Times Co.* or *Vance*. Here petitioners are not prevented from expressing their message in any one of several different ways; they are simply prohibited from expressing it within the 36-foot buffer zone. Moreover, the injunction was issued not because of the content of petitioners' expression, as was the case in *New York Times Co.* and *Vance*, but because of their prior unlawful conduct. (citations omitted). *Cf.* Justice O'Brien's dictum in *Commonwealth v. Guild Theatres, Inc.*, 248 A.2d 45, 46 (Pa. 1968) (discussing First Amendment precedents, Justice O'Brien states that "[a]lthough we cannot agree with appellants contention that no prior restraint on the exhibition of a motion picture is permissible, it is clear that any such restraint must be very carefully circumscribed").

[82] 393 A.2d 1155 (Pa. 1978). Judge Mandarino's reliance on the strictures against prior restraints was joined by Justices Roberts and O'Brien, both concurring in the result. *Id.* at 1160 (holding that Pennsylvania's constitutional protection of free expression is "based upon an abhorrence of prior restraints"); *id.* (Pomeroy, J., concurring) (incorporating Justice Jacobs' dissenting opinion in the Superior Court, Mazzocone v. Willing, 369 A.2d 829, which was premised on the proposition that "Article I Section 7 . . . was designed to . . . prohibit the imposition of prior restraints"). *See* Kramer v. Thompson, 947 F.2d 666 (3d Cir. 1991) (reviewing Pennsylvania cases and concluding that injunction against defamation is improper, even after a jury verdict awarding damages); Terminix Int'l Co. v. Kay, 150 F.R.D. 532 (E.D. Pa. 1993) (granting Rule 11 sanctions against plaintiff's counsel who sought an injunction against critical speech); Commonwealth v. Pittsburgh Press Co., 396 A.2d 1187, 1191 (Pa. 1979) (Roberts, J., concurring) (arguing that statutory authorization of the Human Relations Commission to direct newspaper to cease and desist publication of "situation wanted" advertisements identifying the advertiser by sex, race, religion or age is an unconstitutional prior restraint under Article I, Section 7); Vogel v. W.T. Grant Co., 327 A.2d 133, 138 (Pa. 1974) (Mandarino, J., concurring) (arguing that an injunction against contacting employers and family of credit card purchasers in effort to collect debt was an impermissible prior restraint).

ing injunctions as prior restraints. The prevailing opinion of Justice Mandarino relied on the prohibition of prior restraints in Article I, Section 7 to reverse an injunction entered against the picketing of a law firm by a disgruntled former client, despite a showing that the client's allegations were false and that her indigent status made her judgment proof in a defamation action. Since *Willing*, the Pennsylvania Supreme Court has not upheld an injunction prohibiting an exercise of free expression in the face of a prior restraint challenge under Article I, Section 7.[83]

2. *Permit Requirements*

It is not uncommon for municipal governments to require permits for parades, demonstrations, or public meetings. While denial of such permits may not entirely foreclose the possibility of conveying the communications at issue, neither did denial of the classic press license prevent the dissemination of the information at issue by word of mouth. Article I, Section 20 declares that citizens have the right to peaceably assemble, and permit requirements, like the prior restraints against which Blackstone inveighed, place the opportunity to exercise unilateral discretion over the exercise of a constitutional right in the hands of the administrative officer who issues the permit. On the other hand, public meetings, and sometimes other forms of communication, carry with them the possibility of physical disruption

[83] In *Giant Eagle Mkts. Co. v. United Food & Commercial Workers Union, Local Union No. 23*, 652 A.2d 1286 (Pa. 1995), the court sustained an injunction "ordering the pickets to be peaceful and lawful in nature, restricting the number of pickets at the entrances of all appellants' stores, mandating the proper spacing and location of those pickets, and enjoining appellees from preventing persons having business with appellant from entering or leaving the premises" after a showing of mass picketing, violence, and intimidation. *Id.* at 1291. The order in question did not prevent the communication of any thoughts or opinions, and the issue of prior restraint under Article I, Section 7 was not raised.

During the last quarter century, the Pennsylvania Supreme Court has three times explicitly declined to address Article I, Section 7 prior restraint issues: in *Adler Barish, Daniels, Levin & Crescoff v. Epstein*, 393 A.2d 1175, 1179 (Pa. 1978), the court upheld an injunction against solicitation by a former employees of a law firm of the firm's clients, but engaged in no prior restraint analysis, observing that the employees "have not disputed the constitutionality of an injunction as a form of sanction." *Id.* at 1149 n.9. This seems a sensible approach.

In *Masloff v. Port Auth. of Allegheny County*, 613 A.2d 1186, 1187 (Pa. 1992), the court declined to address the propriety of a lower court order directing the participants in court-supervised labor negotiations not to make public statements without prior court authorization because "neither of the parties has asserted that the [court] has denied it authorization to make any public statements." *Id.* at 1187 n.1. This seems to be in some tension with the usual rule that the mere requirement of obtaining authorization is an impermissible prior restraint.

Finally, in *Bodack v. Law Enforcement Alliance of Am.*, 790 A.2d 277 (Pa. 2001), a majority of the Supreme Court without opinion declined to grant extraordinary jurisdiction to review an injunction entered against the airing of advertisements by political advocacy groups who had not complied with campaign disclosure laws. Justice Castille's dissent from the denial of jurisdiction argued, with some plausibility that the orders constituted impermissible prior restraints.

of traffic flow or other content-neutral interests which are not adequately addressed by the possible assessment of damages.

In an initial encounter with the issue in 1920, *Duquesne City v. Fincke*[84] reviewed a conviction of labor organizers for holding a parade in violation of a local ordinance which forbade the holding of public meetings on city streets without a permit issued by the mayor. Notwithstanding the fact that the organizers had filed three successive requests for permits upon which the mayor had taken no action,[85] the court held that the conviction was consistent with the constraints of Pennsylvania's guarantees of free expression. The streets, according to the opinion, "are intended for passage and not assemblage" and "unless regulation is vested somewhere we may renew in our large cities the disorders which have recently appeared in those of the old world."[86] A city, being the owner of the streets, was said to be entitled to regulate their use "under such restrictions and limitations, as in her opinion would best conserve 'the peace, good government, safety, and welfare of the city.'"[87] If the mayor's refusal to act on the permit was unconstitutionally arbitrary or discriminatory, according to the court, a mandamus petition would provide the appropriate remedy. No mention was made of the constitutional strictures against prior restraints.

Modern cases have been more skeptical of administrative licensing. They have, in general, applied the federal free speech doctrine that a permit regime "which establishes a 'previous restraint' on free speech with no standards prescribed for the exercise of the discretion of the officer issuing the permit is invalid."[88] Under Pennsylvania's

[84] 112 A. 130 (Pa. 1920).

[85] Duquesne's Mayor Crawford is quoted as saying "Jesus Christ himself could not speak in Duquesne on behalf of the A.F.L." JOHN P. HOERR, AND THE WOLF FINALLY CAME 172 (1988); DAVID BRODY, LABOR IN CRISIS; THE STEEL STRIKE OF 1919 94 (1965). *See also* INTERCHURCH WORLD MOVEMENT OF NORTH AMERICA, PUBIC OPINION AND THE STEEL STRIKE 188 (1921) (quoting Crawford as announcing "Jesus Christ himself could not hold a meeting in Duquesne"). Labor organizers were not favorites of local officials during this period in Pennsylvania's history. *See, e.g.*, Elizabeth Ricketts, *The Struggle for Civil Liberties and Unionization in the Coal Fields: The Free Speech Case of Vintondale, Pennsylvania, 1922*, 122 PA. MAG. OF HIST. AND BIOGRAPHY 319 (1998).

[86] *Duquesne City*, 112 A. at 132-33.

[87] *Id.* at 134.

[88] Commonwealth *ex rel.* Hines v. Winfree, 182 A.2d 698, 702 (Pa. 1962) (quoting Saia v. New York, 334 U.S. 558 (1948)) (upholding a truck ordinance which provided for automatic issuance of license on showing of technical compliance and payment of license fee). *See also* Shuttlesworth v. Birmingham, 394 U.S. 147, 150-151 (1969) (expounding "the many decisions of this Court over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional"). *Cf.* Commonwealth v. Wadzinski, 422 A.2d 124 (Pa. 1980) (invalidating a statute which required prior notification of an opponent before a candidate can make statements within last 48 hours of campaign by utilizing solely First Amendment analysis); Brush v. Pa. State Univ., 414 A.2d 48 (Pa. 1980) (upholding a

independent free expression guarantees, the court in *Commonwealth v. Tate* held impermissible the exclusion of leafletters from a public forum on the basis of "a vague requirement of permission, governed by no articulated standards."[89]

B. "Every Citizen May Freely Speak, Write and Print"

1. *The Scope of the Protected Conduct: "Free Communication of Thoughts and Opinions"*

Pennsylvania's free expression protections are broadly phrased. Although particular modes of communication are mentioned—"the printing presses" in Article I, Section 7[a], "speech printing and writing" in Article I, Section 7[b], the "publication of papers" in Article I, Section [c], and "assembly" and "petition address or remonstrance" in Article I, Section 20—the underlying protection is accorded to the right of citizens to "free communication of thoughts and opinions."

A citizen need use no particular means of communication to invoke her right to free expression. Pennsylvania's courts have recognized that constitutional protection extends to display of the flag as a decoration within the privacy of a citizen's home,[90] as well as to erec-

college rule that allowed canvassing in dormitories only if majority of residents voted to allow canvassing where Article I, Section 7 was raised, but citing only federal cases in response); Commonwealth v. Sterlace, 391 A.2d 1066 (Pa. 1978) (upholding a prohibition on the placing of advertising materials such a flyers on residential property without prior consent of the resident using entirely federal analysis).

[89] Commonwealth v. Tate, 432 A.2d 1382, 1390-91 (Pa. 1981). *See id.* at 1391 ("[T]he college could not, consistent with the invaluable rights to freedom of speech, assembly, and petition constitutionally guaranteed by this Commonwealth to its citizens exercise its right of property to invoke a standardless permit requirement . . . to prevent appellants from peacefully presenting their point of view."). The analysis in *Tate* applied Article I, Sections 7 and 20 to the exercise of authority by a private college, and there is some debate as to the vitality of its holding in that regard. *See infra* text accompanying notes 119-131. For public actors, however, *Tate* seems clearly to preclude the exercise of "standardless" discretion in the administration of a public forum. *See Tate*, 432 A.2d at 1391 n.14 ("Nor may they be based simply upon an undifferentiated fear or apprehension of disturbance . . . .) (citation omitted).

[90] *See* Commonwealth v. Bricker, 666 A.2d 257, 261 (Pa. 1995):

> Clearly, there is no precise constitutional calculus as to what constitutes constitutionally protected expression. However, we believe that the government must satisfy constitutional scrutiny before it can tell the citizens of this Commonwealth what pictures they may hang on their walls or what symbols they may display in the sanctity of their homes. We recognize that Ms. Bricker's display of the flag is not "high art" such as a display of decorative arts found in a fine art museum. However, we believe that the Constitution applies to "low art" as well as "high art."

Bricker undertakes analysis primarily in First Amendment terms, but the conclusion regarding the protected nature of home decoration is grounded on an exposition of Pennsylvania's constitutional right to privacy in the home.

tion of a liberty pole in the public square.[91] The effort to peacefully persuade employees to withdraw from employment or join a union,[92] to picket the premises of employers involved in a labor dispute,[93] to picket landlords accused of disreputable practices,[94] to seek to persuade others to join a boycott for legitimate purposes,[95] to distribute or sell printed materials on a public street (though not to establish a stationary newsstand)[96] have all been regarded as protected exercises of the rights of free expression under the Pennsylvania constitution.[97] Likewise, the right to free communication of thoughts and opinions is infringed by a compulsion to engage in undesired communication.[98]

Although the Pennsylvania Court formerly excluded commercial speech from the protected "communication of thoughts and opin-

[91] Respublica v. Montgomery, 1 Yeates 419, 422 (1795) (rejecting the claim that erection of a liberty pole was an exercise of the right to "free communication of thoughts and opinions" because it constituted an "abuse of that liberty" "when the army were known to have been on the march in support of the constitution and law could only be attributed to an avowed design of giving aid to the insurgents"); *cf.* Pennsylvania v. Morrison, 1 Add. 274 (1795) (prosecuting for a liberty pole "in defiance of the laws of the state of Pennsylvania").

Liberty poles originated as large wooden columns often fashioned out ships masts erected in public squares as part of the rites of resistance to British authority during the American revolution. SIMON P. NEWMAN, PARADES AND THE POLITICS OF THE STREET 25-29 (1997). After the revolution, they were used as symbols of resistance during the Whiskey Rebellion, *id.* at 172-73, and adopted by Jeffersonian republicans as prominent and easily recognizable symbols of liberty, equality and republicanism, and as symbols of opposition to the Federalists government, as well as to the Sedition Act. *Id.* at 80-81, 97, 170-79.

[92] Kirmse v. Adler, 166 A. 566 (Pa. 1933); Kraemer Hosiery Co. v. Am. Fed'n of Full Fashioned Hosiery Workers, 157 A. 588 (Pa. 1931).

[93] Locust Club v. Hotel & Club Employees' Union, 155 A.2d 27 (Pa. 1959); Warren v. Motion Picture Mach. Operators, 118 A.2d 168 (Pa. 1955); American Brake Shoe Co. v. District Lodge 9 of the Int'l Ass'n of Machinists, 94 A.2d 884 (Pa. 1953); Wortex Mills Inc. v. Textile Workers Union, 85 A.2d 851 (Pa. 1952); Alliance Auto Serv. Inc. v. Cohen, 19 A.2d 152 (Pa. 1941).

[94] Hibbs v. Neighborhood Org. to Rejuvenate Tenant Housing, 252 A.2d 622 (Pa. 1969).

[95] 1621 Inc. v. Wilson, 166 A.2d 271 (Pa. 1960) (neighborhood organization picketing local taproom viewed as nuisance); Watch Tower Bible & Tract Soc'y v. Dougherty, 11 A.2d 147 (Pa. 1940) (Catholic threat to boycott department store whose radio station broadcast anti-Catholic programming).

[96] 46 S. 52nd St. Corp. v. Manlin, 157 A.2d 381 (Pa. 1960).

[97] The Court's conclusions that "fighting words" are outside of free speech protections have used First Amendment analysis exclusively. *Compare* Commonwealth v. Mastrangelo, 414 A.2d 54 (Pa. 1980) (upholding a conviction for disorderly conduct, defined as "making unreasonable noise with intent to annoy or alarm," where defendant followed and frightened a meter maid, calling her "nigger lover" and "cocksucker") *with* Commonwealth v. Hock, 728 A.2d 943 (Pa. 1999) (addressing the words "[f]*** you, a**" [sic] to a police officer did not constitute disorderly conduct). *Cf.* Commonwealth v. Hendrickson, 724 A.2d 315 (Pa. 1999) (upholding a "harassment by communication" statute requiring specific intent to harass by repeated communications against first amendment challenge—Article I, Section 7 challenge waived because not raised below).

[98] Dudek v. Pittsburgh City Fire Fighters, 228 A.2d 752 (Pa. 1967).

ions,"[99] the current rule considers commercial speech to be within the sphere of constitutional safeguards when it is neither false nor misleading.[100]

2. *The Scope of Prohibited Interference*

Article I, Section 7[a] announces that the freedom of the press is protected against "laws . . . made to restrain the right thereof."[101] Article I, Section 7[c] places constraints on "prosecutions" and "indictments" for publications of papers. It is clear, therefore, that official actions which impose criminal punishment for the exercise of rights of free expression are subject to the limits imposed by the Pennsylvania constitution.

But the potential for interference with free expression extends beyond the threat of criminal prosecution and Article I, Section 7[b] and Article I, Section 20 are phrased in broader terms. They announce that "every citizen may freely speak, write and print on any subject" and that "citizens have the right" to freedom of assembly, petition or remonstrance. Under these provisions, actions other than criminal prosecution may constitute derogations of the right to "freely speak, write, or print" and the right to freedom of assembly, petition, and remonstrance that call forth scrutiny under the Pennsylvania constitution.[102]

a. *Civil Sanctions*

Although the protections of Article I, Section 7[c] are limited by their terms to "indictments" or "prosecutions," it has long been clear

[99] Ullom v. Boehm, 142 A.2d 19 (Pa. 1958) (holding that a prohibition of price advertising by sellers of eyeglasses does not violate Article I, Section 7, but rather, is a valid exercise of the state's police power).

[100] *See* Bureau of Prof'l & Occupational Affairs v. State Bd. of Physical Therapy, 728 A.2d 340, 343 (Pa. 1999) ("Insofar as false or misleading commercial speech is concerned, we have followed the federal view that such speech as not constitutionally protected."); Ins. Adjustment Bureau v. Ins. Comm'r for Pennsylvania, 542 A.2d 1317 (Pa. 1988) (invalidating a statute prohibiting solicitation of business by claims adjusters during first twenty-four hours of a catastrophe); *id.* at 1324 ("Our perspective is that in the commercial speech area, we should tread carefully where restraints are imposed on speech if there are less intrusive, practicable methods available to effect legitimate, important government interests."); Commonwealth v. Pittsburgh Press Co., 483 Pa. 314, 396 (1979) (holding that an order forbidding newspapers from printing requests for employment identifying their sex, race, age, and religion of the advertiser was unconstitutional on the ground that there was no showing the limitation was "necessary to promote . . . legitimate state interest[s]" and further, holding that "unsubstantiated belief" was insufficient).

[101] PA. CONST. art. I, § 7[a] (2001).

[102] *Id.* art. I, § 7[b]; *id.* art. I, § 20.

that civil sanctions levied by state courts are also constrained by the general guaranties of Article I, Sections 7[a] and 7[b].[103]

b. *Deprivation of Licenses and Government Employment*

Under the constitution of 1790, the Supreme Court of Pennsylvania determined that despite the fact that attorneys are admitted to the bar on good behavior, the disbarment of an attorney for publication of measured criticism of a sitting judge would be an impermissible limitation of free expression.[104] Similarly, in construing the constitution of 1874, Pennsylvania's Supreme Court treated disbarment as a punishment that would deprive an attorney of "his profession and livelihood," holding that

> [i]t would be a clear infraction of the spirit if not the letter of [the free speech protections] to hold that an attorney can be summarily disbarred for the publication of a libel on a man in a public capacity or where the matter was proper for public investigation or information . . . he certainly does not forfeit his constitutional rights as a freeman by becoming an attorney.[105]

In the case of public employment, the Pennsylvania Supreme Court was initially less willing to recognize denial of employment as a "deprivation of livelihood" that impinged on constitutional rights to free expression. During the first half of the twentieth century the court regularly held that discharge from public employment because of particular expressions of political sentiment did not interfere unconstitutionally with the right to "free communication of thoughts

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[103] *See* Briggs v. Garrett, 2 A. 513 (Pa. 1886) (observing tension between liberty of press and protection of reputation in a libel action presenting the constitutional question of whether defendant "abused the right" of free speech); Runkle v. Meyer, 3 Yeates 518 (1803) (justifying a civil action for libel against printer under Article I, Section 9 as an imposition of "responsibility" for "abuse of liberty"). *Cf.* Boettger v. Loverro, 587 A.2d 712, 720-21 (Pa. 1991) (construing a state statute to avoid imposition of liability for publication of wiretap transcripts lawfully obtained).

[104] *In re* Austin, 5 Rawle 191, 205-06 (1835) (stating an attorney is "not professionally answerable for a scrutiny into the official conduct of the judges, which would not expose him to legal animadversion as a citizen").

[105] *Ex parte* Steinman, 95 Pa. 220, 238-39 (1880) (reversing a disbarment for criticism of a judge). *Compare* Margolis' Case, 112 A. 478, 480 (Pa. 1921) (upholding disbarment where in addition to anarchist affiliations, attorney "encouraged others, by his addresses, to violate the laws of the land"); *id.* ("Such conduct . . . in the case of an attorney, whose duty it is to uphold the law, and not encourage a breach thereof it constitutes a positive disregard of the official obligation which he solemnly entered into when he took his oath of office.") (citation omitted) *with* Schlesinger Appeal, 172 A.2d 835, 842 (Pa. 1961) (relying on federal precedents, reversing disbarment of a member of the communist party, because "[c]ulpability does not attach merely from membership in the Communist Party . . . under our traditions beliefs are personal and not a matter of mere association") (citation omitted). *See also* Schlesinger v. Musmanno, 81 A.2d 316 (Pa. 1951) (reversing on due process grounds summary disbarment by a trial judge who concluded the attorney was a communist).

and ideas" because no constitutional provision guaranteed public employment. Objections were dismissed on the ground that "[i]f such restriction is distasteful to [an employee], he has the alternative of seeking other employment."[106] So, too, the Pennsylvania Court concluded that conditions on the grant of licenses could not infringe on guarantees of free expression because there was no right to obtain such licenses.[107]

In the aftermath of the McCarthy era, however, the Pennsylvania Court began to recognize the scope of the potential impact of denials of "privileges" on opportunities for free expression.[108] In 1971 the court sustained a challenge under both federal and state free speech protections to the dismissal of a public employee for statements critical of government welfare policy. It announced that in light of

> the tremendous increase in government activity and employment . . . it is today a well established principle that constitutional rights are no longer forfeited simply because one is a policeman, or a lawyer, or a teacher, or even a lifeguard. These public occupations "are not relegated to a watered-down version of constitutional rights" . . . . "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."[109]

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[106] Duffy v. Cooke, 86 A. 1076, 1081 (Pa. 1913) (upholding statute discharging municipal employees who serve as members of or attend meeting of any political party). *See* Bd. of Pub. Educ. v. August, 177 A.2d 809 (Pa. 1962) (upholding discharge of teacher for refusal to answer questions about communist affiliations); Bd. of Educ. v. Soler, 176 A.2d 653 (Pa. 1961) (same); Bd. of Pub. Educ. v. Beilan, 125 A.2d 327 (Pa. 1956) (same); Fitzgerald v. Philadelphia, 102 A.2d 887 (Pa. 1954) (upholding loyalty oath required of hospital nurse); Albert Appeal, 92 A.2d 663 (Pa. 1952) (upholding discharge of high school English teacher for "advocation of or participating in un-American or subversive doctrines"); McCrory v. Philadelphia, 27 A.2d 55 (Pa. 1942) (upholding dismissal of fire fighter because he wore a political badge and solicited votes); Hutchinson v. Magee, 122 A. 234 (Pa. 1923) (upholding order barring members of fireman's association from employment in fire department).

[107] *In re* Tahiti Bar, Inc., 150 A.2d 112, 114 (Pa. 1959) (upholding suspension of liquor licenses suspended for "lewd, immoral and/or improper entertainment"); *see also id.* at 116:

> An individual has no constitutional right to engage in the business of selling alcoholic beverages . . . . [The statute] merely provides that, if a certain type of entertainment is presented, the privilege of dispensing alcoholic beverages, to which an individual has no constitutional right, will be withdrawn . . . the right of the individual to freedom of speech is not involved.

[108] *See* Bd. of Pub. Educ. v. Watson, 163 A.2d 60 (Pa. 1960) (reversing dismissal of teacher dismissed for failing to answer HUAC questions on First Amendment grounds); Ault v. Unemployment Comp. Bd. of Review, 157 A.2d 375, 378 (Pa. 1960) (reversing denial of unemployment compensation to claimant discharged from private employment for invoking Fifth Amendment before U.S. Senate investigating committee, and noting the tendency to "become[s] myopic upon the mere mention of Communism"). This recognition had been foreshadowed in Wilmerding Borough Sch. Dist. Bd. of Dir. v. Gillies, 23 A.2d 447, 448 (Pa. 1942) (reversing dismissal of teacher who was alleged to have "chosen as his companions and associates, communists and persons of radical political belief," because evidence did not meet statutory standard for dismissal on the basis of immorality or incompetence).

[109] *In re* Chalk, 272 A.2d 457, 459-60 (Pa. 1971) (citations omitted). *See also* Redevelopment Auth. of Philadelphia v. Lieberman, 336 A.2d 249 (Pa. 1975) (reversing dismissal of employee

c. *Private Interference with Free Expression*

Unlike the First and Fourteenth Amendments of the federal constitution, which are by their terms directed respectively against actions by "Congress" and "states," the words of Pennsylvania's free expression guaranties do not confine their protection to particular modes of "state action." Article I, Section 7[b] announces, as its predecessors have since 1790, that "[t]he free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for abuse of that liberty."[110] Article I, Section 20 declares, in similar fashion, that "[t]he citizens have a right" to assembly, petition and remonstrance.[111] The constitutional text gives no reason to believe that private and public assaults may not equally violate these rights.

To be sure, the concluding paragraph of the Declaration of Rights has provided since 1790 that "everything in this article is excepted out of the general powers of government and shall forever remain inviolate."[112] But the limitation of the "powers of government" does not exhaust the effect of the Declaration of Rights. In *Spayd v. Ringing Rock Lodge*,[113] the court gave weight to the separate constitutional admonition that the rights of the Declaration should "forever remain inviolate" to preclude retaliation by a labor union against one of its members. Moreover, the Declaration's wording since 1790 has been introduced by an intent that the "essential principles of liberty and free government may be recognized and unalterably established."[114]

By the terms of the constitution, the "invaluable right" of "free communication of thoughts and opinions" is one such "principle of liberty and free government." To take the extreme case, a polity in which one political group is at liberty to suppress its competitors by

who had publicly criticized employer; relying on federal First Amendment precedents); Commonwealth *ex rel.* Specter v. Moak, 307 A.2d 884 (Pa. 1973) (stating "it is now beyond cavil that public employees may not be denied constitutional rights on the theory that public employment is a privilege, not a right," but holding under First Amendment precedents that prohibition on political candidacy is a constitutionally permissible restriction on the political activity of municipal employees).

In *Pennsylvania State Police v. Hospitality Inv. of Philadelphia, Inc.*, 650 A.2d 854 (Pa. 1994), a majority of the court relied on *Tahiti Bar* to hold that liquor licensees waived their free speech objections to prohibitions on price advertising. The case was reversed and remanded for reconsideration by the U.S. Supreme Court, 517 U.S. 1206 (1996) and on remand, the statute was struck down on First Amendment grounds without addressing Article I, Section 7. Pennsylvania State Police v. Hospitality Inv. of Philadelphia, Inc., 689 A.2d 213 (Pa. 1997).

[110] PA. CONST. art. I, § 7[b] (2001).

[111] *Id.* art. I, § 20.

[112] *Id.* art. I, § 25.

[113] 113 A. 70, 72 (Pa. 1921).

[114] PA. CONST. art. I, Introduction (2001).

private force would be characterized by neither "liberty" nor "free government," even if the form of elections remained. Given the importance of free speech in underpinning Pennsylvania's democratic self governance, its constitution cannot be indifferent to private attempts to stifle political expression.

A line of twentieth century cases confirms this perception. In *Spayd v. Ringing Rock Lodge*, the Pennsylvania Supreme Court reviewed a petition from a member of the Brotherhood of Railroad Trainmen who had been expelled for signing a petition asking the Pennsylvania legislature to reconsider a "full crew law" supported by the union. The court issued an injunction grounded on the free expression provisions of the Pennsylvania constitution, compelling the plaintiff's reinstatement. It declared:

> When plaintiff signed the petition to the legislature to repeal the Full Crew Law, he was communicating his "thoughts and opinions" to that body, and seeking at its hands redress of what he considered a public "grievance"—relief which the lawmakers alone could grant. Since plaintiff viewed the statute petitioned against as such a grievance, the course of conduct pursued by him was not merely within his legal rights, but accorded with his solemn duty as a citizen, for the exercise of which he can under no circumstances be penalized.[115]

The court adduced as well a narrower ground for decision:

> We have often said that the by-laws, rules and regulations of these artificial bodies will be enforced only when they are reasonable . . . . and they never can be adjudged reasonable when, as here, they would compel the citizen to lose his property rights in accumulated assets, or forego the exercise of other rights which are constitutionally inviolable.[116]

Similarly, in *Dudek v. Pittsburgh City Fire Fighters, Local No. 1*,[117] the court, relying on *Spayd*, enjoined the imposition of fines by a public employees union on eighteen members who refused to picket Democratic ward meetings as the union directed. The court reasoned:

> It is just as illegal to compel one to speak when he prefers to remain silent as it is to gag one when he wishes to talk . . . . [T]he regulations and by-laws of organizations such as the one under consideration, will be enforced only when they are reasonable . . . . [P]laintiffs would be compelled to oppose by signs, and by picketing, candidates for whom they might well have a decided preference. Such a regulation imposes a blanket opposition which is so contrary to the fundamental rules of fairness

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[115] *Spayd*, 113 A. at 72. *See also id.* ("The rights above noted cannot lawfully be infringed, even momentarily, by individuals any more than by the State itself."); *id.*:

> The Constitution does not confer the right, but guarantees its free exercise—without let or hindrance from those in authority, at all times, under any and all circumstances; and, when this is kept in view, it is apparent that such a prerogative can neither be denied by others nor surrendered by the citizen himself.

[116] *Id.*

[117] 228 A.2d 752 (Pa. 1967).

> that it cannot possibly pass muster under the criterion of reasonableness.[118]

Commonwealth v. Tate[119] reversed the defiant trespass conviction of demonstrators who sought to peacefully distribute leaflets on a private college campus opposing the policies of the FBI director who had been invited to a public meeting on campus. The court began by reviewing the wording and heritage of Pennsylvania's constitutional guarantees of free speech, concluding that "the rights of freedom of speech, assembly, and petition have been guaranteed since the first Pennsylvania Constitution, not simply as restrictions on the powers of government, as found in the Federal Constitution, but as inherent and 'invaluable' rights of man."[120] Construing the Pennsylvania statute's affirmative defense to prosecution for defiant trespass when property is "open to members of the public" and an alleged trespasser has complied with all "lawful conditions" for access, the court concluded that the prohibition of defendants' leafletting was not a "lawful" condition:

> [T]he college could not, consistent with the invaluable rights to freedom of speech, assembly, and petition constitutionally guaranteed by this Commonwealth to its citizens, exercise its right of property to invoke a standardless permit requirement and the state's defiant trespass law to prevent appellants from peacefully presenting their point of view to this indisputably relevant audience in an area of the college normally open to the public.[121]

Some federal courts have viewed the Supreme Court's subsequent decision in *Western Pennsylvania Socialist Workers v. Connecticut General Life Insurance Co.*[122] as a repudiation of the *Spayd-Dudek-Tate* line of

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[118] *Id.* at 755-56. *See also id.* at 757 (Cohen, J., concurring in the result) ("The legality of the objective sought by the union did not overcome its unlawful attempt at coerced expression by individual union members contrary to their constitutional rights of free speech and political belief."); *id.* at 758 (Roberts, J., concurring) ("It should be noted that the language of our Constitution prohibits not only state interference with free expression but also coercion of speech from sources other than the state."). *See also* Collins v. Main Line Bd. of Realtors, 304 A.2d 493 (Pa. 1973) (enjoining exclusion of real estate broker from trade organization as common law restraint of trade).

> One of the reasons, for example, given by the appellee corporation for denying membership to the appellants centered around charges brought by appellants on behalf of a client against the appellee, charging it with discrimination before the Pennsylvania State Human Relations Commission. Although the charge was dismissed by the Commission, the Board felt that Collins had maligned its reputation by bringing the charge. We think it sufficient to say that Collins and Suburban should not now be permitted to be penalized for assisting a client in an attempt to assert his constitutional right to petition the government for a redress of grievances.

Id. at 497-98.

[119] 432 A.2d 1382 (Pa. 1981).

[120] *Id.* at 1388.

[121] *Id.* at 1391.

[122] 515 A.2d 1331 (Pa. 1986).

cases, and therefore as a rejection of the possibility that private actions can constitute an unconstitutional interference with Pennsylvania free expression rights.[123] *Socialist Workers* refused to enjoin the owner of a shopping center from enforcing a policy uniformly banning all political leafletting, but to view it as overruling the prior construction of Pennsylvania's free expression guarantees misreads the five opinions delivered by the fractured court in the case.[124]

The concurring opinions of Justices Larsen and McDermott explicitly rejected *Tate*, and Justice Zappala expressed "serious doubts" regarding its conclusions.[125] Justice Nix, however, explicitly reaffirmed *Tate* and joined in what he regarded as the lead opinion's conclusion that "the limitation in federal constitutional decisions to matters involving 'state action' is not applicable in an analysis where it is alleged that one of these rights conferred under our constitution has been violated."[126] The lead opinion by Justice Hutchinson, joined by Justice Flaherty, offered a very narrow analysis in support of its conclusion that "the Pennsylvania Constitution does not guarantee access to private property for the exercise of such rights where, as here, the owner uniformly and effectively prohibits all political activities and similarly precludes the use of its property as a forum for discussion of matters of public controversy."[127]

On one hand, the lead opinion affirms that the Pennsylvania Constitution "is a limitation on the power of state government . . . [that] prohibits the government from interfering with [inherent natural rights] and leaves adjustment of the inevitable conflicts among them to private interaction, so long as that interaction is peaceable and non-violent."[128] On the other hand, the opinion immediately cau-

[123] *See, e.g.*, Fraser v. Nationwide Mut. Ins. Co., 135 F. Supp. 2d 623 (E.D. Pa. 2001); Constitutional Def. Fund v. Humphrey, No. 92-396, 1992 U.S. Dist. LEXIS 9306 (E.D. Pa. July 1, 1992); Tinneny v. Frasse-Basset, Inc., No. 85-547, 1990 U.S. Dist. LEXIS 6152 (E.D. Pa. May 21, 1990); *cf.* Sabatini v. Reinstein, No. 99-2393, 1999 U.S. Dist. LEXIS 12820 (E.D. Pa. Aug. 18, 1999) (holding that no private cause of action existed under Article I, Section 7).

[124] *See, e.g.*, Radich v. Goode, 886 F.2d 1391 (3d Cir. 1989) (same); Cable Inv., Inc. v. Woolley, 867 F.2d 151 (3d Cir. 1989) (same); Cyber Promotions v. America Online, 948 F. Supp. 436 (E.D. Pa. 1996) (treating Western Pennsylvania Socialists as clarifying Tate; crucial question was whether defendant established a public forum); Coatesville Dev. Co. v. United Food & Commercial Workers, 542 A.2d 1380 (Pa. Super. Ct. 1988) (reversing grant of injunction against picketing on private property, and declining to reach Article I, Section 7).

[125] *W. Pennsylvania Socialist Workers*, 515 A.2d 1331, 1340 (Larsen, J., concurring); *id.* at 1340 (Zappala, J., concurring); *id.* at 1341 (McDermott, J., concurring in the result).

[126] *Id.* at 1341 (Nix, J., concurring in part and dissenting in part).

[127] *Id.* at 1333 (distinguishing the one-sided college policy in *Tate* which allowed speech by the FBI director, but banned that of his critics).

[128] *Id.* at 1335. The opinion fails to note that the key language regarding the "free communication of ideas and opinions" was adopted in the 1790 constitution rather than the natural rights constitution of 1776, ignoring the clear salience to the framers of the political function of the rights of free communication (*see* Declaration of Rights, *supra* note 7), and overlooking the insertion by the 1790 convention of the clarification that the Declaration of Rights is promul-

tions, "[w]e are not suggesting that the rights enumerated in the Declaration of Rights exist only against the state;" "[t]hey are not created by the constitution, but preserved by it," citing *Spayd*.[129] It concludes that shopping malls are not "require[d] . . . to provide a political forum for persons or groups with views on public issues, so long as the owner does not grant unfair advantage to particular interests or groups by making his premises arbitrarily available to those he favors while excluding all others," citing *Commonwealth v. Tate*.[130] Thus, the opinion apparently reaffirms both *Tate* and *Spayd* without mentioning *Dudek*.

The current state of doctrine is hardly pellucid. None of the Pennsylvania cases go so far as to declare that every action by a private party which deters the exercise of free expression is a violation of the Pennsylvania Constitution. But the constitutional commitment to free expression clearly exercises a "gravitational" pull in interpreting both statutory and common law requirements. Where either statutory or common law doctrines constrain the exercise of a legal right or privilege to "reasonable" dimensions, this line of cases at a minimum mandates that a "reasonable" application of those rights or privileges cannot be one that derogates Pennsylvania's constitutional commitment to free expression.[131]

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gated in order that "essential principles of liberty and free government may be recognized and unalterably established."

[129] *Id.* at 1335.

[130] *Id.* at 1336. *See also id.* at 1338 (affirming that *Tate* "implicitly recognized" Pennsylvania's constitution provides greater protection than the federal constitution).

[131] These cases also suggest that Judge Adams was on solid ground in *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894 (3d Cir. 1983), in holding that the Pennsylvania free expression guarantees provide a basis for concluding that public policy prohibits the discharge of a private employee for refusing to sign letters to legislators in support of his employer's political agenda. The possibility of a wrongful discharge action based on the Declaration of Rights has occasioned a long-running debate as Pennsylvania's law has evolved over the last twenty years. *See* James G. Fannon, *The Public Policy Exception to the Employment at Will Doctrine: Searching for Clear Mandates in the Pennsylvania Constitution*, 27 RUTGERS L.J. 927 (1996). The most recent opinions from the Pennsylvania Supreme Court suggest that an employer's efforts to interfere with an employee's activities as a citizen, exercising her constitutional right to participate in political discourse or petition or demonstrate, would be actionable. *See* Shick v. Shirey, 716 A.2d 1231 (Pa. 1998) (discharge in retaliation for filing worker's compensation claim was actionable); *see also* Shick v. Shirey, 691 A.2d 511, 518 (Pa. Super. Ct. 1997), *rev'd*, 716 A.2d 1231 (Pa. 1998) (Saylor, J., dissenting) (wrongful discharge action is available on the basis of "a violation of a clearly mandated public policy which 'strikes at the heart of a citizen's social right, duties, and responsibilities'") (quoting *Novosel*). *Cf.* McLaughlin v. Gastrointestinal Specialists, Inc., 750 A.2d 283, 289 (Pa. 2000) (rejecting wrongful discharge claim based on a possible violation of a federal statute distinguishing case where "if we allowed an employer to discharge an employee for filing a complaint with a Commonwealth agency such as the Workers' Compensation Appeal Board, we impact the rights of that employee and the public by undermining the very purposes of a statute of this Commonwealth").

d. *Other Regulations*

In the usual case, the free communication of thoughts and opinions is not infringed by generally applicable regulations simply because they impose some collateral burden on communication. Thus, the elimination of a sales tax exemption for magazines, while the tax was retained for newspapers, was held to be consistent with Article I, Section 7 because the tax was identical to that imposed on other items of commerce and incidence of the tax was based on format and frequency of the publication rather than its contents.[132]

In *Philadelphia Fraternal Order of Correctional Officers v. Rendell,* the court held that a statute which limited collective bargaining rights of public employees to a single designated union even when a rival union had been chosen by employees did not impinge on rights guaranteed by Pennsylvania's free expression protections. The Court reasoned: "Appellants have not been prohibited from forming PFOCO nor have they suffered any retaliation from the City or the Commonwealth for forming a rival union and expressing dissatisfaction with AFSCME . . . freedom of speech does not include the right to force another to listen . . . ."[133]

On the other hand, while an order denying access to government information is not a prior restraint, interferences with the opportunity to gather news are subject to review under the Pennsylvania Court's free expression jurisprudence, to guard against gratuitous government interference with the flow of information to the public.[134]

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[132] *See* Magazine Publishers of Am. v. Commonwealth, 654 A.2d 519 (Pa. 1995). So, too, the Pennsylvania constitution does not protect the press from the general obligation to comply with grand jury subpoenas. *In re* Taylor, 193 A.2d 181, 184 (Pa. 1963) ("[B]y no stretch of language can it protect or include under 'freedom of the press' the non-disclosure of sources of information . . . ."). *See also* Commonwealth v. Abu-Jamal, 555 A.2d 846, 859 (Pa. 1989) ("Punishing a person for expressing his views or for associating with certain people is substantially different from allowing his statements to be used for impeachment or to be considered as evidence of his character where that character is a relevant inquiry.").

[133] Philadelphia Fraternal Order of Correctional Officers v. Rendell, 736 A.2d 573, 577 (Pa. 1999).

[134] *See, e.g.*, McMullan v. Wohlgemuth, 308 A.2d 888, 896-97 (Pa. 1973):

> [It] is perhaps logical to assume that . . . a right to gather news "of some dimension must exist" if the First Amendment is to have realistic vitality . . . we agree that such a right, emanating from the First Amendment, does exist, this right, as all other First Amendment rights, is not absolute . . . . Here appellees have no right to compel the disclosure of names explicitly restricted by statute . . . . The Commonwealth's interest in protecting the privacy of those it aids through public assistance is paramount and compelling . . . . The statutory limitation imposed on appellees' asserted First Amendment right to compel the disclosure . . . is no greater than necessary to protect the substantial governmental and individual interests involved.

See also In re McLaughlin, 348 A.2d 376, 382 (Pa. 1975) ("We need not here intimate any view as to whether such a right of access exists in this case, for even assuming [it does] . . . we would conclude that the right is overborne by the paramount interest of the state in protecting the grant of confidentiality."); *In re* Mack, 126 A.2d 679, 681 (Pa. 1956) (upholding an order pro-

3. *"Responsible for Abuse"*

The protections offered by Pennsylvania's free speech provisions are qualified. The core constitutional text contemplates the possibility of sanctions for "abuse" of constitutional liberties, and the prime interpretative challenge is to identify the substance of these "abuses."

The clearest constitutional provision, the substantive and procedural protections against criminal prosecution for publications involving public officials or issues provided by Article I, Section 7[c], has been largely superceded by more protective federal constitutional standards in the area of libel.[135] The Pennsylvania Supreme Court has taken the position that in light of the constitutional protection for personal reputation provided by Article I, Section 1 of the Declaration of Rights, federal rules establish the outer limits of constitutional protection against defamation actions. The Court wrote: "[t]o gratuitously embellish upon the stringent requirements of current federal constitutional law [regarding libel] . . . would be in conflict with the

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hibiting taking pictures of criminal defendant within the courthouse upheld because freedom of the press is "subject to reasonable rules seeking maintenance of the court's dignity and the orderly administration of justice").

Orders closing courtrooms have been held to be subject to a balancing process which gives substantial weight to the right to public access under Pennsylvania's constitutional mandate of "speedy public trials" and "open courts." *See* PA. CONST. art. I, §§ 9, 11 (2001). *See also In re* Seegrist, 539 A.2d 799, 803 (Pa. 1988) ("Before closing a judicial proceeding, a trial court must determine that closure will effectively protect the compelling interest endangered by openness and that the information sought to be withheld from public exposure will not be made public anyway."); Commonwealth v. Berrigan, 501 A.2d 226, 234 n.10 (Pa. 1985) ("*Contakos* does not stand for the implacable view that 'it is improper to exclude the public from a segment of a criminal trial.'"); Commonwealth v. Contakos, 453 A.2d 578, 580 (Pa. 1982) (arguing that "the public shall not be excluded from trials . . . [but] that the attendance at a criminal trial is subject to reasonable time, place, and manner restrictions"); Commonwealth v. Hayes, 414 A.2d 318, 328 (Pa. 1980) (Larsen and Flaherty, JJ., concurring) (arguing that court proceedings should always be open to the public and the media, without exception). In *Philadelphia Newspapers, Inc. v. Jerome*, 287 A2d 425 (Pa. 1978), the court found that under Pennsylvania free expression provisions,

> any limitation on access should be carefully drawn . . . [and] should not be limited for any reason less than the compelling state obligation to protect constitutional rights of criminal defendants . . . and . . . the threat posed to the protected interest is serious . . . and access should be limited no more than is necessary to accomplish the end sought.

Id. at 434.

Likewise, records of public trials have been held to be subject to a mandate of public accessibility under Article I, Section 7 and Article I, Section 11. *See, e.g.*, Commonwealth v. French, 611 A.2d 175, 180 n.12 (Pa. 1992) ("strongly condemning" sealing of record and stating "public trials involve public records"). A separate common law rule, established under the "same considerations," mandates access to material filed in courts. *See* PG Publ'g Co. v. Commonwealth, 614 A.2d 1106 (Pa. 1992) (recognizing common law right of access to search warrants in the absence of good cause for sealing); Commonwealth v. Fenstermaker, 530 A.2d 414 (Pa. 1987) (holding that there is a common law right of access to arrest warrants, absent substantial threats to legitimate state interests).

[135] *See* Commonwealth v. Armao, 286 A.2d 626, 632 (Pa. 1972).

recognition given by our state's constitution to a citizen's right to protect his or her reputation."[136]

Outside of the context of reputation, however, a separate analysis under the Pennsylvania constitution is necessary. The fulcrum of analysis is the proposition under Article I, Section 7[b] that "every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty."[137]

Beginning with the constitution of 1790, eighteenth and nineteenth century courts held that the definition of "abuse" of free expression for which punishment could be imposed was tied to the common law: a common law criminal offense or tort was by definition an abuse of free expression. Thus, notwithstanding the constitutional protection of free communication, the early Pennsylvania courts had no difficulty in sanctioning criminal prosecutions for communicative actions which today would be recognized as obvious "abuses" such as riots, conspiracies and solicitations to engage in criminal acts,[138] and

[136] Sprague v. Walter, 543 A.2d 1078,1084-85 (Pa. 1988); *see also* Hatchard v. Westinghouse Broad. Co., 532 A.2d 346 (Pa. 1987) (interpreting Pennsylvania Shield Law to allow discovery of "out-takes" in libel actions to the extent that the documentary information does not reveal the identity of a personal source of information or may be redacted to eliminate the revelation of a personal source of information); Moyer v. Phillips, 341 A.2d 441 (Pa. 1975) (holding that exception in survival action for cause of action for libel and slander is arbitrary and thus violative of equal protection rights afforded under the state constitution for the protection of a fundamental right of reputation); Barr v. Moore, 87 Pa. 385, 393 (1878):

> The high esteem in which reputation is held, and the protecting care which the organic law has thrown around it, are clearly expressed in first section of the Declaration of Rights . . . . The general liberty of the press must be construed in subordination to the right of any person calumniated thereby, to hold it responsible for an abuse of that liberty.

[137] As a textual matter, one might argue that the different phrasing in Article I, Section 20, protecting without qualification the right to assembly, petition and redress "in a peaceable manner" provides unqualified protection to political interchange and petition so long as it is peaceable. The Pennsylvania courts have, however, interpreted Article I, Section 20 and Article I, Section 7 *in pari materia*. *See* Philadelphia Fraternal Order of Correctional Officers v. Rendell, 736 A.2d 573, 576 (Pa. 1999); W. Pennsylvania Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co., 515 A.2d 1331 (Pa. 1986); Commonwealth v. Tate, 432 A.2d 1382 (Pa. 1981); Duquesne City v. Fincke, 112 A. 130 (Pa. 1920).

[138] In the aftermath of the Whiskey Rebellion of 1794, the Pennsylvania Supreme Court upheld prosecutions for erecting "liberty poles" as standards of rebellion. Pennsylvania v. Morrison, 1 Add. 274 (Pa. 1795) (detailing prosecution for erecting a liberty pole "in defiance of the laws of the state of Pennsylvania"). *See* Respublica v. Montgomery, 1 Yeates 419, 422 (Pa. 1795) (discussing duty of magistrate was to prevent erection of liberty pole; "setting up [of] a pole at any time, in a tumultuous manner, with arms, is a riot" notwithstanding right of "free communication").

Likewise, courts regularly upheld indictments for conspiracy and solicitation to illegal actions. *See, e.g.*, Commonwealth v. Gillespie, 7 Serg. & Rawle 469, 474 (Pa. 1822) (regarding conspiracy to sell illegal lottery tickets); *see also, e.g.*, Commonwealth v. Franklin, 4 U.S. 255 (1802) (upholding indictment under statute that defendants "unlawfully did combine and conspire, for the purpose of conveying, possessing, and settling, on certain lands within the limits of the county aforesaid, under a certain pretended title not derived from the authority of this commonwealth," on grounds that such conspiracies were violations of common law); Common-

obstructions of the public highways.[139] But the courts equally approved common law prosecutions for seditious libel,[140] personal libel,[141] obscenity,[142] blasphemy,[143] public profane swearing,[144] and the

wealth v. Randolph, 23 A. 388 (Pa. 1892) (holding solicitation to commit murder is a common law crime although solicitation to commit fornication and adultery is not); *In re* Northern Liberty Hose Co., 13 Pa. 193, 195 (1850) (upholding statutory proceedings to require fire company to close its doors because of rioting "by the [hose] company, or [its] adherents").

Pennsylvania's early conspiracy law extended to communications we would today regard as protected. *E.g.*, Mifflin v. Commonwealth, 5 Watts & Serg. 461 (Pa. 1843) (upholding indictment for conspiring "to effect the escape of Jane M. Nevin, an infant . . . with a view to her marriage"); Commonwealth v. Eberle, 3 Serg. & Rawle 9 (Pa. 1817) (upholding conspiracy indictment for colorful language committing members of German Evangelical Lutheran Congregation to oppose the use of English in services); *id.* at 16 ("[T]he defendants complain of the hardship of charging them with all the rash and violent speeches of a few individuals. Such however is the law."); Commonwealth v. Wood, 3 Binn. 414 (Pa. 1811) (discussing conspiracy prosecution against journeyman hatters).

[139] The Supreme Court of Pennsylvania rejected free speech claims and upheld a nuisance prosecution against a defendant who "by means of violent, loud, and indecent language" "caus[ed] to assemble and remain [in the public highway] for a long space of time great members of men and boys, so that the streets were obstructed." Barker v. Commonwealth, 19 Pa. 412 (1852).

The Court subsequently emphasized in *Fairbanks v. Kerr & Smith*, 70 Pa. 86, 92 (1872), that it does not follow that every one who speaks or preaches in the street, or who happens to collect a crowd therein by other means, is therefore guilty of the indictable offence of nuisance. His act may become a nuisance by his obstruction of the public highway, but it will not do to say it is a nuisance *per se*. Such a stringent interpretation of the case of Barker is scarcely suited to the genius of our people or to the character of their institutions. *See also* County of Allegheny v. Zimmerman, 95 Pa. 287 (1880) (holding plaintiff cannot claim that erection of a 40 foot liberty pole in public street prior to election was a nuisance *per se*); *id.* at 294:

> It is a custom sanctioned by a hundred years and interwoven with the traditions, memories and conceded rights of a free people . . . . It did not occupy the street to such an extent or in such a manner that any person complained of its interfering with the public travel.

[140] Respublica v. Dennie, 4 Yeates 267 (1805) (detailing prosecution for statement that "[a] democracy is scarcely tolerable at any period of national history"). The *Dennie* court charged the jury that a conviction required a finding that the statement was "seditiously, maliciously and willfully aimed at the constitution" and that a privilege was available on a showing of "good motives, and for justifiable ends." The jury acquitted.

[141] Commonwealth v. Place, 26 A. 620, 621 (Pa. 1893) (criminal libel prosecution for newspaper story that "sets forth in a sensational manner the details of a disgusting private scandal concerning parties residing in Pottsville"); Commonwealth v. Duane, 1 Binn. 601 (1809) (prosecution for libeling Governor held constitutional, but suspended by 1809 statute barring indictments for libel of public officials); *see also* Wood v. Boyle, 35 A. 853 (Pa. 1896) (upholding civil libel verdict in case brought after defendant had been acquitted on criminal libel charge).

[142] *See* Barker v. Commonwealth, 19 Pa. 412, 413 (1852) (determining that prosecution for "openly and publicly speaking with a loud voice . . . representing men and women in obscene and indecent positions and attitudes" is justified where statements are public and have a "tendency . . . to debauch and corrupt the public morals"); *see also* Commonwealth v. Sharpless, 2 Serg. & Rawle 91, 102-03 (1815) (showing "painting, representing a man in obscene, impudent, and indecent posture with a woman," despite the absence of public display was indictable at common law, like "an indecent book"); *id.* ("What tended to corrupt society, was held to be a breach of the peace and punishable."). The Pennsylvania Court continued to take the position that *Sharpless* was good law through the middle of the twentieth century. *See* William Goldman

offense of being a "common scold."[145] So, too, the common law's bar against interference with contractual and business relations were held to sanction the issuance of injunctions against strikes, labor organizing and picketing as "abuses" of Pennsylvania's guarantees of free communication and assembly.[146]

Theatres, Inc. v. Dana, 173 A.2d 59, 64 (Pa. 1961); Commonwealth v. Blumenstein, 153 A.2d 227, 228 (Pa. 1959).

The *Sharpless/Barker* rule has been supplanted by more protective First Amendment rules. In evaluating the protection of sexualized communication during the last part of the twentieth century, the Pennsylvania Court has taken protection to be governed by federal standards. *See* Zimmerman v. Philjon, Inc. 368 A.2d 694 (Pa. 1977); Commonwealth v. MacDonald, 347 A.2d 290 (Pa. 1975) (Pennsylvania obscenity statute unconstitutional under federal standards); Commonwealth v. Rodgers, 327 A.2d 118 (Pa. 1974) (holding contrary United States Supreme Court decision required reversal of *Commonwealth v. Lalonde*, 288 A.2d 782 (Pa. 1972), which had unanimously adopted a mandate that contemporary community standards in obscenity cases be established by expert testimony); Duggan v. Guild Theatre, Inc., 258 A.2d 858 (Pa. 1969); Commonwealth v. Dell Publ'n, 233 A.2d 840 (Pa. 1967) (describing federal obscenity law as a conceptual "disaster area" but applying it); Commonwealth v. Robin, 218 A.2d 546 (Pa. 1966).

Justices Castille and Zappala have recently taken the position that an even more protective state rule shielded federally unprotected erotic dancing on the ground that "[l]awmakers may not categorically proscribe *any* form of protected expression simply because they are not at ease with its content." Pap's A.M. v. City of Erie, 719 A.2d 273, 284 (Pa. 1998) (Castille, J., concurring in the result), *rev'd on other grounds*, 529 U.S. 277 (2000).

[143] Updegraph v. Commonweallth, 11 Serg. & Rawle 394 (1824) (holding that blasphemy may be punished, like cursing, swearing in public).

[144] Commonwealth v. Linn, 27 A. 843 (Pa. 1893) (prosecution dismissed because no sufficient allegation that swearing was heard by the public); *see also id.* at 844 ("It cannot be doubted that profane swearing and cursing, in aloud and boisterous tone of voice, and in the presence and hearing of citizens of the commonwealth passing and repassing on the public streets . . . is an indictable offense.").

[145] In *James v. Commonwealth*, 12 Serg. & Rawle 220, 225 (1825) the court declared unconstitutional, as cruel and unusual punishment "revolting to humanity," the punishment of subjecting women convicted of being common scolds to being "plunged three times in the water" on a "cucking stool." The court, however, despite some "hesitations" declared that "the offence of *communis vexatrix*" remained "punishable as a common nuisance, by fine, or by fine and imprisonment." *Id.* at 236. *See also* Commonwealth v. Mohn, 52 Pa. 243 (1866) (upholding prosecution of "common scold" as a nuisance); *id.* at 246 ("As to the unreasonableness of holding women liable to punishment for a too free use of their tongue, it is enough to say that the common law, which is the expressed wisdom of ages, adjudges that it is not unreasonable.").

[146] Kraemer Hosiery Co. v. American Fed'n of Full Fashioned Hosiery Workers, 157 A. 588 (Pa. 1931) (enjoining union efforts to recruit employees who had signed contracts forbidding union membership); Jefferson & Indiana Coal Co. v. Marks, 134 A. 430, 432 (Pa. 1926) (injunction against parades and demonstrations "aimed at the fears rather than the judgment of those who desired to work"); Purvis v. Local 500 United Bhd. of Carpenters, 63 A.585 (Pa. 1906) (injunction issued against boycott, encouraging boycott, forbidding work on non-union material); Erdman v. Mitchell, 56 A. 327 (Pa. 1903) (injunction against "coercive" strike); Flaccus v. Smith, 48 A. 894 (Pa. 1901) (injunction against "enticing" apprentices to break their indentures); O'Neill v. Behanna, 37 A. 843 (Pa. 1897) (injunction against strikers who used "annoyance, intimidation, [and] ridicule").

Privileges were accorded in civil libel actions on the basis of "good motives" and "probable cause."[147] This privilege and the broader constitutional mandate extended their protection primarily to sober addresses to the public on political topics,[148] though more extreme statements could prevail before juries.[149]

In the early twentieth century, Pennsylvania courts began to evaluate limitations on free expression that diverged from the common law. In general, in the early years of the twentieth century, the Pennsylvania Supreme Court was as deferential to legislative constraints as to common law limitations. Legislative exercises of the police power were held consistent with the guarantees of free expression so long as the legislative determinations were "reasonable."[150]

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[147] *See* Conroy v. Pittsburgh Times, 21 A. 154 (Pa. 1891) (claiming burden on libel defendant to come forward with evidence of probable cause where privilege is claimed); *see also* Neeb v. Hope, 2 A. 568 (Pa. 1886) (stating that in libel action for comments about actions of public officer, defendant can prevail either by showing probable cause for accusation or lack of "ill will" or "reckless disregard" of reputation); Chapman v. Calder, 14 Pa. 365 (1850) (holding that in slander action for privileged communication (here: charges to ecclesiastical tribunal) probable cause is a defense even if not given as part of claim of truth); Gray v. Pentland, 4 Serg. & Ralwe 420 (1819) (holding that if charge is false, in order to prevail defendant must show he acted from mistake and with good faith); Gray v. Pentland, 2 Serg. & Rawle 23, 30 (1815) (defendant deposes before justice of the peace that prothonotary was drunk and unfit to perform duties; statement is actionable only if made "in malice" and "without probable cause"); M'Millan v. Birch, 1 Binn. 178, 186-87 (1806) (holding that "freedom of speech in what is called a *course of justice*" presumptively privileges accusations before ecclesiastical tribunal; if accusations are made "in a decent manner" law will not "imply malice"); Runkle v. Meyer, 3 Yeates 518 (1803) (discussing case in which libel was upheld because defendant could not verify statements).

[148] *See, e.g.*, Briggs v. Garrett, 2 A. 513 (Pa. 1886) (holding defendant is protected from libel judgment for reading letter attacking political candidate to good government group, where he acted with probable cause, despite the fact that the letter was inaccurate); *see also Ex parte* Steinman, 95 Pa. 220, 236, 239 (1880) (holding that attorneys are protected from disbarment for publishing statement that acquittal of defendant was "secured by a prostitution of the machinery of justice to serve the exigencies of the Republican party," where the attorneys were "acting in good faith, without malice, and for the public good"); *In re* Austin, 5 Rawle 191, 205 (1835) (holding critics of sitting judge protected against disbarment; "liberty of the press" protects "legitimate . . . scrutiny . . . where the public good is the aim").

[149] *E.g.*, Respublica v. Dennie, 4 Yeates 267, 270 (1805) (jury acquitted printer indicted for seditious libel on the basis of the statement, "A democracy is scarcely tolerable at any period of national history . . . ."); *cf.* Rowand v. DeCamp, 96 Pa. 493, 502 (1880):

> No statute or rule was cited which obligates a citizen when discussing the conduct of public servants in their official capacity, who speaks the truth as he designs to be understood and as he is understood by his hearers, to employ any prescribed form of expression or language. So long as he speaks the truth . . . he is not liable in damages, whether his language be chaste or vulgar, refined or scurrilous.

[150] Commonwealth v. Widovich, 145 A. 295 (Pa. 1929) (upholding prosecution under sedition statute); *id.* at 299 ("The body that determines in the first instance what utterances of speech shall constitute abuse, is the legislature . . . [w]hether the regulation of speech or print goes beyond the 'abuse of liberty' as contemplated by the Constitution, is for the courts. They may review the reasonableness of the enactments."); Commonwealth v. Foley, 141 A. 50 (Pa. 1928) (upholding prosecution for circulation of anonymous defamatory pamphlet regarding district attorney under statute which prohibits anonymous "opprobrious" material, notwithstanding constitutional requirement of "malice" or "negligence" in Article I, Section 7[c]; legis-

Pennsylvania's courts began to develop a more assertive approach to the protection of the rights of free expression during the 1930s, in the shadow of the United States Supreme Court's application of federal free speech principles to the states. In *Kirmse v. Adler*,[151] the Pennsylvania Supreme Court unanimously affirmed that the right of labor unions to peacefully urge employees to withdraw from employment or to induce customers of hostile employers to withdraw their patronage was "secured to the citizen[s]" by Pennsylvania's free expression protections. Characterizing the guarantees of free speech as "absolute rights," the court held that "[h]aving this unquestioned right to present their case to the public in newspapers or circulars in a peaceful way, if the employer suffers loss from this peaceable assertion of rights, it is a damage without a remedy."[152] The constitutional guarantees were largely superseded in the labor area by statutory protection,[153] and much subsequent litigation in the labor field turned on the construction of Pennsylvania's statutory protections in light of federal free speech jurisprudence.[154] Pennsylvania's courts, however, continued to recognize that "[p]eaceful picketing has been recognized as a form of assembly and of speech, and has been afforded the protection of . . . Article I, Section 7 of the Constitution of Pennsylvania," and that "[a] state cannot because of its own notions of the

lature determined that an anonymous publication "is of itself malice and negligence"); *id.* at 51 ("There is nothing in the Constitution to prohibit the legislature or the court from further defining negligence or malice."); Buffalo Branch, Mutual Film Corp v. Breitinger, 95 A. 433 (Pa. 1915) (upholding film censorship statute); *id.* at 435 ("[The police power] is more despotic and broader than the right of eminent domain . . . it is the application of the . . . principle of self preservation of the body politic."). *See also In re* Mack, 126 A.2d 679, 681 (Pa. 1956) (holding that freedom of the press is "subject to reasonable rules seeking maintenance of the court's dignity and the orderly administration of justice"). *Cf.* Spayd v. Ringing Rock Lodge, 113 A. 70, 72 (Pa. 1921) (stating that an a petition addressed to the legislature could "under no circumstances be penalized"). This approach left traces as late as mid-century. *Widovich* was perhaps the high water mark of deference. Relying on the statement in Article XVI of the 1874 Constitution that "the police power shall never be abridged," the *Widovich* court concluded, "[i]f the exercise of the police power should be in irreconcilable opposition to a constitutional provision or right, the police power would prevail." 145 A. at 298. This police power provision was deleted by the constitution of 1968.

[151] 166 A. 566, 569 (Pa. 1933).

[152] *Id.*

[153] *See, e.g.*, Labor Anti-Injunction Act of 1937, Pub. L. No. 1198 (1937).

[154] *See, e.g.*, Phillips v. United Bhd. of Carpenters, 66 A.2d 227 (Pa. 1949) (stating that picketing to coerce employer into requiring union membership (itself an unlawful act) can be enjoined; using federal free speech analysis); Pennsylvania Labor Rel. Bd. v. Chester & Delaware County Bartenders, 64 A.2d 834 (Pa. 1949) (holding Pennsylvania statute outlawing picketing by non-employees unconstitutional under the First Amendment); Wilbank v. Chester & Delaware County Bartenders, 60 A.2d 21 (Pa. 1948) (stating that picketing to induce employer to require union membership can be enjoined; requirement would itself be illegal); Westinghouse Elec. Corp. v. United Elec., Radio, & Mach. Workers Local 601, 46 A.2d 16 (Pa. 1946) (upholding injunction against plant seizure by employees); Carnegie-Illinois Steel Corp. v. United Steelworkers, 45 A.2d 857 (Pa. 1946) (holding that employees could not block plant access).

wise limits of industrial dispute, either by legislative enactment or judicial determination, unduly limit the right of free speech."[155] Outside the labor context the Pennsylvania Supreme Court continued to hold that efforts to persuade customers to withdraw their patronage were protected.[156]

The free speech analysis of Pennsylvania's high court in the mid-twentieth century in large measure tracked federal doctrine. Thus, in the area of film censorship, the invalidation of vague and overbroad censorship schemes followed exclusively from federal precedents.[157] So, too, in responding to the anti-communist fervor of the 1950s, the Pennsylvania Supreme Court did not interpret Pennsylvania's free expression provisions to provide greater protection than their federal counterparts.[158] While Pennsylvania's high court periodically decried the excesses of red-hunting repression,[159] where it provided relief, the

[155] American Brake Shoe Co. v. Dist. Lodge 9 Int'l Ass'n of Machinists, 94 A.2d 884, 887-88 (Pa. 1953) (citations omitted). *See also* Warren v. Motion Picture Mach. Operators, 118 A.2d 168, 171 (Pa. 1955):

> In a democracy, so long as the communication in a labor controversy—or in any other type of quarrel due to differences in view—advocates persuasion and not coercion, thus appealing to reason and not to force, there attends the message-bearer the invisible sentinel of the law protecting the right of freedom of communication.

[156] Watch Tower Bible & Tract Soc'y v. Dougherty, 11 A.2d 147, 148 (Pa. 1940) ("[Defendants] cannot be mulcted in damages for protesting against the utterances of one who they believe attacks their church . . . ."); *see also* 1621, Inc. v. Wilson, 166 A.2d 271, 275 (Pa. 1960) (refusing to issue injunction against picketing of taproom by neighborhood organizations, and holding that the right to "air grievances" is constitutionally protected).

[157] *See, e.g.*, Commonwealth v. Blumenstein, 153 A.2d 227 (Pa. 1959) (holding that a statute making the exhibition of indecent films punishable as a misdemeanor was too vague and unconstitutional); Hallmark Prod., Inc. v. Carroll, 121 A.2d 584 (Pa. 1956) (stating that a statute allowing board to censor films was too broad). Subsequent obscenity analysis has also tracked the evolution of federal doctrine. *See supra* note 142.

[158] The trend began with *Albert Appeal*, 92 A.2d 663 (Pa. 1952) (upholding the discharge of a high school English teacher for "advocation of or participating in un-American or subversive doctrines"), and *Fitzgerald v. Philadelphia*, 102 A.2d 887 (Pa. 1954) (upholding loyalty oath required of hospital nurse using an analysis based entirely on federal precedents). *See also* Bd. of Pub. Educ. v. August, 177 A.2d 809 (Pa. 1962) (upholding discharge of teacher for refusal to answer superior's questions about communist connections); Bd. of Pub. Educ. v. Soler, 176 A.2d 653 (Pa. 1961) (holding refusal to answer questions about communist connections by superior grounds for discharge); Kaplan v. Philadelphia Sch. Dist., 130 A.2d 672 (Pa. 1957) (denying pay to teacher discharged for failing to reply to questions regarding communist affiliation); Bd. of Pub. Educ. v. Beilan, 125 A.2d 327 (Pa. 1956) (upholding discharge of teacher discharged for failure to answer questions by school superintendent regarding communist affiliations).

[159] *See In re* Schlesinger, 172 A.2d 835, 837 (Pa. 1961):

> It is a lamentable commentary, but none the less true, that, in the existing frame of the public mind, a lawyer who undertakes voluntarily the legal representation of a person charged with being, or even pointed at (in *J'accuse* fashion) as, a Communist runs the risk of a disruption of his law practice and the impairment of his own professional reputation.

court relied on requirements of due process and fair procedure rather than the rights of free expression.[160]

As the McCarthy era receded, the Pennsylvania's courts began to approach free expression cases with a somewhat greater degree of independence.[161] In recent decades, the Pennsylvania cases have

See also Ault v. Unemployment Comp. Bd. of Review, 157 A.2d 375, 378 (Pa. 1960) (noting tendency of officials to "become myopic upon the mere mention of Communism"); Matson v. Margiotti, 88 A.2d 892, 899 (Pa. 1952):

> The recent practice of some high public officials to slander and vilify innocent people who have little or no chance to defend themselves or their reputation has shocked our nation and nearly every respectable citizen would like to see mud-slinging and unjustifiable character assassination by public officials and candidates for public office stopped or abolished.

[160] *See In re* Schlesinger, 172 A.2d 835 (Pa. 1961) (reversing disbarment of former member of communist party because of multiple failures in process by which disbarment was imposed); Bd. of Pub. Educ. v. Intille, 163 A.2d 420 (Pa. 1960) (reversing dismissal of teacher for invocation of 5th amendment before HUAC by relying on federal precedents); *Ault*, 157 A.2d 375 (Pa. 1960) (reversing denial of unemployment compensation to worker discharged for invoking Fifth Amendment before congressional investigating committee); Commonwealth v. Truitt, 85 A.2d 425, 428 (Pa. 1951) (reversing conviction for assault in labor affray where prosecution "injected" irrelevant testimony as to defendant's "communistic connections and activities"); Matson v. Jackson, 83 A.2d 134, 135-137 (Pa. 1951) (enjoining hearing by attorney general into "alleged communistic leanings, sympathies and utterances" of attorney on grounds that the attorney general lacked authority to conduct such hearings, "an authority that would be contrary to the spirit of all our laws which so jealously guard the rights of the individual"); Schlesinger v. Musmanno, 81 A.2d 316 (Pa. 1951) (reversing contempt citation and disbarment of attorney that trial judge concluded was a communist); Communist Party Petition, 75 A.2d 583 (Pa. 1950) (issuing writ of prohibition against order mandating the padlocking of communist party offices as "without warrant in law"); Commonwealth *ex rel.* Roth v. Musmanno, 72 A.2d 263 (Pa. 1950) (reversing order dismissing grand juror because trial judge concluded she was a communist). *See also* Commonwealth v. Nelson, 104 A.2d 133 (Pa. 1954), *aff'd*, 350 U.S. 497 (1956) (reversing sedition conviction because of federal preemption); *cf.* Bd. of Pub. Educ. v. Watson, 163 A.2d 60 (Pa. 1960) (reversing dismissal of teacher for failing to answer HUAC on First Amendment ground; First Amendment privilege may not be well founded but refusal to answer Congressional committee is not statutory "incompetency").

[161] *See, e.g.*, William Goldman Theatres v. Dana, 173 A.2d 59 (Pa. 1961) (holding that film censorship statute was unlawful prior restraint under Article I, Section 7 despite recent U.S. Supreme Court case upholding film censorship under First Amendment); Locust Club v. Hotel & Club Employees' Union, 155 A.2d 27 (Pa. 1959) (holding that peaceful picketing of social club seeking to organize workers was protected by Article I, Section 7, even though federal precedents might hold it unprotected under the First Amendment).

Under the Pennsylvania constitution, the court began to review the actual probability of disruption invoked to justify limitations on expression. *See, e.g*, Commonwealth v. Pittsburgh Press Co., 396 A.2d 1187, 1189-1191 (Pa. 1979) (invalidating limit on advertising because of the absence of any showing that the limitation was "necessary to promote [employment discrimination] legitimate state interest;" the state's "unsubstantiated belief" that the prohibition would limit employment discrimination was insufficient); Conversion Center Charter Case, 130 A.2d 107, 111 (Pa. 1957) (holding that a trial court may not deny approval of charter of "Conversion Center" aimed at converting Catholics; conclusion that group "might" create "unrest" is not sufficient reason because "an interdiction based on nothing more than the possibility of some future transgression of the law is a violation of the applicable constitutional guarantees"); American Brake Shoe Co. v. District Lodge 9 Int'l Ass'n Machinists, 94 A.2d 884 (Pa. 1953) (holding that peaceful labor picketing of non-struck plant of multi-plant employer cannot be enjoined); *see also id.* ("A state cannot because of its own notions of the wise limits of industrial

regularly articulated a doctrine that allows the state to burden free expression only to the extent necessary to remedy demonstrated evils.[162] In *Insurance Adjustment Bureau v. Insurance Commissioner*,[163] the court announced that "Article I, Section 7, will not allow the . . . restriction of commercial speech by any governmental agency where the legitimate, important interests of government may be accomplished practicably in another, less intrusive manner." Reviewing a prohibition on solicitation by claims adjusters within twenty-four hours of a loss, the court concluded that the legitimate governmental goal of preventing overreaching by insurance adjusters "could be accomplished by enforcement of civil, criminal and administrative remedies already in place." In regard to commercial speech, this "least restrictive alternative" requirement has been subsequently held to be limited to speech which is neither false nor misleading.[164]

This approach is congruent with the constitutional language that makes a citizen subject to "responsibility for abuse of liberty;" a requirement that the burden on free communication be no greater than necessary to avoid a demonstrated harm follows the linkage of "responsibility" to a particular "abuse." There is no reason to believe this "least restrictive alternative analysis," which is sometimes more protective than First Amendment standards, is limited to commercial speech cases, since it seems clear that in terms of the concern for political and expressive liberty that underpin Pennsylvania's free expression jurisprudence, commercial speech is far from the core of protected expression.[165]

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dispute, either by legislative enactment or judicial determination, unduly limit the right of free speech.").

[162] *See, e.g.*, Philadelphia Newspapers, Inc. v. Jerome, 387 A.2d 425, 435 (Pa. 1978) (stating that closure of trial is permissible where "the threat posed to the protected interest is serious" and the closure is "no more than is necessary to accomplish the end sought"); Pirillo v. Takiff, 341 A.2d 896, 901 (Pa. 1975) (upholding order preventing joint representation of 12 subpoenaed witnesses by attorneys employed by police union because intrusion is "no greater than necessary to eliminate the substantive evil"); McMullan v. Wohlgemuth, 308 A.2d 888 (Pa. 1973) (upholding refusal to allow access to names of welfare recipients because of interest in privacy); *see also id.* at 897 ("The statutory limitation imposed on appellees' asserted First Amendment right to compel the disclosure . . . is no greater than necessary to protect the substantial governmental and individual interests involved.").

[163] 542 A.2d 1317, 1324 (Pa. 1988).

[164] Commonwealth v. State Bd. of Physical Therapy, 728 A.2d 340 (Pa. 1999) (holding that allowing chiropractors to advertise as "physical therapists" is misleading); *see also id.* at 343 ("[O]nly where speech is not misleading have we engaged in an analysis of whether, for purposes of the Pennsylvania Constitution, there were available less restrictive means by which the government could have accomplished its objective.").

[165] The analysis of the court in *Boettger v. Loverro*, 587 A.2d 712, 718 (Pa. 1991), construing Pennsylvania's wiretap statute not to impose liability for publication of intercepted communications obtained from court records after a motion to suppress had been denied, proceeded largely in terms of First Amendment values. However, the court's conclusion that "it cannot be said that the information . . . [was] protected by a state interest of the highest order" because

CONCLUSION

Two and a quarter centuries ago, Pennsylvania led the nation in establishing explicit constitutional guarantees of liberty of expression. In the intervening years, federal constitutional protections have also come to shelter the "free communication of thoughts and opinions." Yet during this same time Pennsylvania's courts have elaborated their own written guarantees into a fabric which both provides independent protection, and illuminates the underpinnings of free expression in a democratic society. It is well for both citizens and governors to acknowledge and respect that fabric; by setting it forth in some detail, it is my hope that this article renders that respect more likely and more practicable. By highlighting the independent resources with which the courts of Pennsylvania may work, perhaps the guarantees of 1776 will provide raw materials with which to continue to weave the protections for liberty in the twenty-first century.

"our citizens' right to privacy does not extend to protecting a 'right to privacy' in illegal endeavors" is consistent with the notion that infringement on freedom of the press is acceptable no further than is truly necessary to protect important state interests.