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Constitutional Law--Free Speech--Ordinance Prohibiting Distribution of Anonymous Handbills Held Unconstitutional (Talley v. California, 362 U.S. 60 (1960))

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successful. The need lies in the lack of clarity surrounding the conditions suggested by the letter and spirit of the air-brake provisions. This corrected, the medial difficulties of judicial construction would be eliminated. But the solution can only be supplied by the Congress or the ICC.

CONSTITUTIONAL LAW—FREE SPEECH—ORDINANCE PROHIBITING DISTRIBUTION OF ANONYMOUS HANDBILLS HELD UNCONSTITUTIONAL.—Defendant was convicted of violating a Los Angeles ordinance prohibiting distribution of anonymous handbills.[1] On certiorari the Supreme Court *held* that the ordinance was an unconstitutional restraint on free speech. *Talley v. California,* 362 U.S. 60, (1960).

By virtue of the first and fourteenth amendments of the United States Constitution all persons are guaranteed the freedoms of speech and of the press.[2] It is also well settled that municipal ordinances adopted under state authority constitute state action and are also restricted.[3] While the prohibitions of the Constitution are primarily designed to prevent previous restraints on publication,[4] official reprisal against a person for having exercised the protected rights is also forbidden.[5] Nor is freedom of expression limited to the right of publication; the Constitution is also violated by restrictions placed upon circulation.[6]

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[1] LOS ANGELES, CAL., MUNICIPAL CODE § 28.06: "No person shall distribute any hand-bill in any place under any circumstances, which does not have printed on the cover, or the face thereof, the name and address of the following:

"(a) The person who printed, wrote, compiled or manufactured the same.

"(b) The person who caused the same to be distributed; provided, however, that in the case of a fictitious person or club, in addition to such fictitious name, the true names and addresses of the owners, managers or agents of the person sponsoring said hand-bill shall also appear thereon." Cited in Talley v. California, 362 U.S. 60-61 (1960).

[2] The first amendment expressly restricts the federal government, and the fourteenth amendment has been held to restrict the states from unreasonable infringement of these rights. See Near v. Minnesota, 283 U.S. 697, 707 (1931); Gitlow v. New York, 268 U.S. 652, 666 (1925).

[3] Cuyahoga River Power Co. v. City of Akron, 240 U.S. 462 (1916).

[4] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

[5] "[T]he mere exemption from previous restraints cannot be all that is secured by the constitutional provisions, inasmuch as of words to be uttered orally there can be no previous censorship, and the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a byword, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications." 2 COOLEY, CONSTITUTIONAL LIMITATIONS 885 (8th ed. 1927).

[6] See Lovell v. City of Griffin, 303 U.S. 444, 452 (1938).

Freedom of speech does not imply a right to say anything at any time regardless of the consequences.[7] Certain classes of expression, notably the lewd, the profane and the libelous, are outside the protected area of free speech.[8] Even within the legitimate scope of free expression, a restriction may be permissible if necessitated by a compelling public interest.[9]

The point at which the exercise of free speech becomes subject to governmental limitation is not easily located. The "clear and present danger" test, first formulated by the Supreme Court in *Schenck v. United States*,[10] has been imposed as a general guide in determining the constitutionality of a law which purports to restrain the free exercise of the right of expression. The test formulated is that the exercise of the right will be susceptible to restraint only when the gravity of the evil to be averted, discounted by the improbability of its occurrence, justifies it.[11] Implied in the test is the further qualification that, though the public interest be substantial, the statute designed to safeguard that interest should not be so broad as to unnecessarily restrict speech which is not within the objectionable class.[12]

The right to remain anonymous has twice previously been directly considered by the Supreme Court and both times it was in reference to freedom of privacy in group associations. In *New York ex rel. Bryant v. Zimmerman*,[13] a statute[14] which required registration and disclosure of the names of all members of organizations requiring an oath as a prerequisite for membership was upheld. In requiring that the Ku Klux Klan submit membership lists, the Court held that, in view of the violent and unlawful activity of the Klan, the legislature had acted properly. In *NAACP v. Alabama*,[15] a court order to produce membership lists was held to be in violation of the fourteenth amendment where the state could not show a justification for the deterrent effect which disclosure would be likely to have on lawful private activity. The Court recognized the deterrent effect which the interplay of governmental and private action may have on the exercise of the right of association.[16] The distinction between the two cases is not based upon any difference in the result which disclosure had upon the two organizations, but upon the fact that government action having a deterrent effect on a lawful right will nevertheless be upheld if there is demonstrated a public interest

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[7] See Toledo Newspaper Co. v. United States, 247 U.S. 402, 419 (1918).
[8] See Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).
[9] See Near v. Minnesota, 283 U.S. 697, 716 (1931).
[10] 249 U.S. 47 (1919).
[11] See Dennis v. United States, 341 U.S. 494, 510 (1951).
[12] See Lovell v. City of Griffin, 303 U.S. 444, 450-51 (1938) (by implication).
[13] 278 U.S. 63 (1928).
[14] N.Y. CIV. RIGHTS LAW § 53.
[15] 357 U.S. 449 (1958).
[16] See NAACP v. Alabama, 357 U.S. 449, 463 (1958).

sufficient to justify this effect.[17] In both cases the disclosure would have a deterrent effect on the members' exercise of their right of free association, but in the *Bryant* case, the Court found in the activities of the organization a danger of a substantive evil which the state could lawfully act to avert, while in the *NAACP* case, such a danger was not present.[18]

Statutes restricting the right to remain anonymous are not uncommon. Examples of such restrictions may be found in state [19] and federal [20] regulations of distribution of election campaign materials, and in federal statutes requiring the labeling of mail and identification of broadcasts of Communist organizations.[21] The Federal Lobbying Act,[22] compelling the disclosure of all persons employed for the purpose of influencing congressional legislation, has been sustained as a valid method of securing a vital national interest.[23] A statute requiring newspapers to furnish the names and addresses of officers and owners in order to secure second class mailing privileges [24] has been upheld.[25] It will be noted that the legislation in each of these cases is motivated by a substantial governmental interest which was to be protected, and further, that each has application only to expression of the class which was deemed a threat to that interest.

The purpose of the Los Angeles ordinance was to provide an individual, defamed by such literature, with a modicum of information about its origin and to insure the effective operation of the penal sanctions provided for abusing the constitutionally guaranteed rights.[26] To accomplish this, the distribution of handbills was prohibited unless they bore the name and address of the originator and the distributor. The ordinance imposes no other restrictions upon the content of such literature.[27] It is not violated even though the writing is libelous or obscene, provided the author and distributor acknowledge their responsibility therein. Conversely, where the handbill does not contain

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[17] See American Communications Ass'n v. Douds, 339 U.S. 382, 399-400 (1950).

[18] See People v. Talley, 332 P.2d 447, 452 (Cal. App. Dep't 1958) (concurring opinion): "The distinction . . . between the two [cases] seems to be that the members of N.A.A.C.P. are good guys and the members of Ku Klux Klan are wicked men."

[19] See, *e.g.*, N.Y. PEN. LAW § 781(b). The constitutionality of state election laws has been upheld by several state courts. State v. Freeman, 143 Kan. 315, 55 P.2d 362 (1936); State v. Babst, 104 Ohio St. 167, 135 N.E. 525 (1922); Commonwealth v. Evans, 156 Pa. Super. 321, 40 A.2d 137 (1944).

[20] 62 Stat. 724 (1948), as amended, 18 U.S.C. § 612 (1959).

[21] 64 Stat. 996 (1950), 50 U.S.C. § 789 (1959). The act was held valid in Communist Party of the United States v. Subversive Activities Control Bd., 223 F.2d 531 (D.C. Cir. 1954), *rev'd on other grounds,* 351 U.S. 115 (1956).

[22] 60 Stat. 839-42 (1946), 2 U.S.C. §§ 261-70 (1959).

[23] United States v. Harriss, 347 U.S. 612 (1954).

[24] 37 Stat. 553 (1912), as amended, 39 U.S.C. § 233 (1959).

[25] Lewis Publishing Co. v. Morgan, 229 U.S. 288 (1913).

[26] People v. Arnold, 127 Cal. App.2d 844, 273 P.2d 711, 713 (1954).

[27] *Ibid.*

the names and addresses of those responsible for it the ordinance is violated even though the subject matter is within the area of protected speech and otherwise immune from censure. The ordinance was not limited to unlawful handbills, but applied to "any handbill in any place under any circumstances." [28] Therein lies the constitutional objection. In order to accomplish its purpose of deterring and aiding in the punishment of abuses of the right freely to communicate by handbills, the ordinance imposed a restraint upon all occasions where it was desired to use them. The evil sought to be averted simply did not justify the measure adopted to avert it.[29]

It cannot be seriously doubted that such an ordinance would deter at least some writers and distributors. Anonymity clothes not only the lawbreaker, but also the spokesman of the unpopular viewpoint who fears the censure of business and social contacts, as well as the writer who simply wishes to avoid the public eye. The right of free expression cannot be said to be limited only to those who are so courageous or so deeply moved that they will act regardless of the consequences which might follow. The purpose of the ordinance could have been equally well served by providing additional penalties for literature of the offensive class if the author and distributor were not named therein. It is submitted, therefore, that the Court acted wisely in striking down an ordinance which encroached upon a fundamental freedom without any showing of real necessity for doing so.

CONSTITUTIONAL LAW—JURISDICTION—FOREIGN CORPORATION SUBJECTED TO SUIT ON BASIS OF SINGLE CONTRACT NOT VIOLATION OF DUE PROCESS.—Defendant, a foreign corporation engaged in the manufacture of house trailers, was sued on the theory of implied warranty on the basis of a single sale by a resident dealer. The defendant had granted the dealer an exclusive franchise, joined in filing documents for the dealer's license, reimbursed such dealer for one-half of advertising costs, drafted the dealer's conditional sales contracts, sent a warranty policy directly to the resident purchaser, furnished servicemen in an attempt to repair defects, and maintained correspondence with the dealer concerning the unsuitability of plaintiff's trailer. Service of process was made on the Secretary of State and notice to defendant was accomplished by ordinary mail pursuant to

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[28] LOS ANGELES, CAL., MUNICIPAL CODE § 28.06.

[29] "Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions." Schneider v. State, 308 U.S. 147, 161 (1939).