St. John's Law Review

Volume 13
Number 1 *Volume 13, November 1938, Number 1*

Article 11

Constitutional Law--Freedom of the Press--Fourteenth Amendment--Police Power (Lovell v. City of Griffin, 303 U.S. 444 (1938))

St. John's Law Review

the procedure but indicates that substance rather than form shall prevail. Each case will stand or fall upon its own merits and the determining factor will be whether a full hearing in a substantial sense has been granted.

R. M. T.

CONSTITUTIONAL LAW—FREEDOM OF THE PRESS—FOURTEENTH AMENDMENT—POLICE POWER.—In defiance of a city ordinance[1] prohibiting the distribution of literature of any kind within the city limits without first obtaining the prescribed permission, Alma Lovell circulated certain religious magazines and pamphlets.[2] She was arrested and her conviction was upheld in the highest court in her state.[3] On appeal to the United States Supreme Court, *held,* reversed. The ordinance is unconstitutional as abridging the freedom of the press guaranteed by the First and Fourteenth Amendments.[4] *Lovell* v. *City of Griffin,* 303 U. S. 444, 58 Sup. Ct. 666 (1938).

It would seem obvious that the ordinance under consideration—"that the practice of distributing * * * literature * * * of any kind without first obtaining written permission from the city manager * * * shall be * * * punishable as an offense against the City of Griffin,"—is an unwarranted encroachment upon the guaranteed freedom of the press.[5] Yet, surprisingly enough, although a person cannot ordinarily be restrained from publishing literature of any kind, such restraint has frequently been exercised by a strained extension of the doctrine of

---

is here to stay. There is one bright star left shining for the objectors. Administrative control is quasi-judicial, and in time it will become 'truly judicial in attitude, atmosphere, and spirit'." Dickinson, *The Fear of Bureaucracy* (1928) 14 A. B. A. J. 597.

[1] "That the practice of distributing * * * circulars, handbooks, advertising, or literature of any kind, * * *, within the city limits of the City of Griffin, without first obtaining written permission from the city manager of the City of Griffin, * * * shall be deemed a nuisance, and punishable as an offense against the City of Griffin." Instant case, p. 667.

[2] The magazine and pamphlet, called the *"Golden Age"*, set forth the gospel of the *"Kingdom of Jehovah"*. No permit was applied for because defendant regarded herself as sent "by Jehovah to do His work," and that such an application would have been "an act of disobedience to His commandment".

[3] 55 Ga. App. 609, 191 S. E. 152 (1937).

[4] (a) U. S. CONST. Amend. I. "Congress shall make no law * * * abridging the freedom of speech or of the press; * * *."

(b) U. S. CONST. Amend. XIV. "* * * No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; * * *."

[5] See Patterson v. Colorado, 205 U. S. 454, 462, 27 Sup. Ct. 556, 558 (1907); Near v. Minnesota, 283 U. S. 697, 713, 51 Sup. Ct. 625, 630 (1931); Grosjean v. American Press Co., 297 U. S. 233, 245, 56 Sup. Ct. 444, 447 (1936).

police power.[6] This is possible because the First Amendment places no definite restrictions on either the federal or the states' power to punish for abuses of the so-called "freedom of the press".[7]

This anomalous condition was first revealed in an Act passed by Congress in 1798.[8] The Act, passed primarily for the protection of the governing bodies, restrained not the liberty of the press, but punished instead the publishers of any false or malicious writings against the government, its functions, or its measures. In this wise was set down a precedent[9] which would later render less effective the Fourteenth Amendment,[10] which in turn was designed to make the First Amendment binding on the states.[11] This is clearly reflected in the adjudicated cases. It has been held that a state legislature may make unlawful, restrain, or forbid the publication of advertisements for the sale of lottery tickets,[12] the publication of any matter inciting or encouraging crime[13]—or dealing with the details of an execution for crime,[14] the use of profane language tending to disturb the public peace,[15] the privilege of photographing the accused against his will,[16]

---

[6] Anderson v. State, 69 Neb. 686, 96 N. W. 149 (1903); City of Milwaukee v. Kassen, 203 Wis. 383, 234 N. W. 352 (1931). See also notes 12–19, *infra*.

[7] "* * * the freedom of speech and of the press * * * secured by the Constitution does not confer an absolute right to speak or publish * * * or * * * prevent the punishment of those who abuse this freedom." Gitlow v. People of State of N. Y., 268 U. S. 652, 666, 45 Sup. Ct. 625 (1925).

[8] The Act made punishable "all unlawful combinations and conspiracies to oppose the measures of the government, or to impede the operations of the laws, or to intimidate and prevent, any officer of the United States from undertaking or executing his duty. The same Act further provided for a public presentation and punishment, by fine and imprisonment of all persons who should write, print, utter, or publish any false, scandalous, and malicious writing or writings against the government of the United States, or of either house of Congress, or of the President, with an intent to defame them, or bring them into contempt or disrepute, or to excite against them the hatred of the good people of the United States; or to excite them to oppose any law or act of the President in pursuance of law or his constitutional powers, or to resist, or oppose, or defeat any law; * * *." ACT OF 14TH JULY, 1798. C. 91.

[9] The Act was never declared unconstitutional but expired by its own limitation in March, 1801.

[10] See note 4 (b), *supra*.

[11] "* * * by the First Amendment it was meant to preclude the national government, and by the Fourteenth Amendment to preclude the states, from adopting any form of previous restraint upon printed publications or their circulation, * * *." Grosjean v. American Press Co., 297 U. S. 233, 249, 56 Sup. Ct. 444 (1936). But *cf.* Prudential Ins. Co. v. Cheek, 259 U. S. 530, 543, 42 Sup. Ct. 516, 522 (1922), wherein it was said, "Neither the Fourteenth Amendment nor any other provision of the Federal Constitution imposes upon states any restrictions respecting freedom of speech or liberty of silence, nor does it confer any right of privacy upon either persons or corporations."

[12] State v. McKee, 73 Conn. 18, 46 Atl. 409 (1900). See also State v. Sykes, 28 Conn. 225 (1859); Hart v. People, 26 Hun 396 (N. Y. 1882).

[13] People v. Most, 171 N. Y. 423, 64 N. E. 175 (1902). See also State v. Fox, 71 Wash. 185, 127 Pac. 1111 (1912).

[14] State v. Pioneer Press Co., 100 Minn. 173, 110 N. W. 867 (1907).

[15] State v. Warren, 113 N. C. 683, 18 S. E. 498 (1893).

[16] *Ex parte* Sturm, 152 Md. 114, 136 Atl. 312 (1927).

and the sale of publications tending to interfere with pending litigation.[17] In addition, the state, in the exercise of its "police power", may punish for utterances which are inimical to public welfare, tend to corrupt public morals, incite to crime, or disturb the public peace.[18]

In the light of the above,[19] it would appear that the greatest blessing derived from these Amendments is, in no small sense, psychological. In fact, one of the most eminent authorities on the subject [20] has observed "that the liberty of the press might be rendered a mockery and a delusion and the phrase itself a by-word, if, while every man was at liberty to publish what he pleased, the public authorities might, nevertheless, punish him for harmless publications."

Cognizant of the need for a free press and of the unlimited power of such a press upon public opinion, and at the same time fearful of the unfavorable consequences of any perversion of such power,[21] the framers of our Federal Constitution fashioned, as we have already seen, the First Amendment.[22] As a result, a man is free to print and

---

[17] State v. Lovell, 117 Neb. 710, 222 N. W. 625 (1929). See also *Ex parte* Lindsley, 75 Cal. App. 122, 241 Pac. 934 (1925).

[18] Gitlow v. People of State of N. Y., 268 U. S. 652, 45 Sup. Ct. 625 (1925). See N. Y. PENAL LAW §§ 160, 161, defining anarchy.

[19] See also State v. Faulds, 17 Mont. 140, 42 Pac. 285 (1895) (forbidding the publication of false and grossly inaccurate reports of court proceedings); State v. Van Wye, 136 Mo. 227, 37 S. W. 938 (1896) (forbidding the publication and sale of a newspaper devoted to scandal and stories of immoral conduct); People v. Apfelbaum, 251 Ill. 18, 95 N. E. 995 (1911) (making it unlawful for a physician to advertise under a false name). See also Toledo Newspaper Co. v. United States, 247 U. S. 402, 38 Sup. Ct. 560 (1918); Schenck v. United States, 249 U. S. 47, 39 Sup. Ct. 247 (1919); U. S. *ex rel.* Milwaukee Social Democratic Pub. Co. v. Burleson, 255 U. S. 407, 41 Sup. Ct. 352 (1921); Prudential Ins. Co. v. Cheek, 259 U. S. 530, 42 Sup. Ct. 516 (1922); Burkitt v. Beggans, 103 N. J. Eq. 7, 142 Atl. 181 (1928); City of Milwaukee v. Kassen, 203 Wis. 383, 234 N. W. 352 (1931).

[20] 2 COOLEY, CONST. LIM. (8th ed. 1927) 885.

[21] See 2 STORY ON THE CONSTITUTION (5th ed.) 643.

[22] An understanding of the history involved may be of some aid to the reader.—Prior to the Eighteenth Century in England, the press was primarily an organ of the crown. Besides prohibiting unlicensed publications, the king limited the number of printers and presses that each could employ. Only with the Revolution of 1688, and the ratification of the Bill of Rights, was this dictatorial policy repudiated,—thereby insuring for man the privilege to publish what he pleased, subject, however, to the consequences of the law. Nearly a century later a similar problem faced the framers of our Federal Constitution. Not content with the Articles of Confederation, they arranged for a Constitutional Convention. In the convention a proposition was moved to insert in the Constitution a clause that the "liberty of the press shall be inviolably preserved"; but it was rejected by a vote of six states against five. When the Constitution was finally drafted, the states were reluctant to ratify it until they were assured that the First Congress would draw up Amendments specifically granting to the people their inalienable rights. Accordingly the first ten Amendments were adopted in 1791.—For a more complete discussion see 4 BLACK. COMM. 152, n.; 2 STORY ON THE CONSTITUTION (5th ed.) 636; 2 COOLEY, CONST. LIM. (8th ed. 1927) 876; JOURNAL OF CONVENTION, p. 217.

circulate [23] what he pleases,—subject, however, to the police power of the state.[24] This is the blind spot of the Amendments in question—depending as they do upon arbitrary and changeable concepts woven from the nebulous pattern of police power.[25] It is true that "the right of the press to state public things and discuss them * * * as every other right enjoyed in human society, is subject to the restraints which separate right from wrong-doing," [26] but we must take care lest this fundamental right be destroyed by an over-zealous imposition of arbitrary restraints.[27]

R. J. M.

CONSTITUTIONAL LAW—FREEDOM OF WORSHIP—SALUTE TO THE FLAG.—Defendants were convicted under Section 627 of the Education Law for failure to send their daughter to the public school or any other suitable school. Defendants and their daughter were members of a religious association called "Jehovah's Witnesses". As such they believed that to salute the flag contravened the laws of God, quoting from the Bible, Exodus, Chapter 20, verses 4 and 5: "Thou shalt not make unto thee any graven image * * * thou shalt not bow down thyself to them * * *." They regard the regulation of the Commissioner of Education, under Section 712 [1] of the Education Law, whereby pupils in the public schools were required to salute the United States flag as a violation of their right to religious liberty and freedom of worship. Their defense is the unconstitutionality of such regulation. *Held,* the section does not violate the constitutional rights of the defendants. Saluting the flag is not a religious rite and therefore does not interfere with their right to freedom of worship. The Government was in lawful pursuit of its duty to inculcate patriotism. Laws and regulations enacted for such purposes are to be obeyed by

[23] People v. Armentrout, 118 Cal. App. Supp. 761, 1 P. (2d) 556 (1931) (Feedom of speech and press includes liberty of circulating and publishing; to "publish" ordinarily meaning to disclose, reveal, proclaim, circulate or make public. [CALIF. CONST. art. I, § 9].) *Ex parte* Jackson, 96 U. S. 727, 733 (1877). Liberty of circulating is as essential to the freedom of the press as liberty of publication; indeed, without the circulation, the publication would be of little value.

[24] See note 7, *supra.*

[25] See notes 12–19, *supra.*

[26] Toledo Newspaper Co. v. United States, 247 U. S. 402, 419, 38 Sup. Ct. 560 (1918).

[27] For other viewpoints see Deutsch, *Freedom of the Press and of the Mails* (1938) 36 MICH. L. REV. 703; Notes (1938) 13 ST. JOHN'S L. REV. 81, (1935) UNIV. OF CINC. L. REV. 265; (1935) 21 A. B. A. J. 595.

[1] N. Y. ED. LAW § 712: "It shall be the duty of the commissioner of education to prepare, for the public schools * * * a program providing for the salute to the flag * * *."