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Article 11

Recent Decision: Mandatory Identification Statute Held Unconstitutional

the burden of proving the defamatory meaning through extrinsic facts; but when such defamatory meaning is established, a presumption, rebuttable by the broadcaster, that the plaintiff was injured might arise. This would avoid imposing upon the plaintiff the almost impossible burden of proving special damages and yet, would provide the broadcaster with an opportunity to prove that the extrinsic facts were not widely known and hence, that the plaintiff was not damaged or that his damages were negligible.

Whatever rule a court may adopt concerning damages, it would appear that, in the public interest and in the light of modern communication, a court should rule either that all defamatory broadcasts are actionable per se or that, where a defamatory broadcast is defamatory only through extrinsic facts, a rebuttable presumption should arise that a plaintiff has been injured.

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Defendant was convicted of publishing books which contained no imprint of his name or the printer's name as required by the New York General Business Law. Section 330, Subdivision 2, provides that "every . . . publication printed or reprinted . . . and published in this state shall conspicuously have imprinted on the cover, title, or copyright page or at the end of the publication the true name and address of the publisher or printer." Section 331 makes a failure to carry out the provisions of the preceding section a misdemeanor. The Appellate Division reversed the conviction, *holding* the statute void on its face as an unconstitutional interference with the right of free speech. *People v. Mishkin,* 17 App. Div. 2d 243, 234 N.Y.S.2d 342 (1st Dep't 1962) (per curiam).

The freedoms of speech and press are secured against federal infringement by the first amendment and are protected from abridgement by state action through the fourteenth amendment.[1] These freedoms are not absolute and unlimited.[2] Certain types of speech such as obscenity and defamation have been held to be beyond constitutional protection.[3] These freedoms are among those which are acknowledged as having a "preferred position" in relation to other constitutional freedoms,[4] although some dissent has been voiced as to the validity of this concept when "it carries the thought . . . that any law touching communication is infected with presumptive invalidity."[5]

[1] See, *e.g.*, Near v. Minnesota, 283 U.S. 697, 707 (1931); Gitlow v. New York, 268 U.S. 652, 666 (1925).

[2] See, *e.g.*, Whitney v. California, 274 U.S. 357, 371 (1927); Gitlow v. New York, 268 U.S. 652, 666-68 (1925); Schenck v. United States, 249 U.S. 47 (1919).

[3] See Roth v. United States, 354 U.S. 476 (1957) (obscenity); Beauharnais v. Illinois, 343 U.S. 250 (1952) (libel); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

[4] See Marsh v. Alabama, 326 U.S. 501, 509 (1946); Thomas v. Collins, 323 U.S. 516, 529-30 (1945); Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943).

[5] Kovacs v. Cooper, 336 U.S. 77, 90 (1949).

Therefore, a statute or ordinance seeking to limit or restrict freedom of speech or press under the state's power to protect the public health, safety and welfare must be engendered by a "clear and present danger" and justified by a compelling public interest in combating a substantial evil.[6] Furthermore, except in highly unusual circumstances,[7] these freedoms are favored in that no expression, damaging as it may be, can be prohibited in advance of its utterance, though of course such utterance may be subsequently penalized.[8]

It is well established that handbills, books and other printed literature fall within the general protection given to the freedoms.[9] The regulation of handbill distribution by municipal governments has presented difficulties for both legislative bodies and courts for many years.[10] It was not until the late 1930's however, when the Supreme Court decided the case of *Lovell v. City of Griffin*,[11] that any significant blow was dealt to the thousands of municipalities attempting to regulate, or completely proscribe, handbill distribution. The city of Griffin, Georgia, had enacted an ordinance prohibiting the distribution of any type of handbill within the city without the permission of the city manager. A unanimous Court held the ordinance void on its face since it violated the rights of free speech and press by subjecting the handbill to prior licensing and censorship. Although the opinion in the *Griffin* case seemed broad and clear, the rule set down by the Court was emasculated by several state courts,[12] which subsequently upheld similar handbill ordinances, restricting the *Griffin* case to a narrow interpretation. The doubt raised by these conflicting decisions was short-lived when the Supreme Court, in *Schneider v. State*,[13] overruled these state decisions. Efforts were made to distinguish these ordinances from the one held void in the *Griffin* case.[14] The chief grounds urged for distinction were that the

Mr. Justice Frankfurter, concurring, discussed the historical development of the concept of "preferred freedoms," deploring the "ways of mechanical jurisprudence through the use of oversimplified formulas." *Id.* at 96.

[6] Dennis v. United States, 341 U.S. 494, 513 (1951); Schenck v. United States, 249 U.S. 47, 52 (1919).

[7] Near v. Minnesota, *supra* note 1, at 715-16 (obstruction of recruiting service; advocating rebellion in wartime; publication of troop sailing dates in wartime).

[8] *Id.* at 713-23.

[9] "The liberty of the press is not confined . . . in its historic connotation [and] comprehends every sort of publication which affords a vehicle of information and opinion." Lovell v. City of Griffin, 303 U.S. 444, 452 (1938).

[10] Municipal governments have reacted to the handbill probem in various ways. Though some ordinances are concerned with size and content, the most common area of regulation involves distribution, *e.g.*, the ordinance may either completely or partially prohibit handbill distribution, or it may prescribe various limitations, such as the licensing of the distribution. In sustaining many of the early ordinances, the courts concluded that handbills were an annoyance to the public, a health and safety menace, a vehicle for fraud and other criminal activities, a possible stimulus for breaches of the peace, and that they imposed a heavy financial burden on the municipality responsible for keeping the streets free from litter. For an analysis of the early ordinances and the litigation they precipitated, see Lindsay, *Council and Court: The Handbill Ordinances, 1889-1939,* 39 MICH. L. REV. 561 (1941).

[11] 303 U.S. 444 (1937).

[12] People v. Young, 33 Cal. App. 747, 85 P.2d 231 (Super. Ct. 1938); Commonwealth v. Nichols, 301 Mass. 584, 18 N.E.2d 166 (1938); Town of Irvington v. Schneider, 121 N.J.L. 542, 3 A.2d 609 (Ct. Err. & App. 1939); Milwaukee v. Snyder, 230 Wis. 131, 283 N.W. 301 (1939).

[13] 308 U.S. 147 (1939).

[14] Lovell v. Griffin, *supra* note 9.

ordinances had been passed to prevent either frauds, disorder or littering, and that two of the ordinances applied only to certain city areas.[15] The Court held that although the various ordinances involved were of somewhat narrower scope than that in the *Griffin* case, nevertheless handbill distribution on public streets, without prior discretionary licensing requirement, was implicit in the right of free speech. The Court pointed out that where legislative abridgments of the right are asserted, the court should be astute to examine the effect of the challenged legislation.

> 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. And so, as cases arise, the delicate and difficult tasks falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.[16]

The Court further pointed out that there were other ways to accomplish these legitimate aims without abridging freedom of speech and press.

The decision in *Martin v. City of Struthers*[17] clearly pointed out how far the Court would go in safeguarding the right of free dissemination of ideas against the conflicting interest of local governments in protecting their citizens from annoyance. In that case, the ordinance forbade the ringing of doorbells in order to summon the occupant of a residence to the door to receive a handbill. The city attempted to counter the free speech attack by showing that many of its residents were employed at night and that constant doorbell ringing would disturb their rest. Also, since criminals often posed as house-to-house canvassers, a prohibitory ordinance would clearly aid in crime prevention. Mr. Justice Black, writing for the majority, pointed out that the dangers implicit in allowing free handbill distribution could be controlled by other legal methods which would not restrict the fullest enjoyment of free speech. The test formulated was 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 occurence, justifies it.[18] Implicit in that 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 objectional class.[19]

In the leading case of *Talley v. California*,[20] which was the primary authority in the instant case, the Supreme Court found the prerequisite of disclosure of authorship to be the equivalent of a general prohibition, thus uniting the heretofore distinct lines of decision concerning handbill distribution and the right to anonymity. The

[15] The ordinance in the *Schneider* case covered both handbill distribution and canvassing and vested inquisitorial power in the chief of police who had to satisfy himself of the good character of the applicant and the bona fides of the cause he professed before a permit would be issued. The ordinances in the *Young, Nichols* and *Snyder* cases restricted handbill distribution on public streets and were more closely related to the problem of littering.

[16] Schneider v. State, 308 U.S. 147, 161 (1939).

[17] 319 U.S. 141 (1943).

[18] See Dennis v. United States, 341 U.S. 494, 510 (1951).

[19] See Lovell v. City of Griffin, 303 U.S. 444, 450-51 (1938).

[20] 362 U.S. 60 (1960).

right to remain anonymous as part of the guarantees of the fourteenth amendment has had but a short history before the Supreme Court. In *New York* ex rel. *Bryant v. Zimmerman,*[21] a New York statute[22] 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. *NAACP v. Alabama* ex rel. *Patterson*[23] in 1958, was the first decision in which the right to remain anonymous was upheld. That case and *Bates v. City of Little Rock*[24] both struck down state attempts to require public identification of the membership of the NAACP. In both cases the petitioners attacked the application of the disclosure requirements by showing that the effect would be restraint upon their exercise of free association because of threats of economic and even physical reprisals.[25]

In the *NAACP* case,[26] Alabama brought suit to oust the NAACP from the state because of its failure to comply with a statute[27] requiring foreign corporations to qualify before doing business in the state. The state secured a court order requiring the production of certain records, including the names of all Alabama members, alleging that the records were necessary to answer the NAACP's denial that it was conducting intrastate business. The Supreme Court held that compelled disclosure of the membership lists was so related to an individual member's right to freedom of association and such a deterrent to the perfectly peaceful discussion of public matters of importance as to be violative of the fourteenth amendment. The state's asserted purpose in requiring the disclosure was held not to justify the deterrent effect on free association, since there was no relevant correlation between the names of members and the conduct of intrastate business within the meaning of the statute.

The decision in *Bates*[28] was based squarely on the *NAACP* case. There, the custodian of the local NAACP branch refused to produce the names of all local members as required by a city license tax ordinance. Here again, no compelling justification was found for the deterrence of free association which disclosure of the membership lists would cause.

The *Talley* decision[29] extends the protection of anonymity from the field of association generally to that of a specific utterance. This presents no conceptual difficulties, for once the necessity for such protection is accepted, there can be little doubt that it applies equally to both situations.[30] Fear of retaliation can be just as effective a deterrent

[21] 278 U.S. 63 (1928).
[22] N.Y. CIV. RIGHTS LAW § 53.
[23] 357 U.S. 449 (1958).
[24] 361 U.S. 516 (1960).
[25] *Id.* at 523-24; NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462 (1958).
[26] NAACP v. Alabama *ex rel.* Patterson, *supra* note 25.
[27] ALA. CODE tit. 10, §§ 192-98 (1940).
[28] Bates v. City of Little Rock, 361 U.S. 516 (1960).
[29] Talley v. California, 362 U.S. 60 (1960).
[30] The most often advanced rationale for protection of anonymous speech as a necessary corollary to the constitutional right of free speech is based on the proposition that it is the unpopular idea that needs protection. See CHAFEE, FREEDOM OF SPEECH IN THE UNITED STATES 1-36 (1948). Where there is danger of retaliation against the advocate of the unpopular idea, his right to speak is invaded by a requirement that he acknowledge

to an individual author as to a member of an unpopular association. In the *Talley* case, a Los Angeles city ordinance[31] prohibited the distribution of any handbill not carrying upon its face the name and address of the person printing and distributing it. The Supreme Court reversed a conviction under this ordinance, holding it void on its face as an abridgement of freedom of speech and press. The Court based its decision partially upon prior cases invalidating ordinances which prohibited the distribution of handbills without licenses[32] or which prohibited any public distribution of handbills.[33] In finding that the ordinance imposed a restriction upon free speech in the same manner as excessively broad statutes banning publication or imposing prior restraint, the Court recognized that freedom from public identification is essential to free speech. This is apparent from the fact that identification was the only requirement imposed by the ordinance. The holding was specifically restricted to the broad ordinance at issue, leaving open the question of a statute limited in its application to the specific evil which it was designed to suppress.[34]

In the instant case, the New York court struck down a statute similar to that in the *Talley* case. Here, the statute required disclosure of the name and address of the publisher or printer of every publication printed in the state. The Appellate Division indicated that before a state can require such a disclosure, some grounds for the restriction of free expression must either be found in the statute or be otherwise established. No such grounds appeared in the statute.[35] This holding was also specifically restricted to the broad statute at issue.

Statutes restricting the right to remain anonymous are not uncommon. Examples of such restrictions may be found in state[36] and federal[37] regulation of distribution of election campaign materials, and in federal statutes requiring the labeling of mail and identification of broadcasts of Communist organizations.[38] The Supreme Court has up-

authorship. This is due to the deterrent effect of the possible threat of retaliation which a requirement of disclosure facilitates. For a comprehensive study of "the right to association," see 4 RACE REL. L. REP. 207 (1959).

[31] 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. . . ."

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

[33] Schneider v. State, 308 U.S. 147 (1939).

[34] Talley v. California, *supra* note 29, at 64.

[35] The District Attorney suggested that the statute might be found constitutional if its application were limited to obscene publications, for there would be a justifiable purpose in facilitating the discovery of the publisher. The Court rejected this contention, stating that the statute itself is not so limited and that there was nothing to indicate that this was the legislative intent. People v. Mishkin, 17 App. Div. 2d 243, 244, 234 N.Y.S.2d 342, 343-44 (1st Dep't 1962). However, it appears that this was precisely the legislative intent. The bill was introduced at the request of the joint legislative committee to study the publication of and dissemination of offensive and obscene material. N.Y. SESS. LAWS 1956, Ch. 945, § 3; N.Y. LEG. ANN. 48-49 (1956). *Cf.* the Report of the Joint Legislative Committee to Study the Publication of Comics, N.Y. LEG. ANN. 137-38 (1955).

[36] 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).

[37] 62 Stat. 724 (1948), as amended, 18 U.S.C. § 612 (1958).

[38] 64 Stat. 996 (1950), 50 U.S.C. § 789 (1959).

held a provision of the Federal Post Office Appropriation Act[39] requiring, as a condition precedent to the entering of newspapers as second-class matter in the mails, that the names and addresses of the editors of the paper and other information be disclosed. The rationale behind this decision,[40] however, is that the low postal rates given to second-class mail constitute a privilege granted by the federal government, and as such, are subject to regulation. Likewise, the requirement of the Federal Regulation of Lobbying Act[41] that a lobbyist register and give the names and addresses of the persons who sponsor him has been reconciled with the freedom of speech and press, as a valid method of securing a vital national interest. The validity of this statute was upheld in *United States v. Harriss,*[42] where the Court held that Congress has sufficient interest in protecting itself from having the voice of the public drowned out by special interest groups to pass such regulations. It should be noted that the legislation challenged in each of these cases was motivated by a substantial governmental interest which was to be protected, and further, that each had application only to expression of the class which was deemed to be a threat to that interest.

Although the rationale of the opinions in the instant[43] and *Talley*[44] cases is unclear, several modes of analysis, each with a varying degree of plausibility, are presented. In concluding that the *Talley* case fell precisely under the ban of prior decisions that prohibited all circulation,[45] the Court did not distinguish between *Lovell v. City of Griffin,*[46] a prior restraint case, and *Schneider v. State,*[47] decided only after the Court in *Schneider* had engaged in a weighing process. This, therefore, may be reasonably construed as a holding that any ordinance that inhibits the circulation of all books or pamphlets, regardless of the contents, would be found to be void without consideration of the public interest motivating the ordinance. Such an approach would explain the Court's failure to mention the Lobbying Act and second-class mail privilege cases, which did not involve restrictions as comprehensive as that in *Mishkin* and *Talley.*[48] Although it is otherwise difficult to explain the weight given to *Lovell,* it is unlikely that the Court intended to formulate such a new doctrine sub silentio, or that it intended to change its approach to cases like *Schneider,* in which the Court's opinion was reached only

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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).

[39] 37 Stat. 553, 554 (1912), as amended, 39 U.S.C. § 233 (1959).

[40] Lewis Publishing Co. v. Morgan, 229 U.S. 288, 308 (1913).

[41] 60 Stat. 839-42 (1946), 2 U.S.C. §§ 26-70 (1959).

[42] 347 U.S. 612 (1954).

[43] People v. Mishkin, 17 App. Div. 2d 243, 234 N.Y.S.2d 342 (1st Dep't 1962).

[44] Talley v. California, 362 U.S. 60 (1960).

[45] *Id.* at 63.

[46] See text accompanying note 11 *supra.*

[47] See text accompanying note 14 *supra.*

[48] The Lobbying Act does not suffer from overbroadness, since every lobbying activity is relevant in weighing the political pressures, whereas not every book or handbill is defamatory, obscene or fraudulent. United States v. Harriss, 347 U.S. 612, 625 (1954). The act requiring mail identification was not upheld because of an interest in preventing the circulation of offensive matter, but rather because lower postal rates constituted a privilege to which incidental conditions could be attached. Lewis Publishing Co. v. Morgan, 229 U.S. 288, 314 (1913).

after a careful weighing of the degree to which free speech was restricted against the extent of the public interest motivating the restriction. This is further confirmed by the fact that the *Mishkin* case cited only *Talley* and *Schneider* without mentioning *Lovell.*

Another possibility is that the Court, in referring to the earlier cases, is incorporating the weighing process used in *Schneider,* implicitly holding that the blanket restriction in that case is analogous to the identification requirement of the instant and *Talley* cases, and that there is no more compelling justification here. In accord with this theory, it would seem that in cases involving broad restrictions, the Court requires a very substantial interest as the justification and that in the absence of such a compelling interest, there is no reason for an express weighing process. This explanation, however, is not very reasonable in view of the criticism of the majority opinion in the *Talley* case by the concurring and dissenting opinions in that case which took issue with the majority's failure to weigh the conflicting interests. Furthermore, the opinion in *Lovell,* as previously noted, does not involve a weighing process.

In expressly declaring that they were not passing on the validity of an ordinance[49] or statute[50] limited to prevent specific evils, the opinions in the *Mishkin* and *Talley* cases may be viewed as suggesting that the statutes were invalidated because there were means of achieving the purpose of identifying those responsible for obscene or defamatory publication which would be less restrictive of free speech. This would seem to imply a weighing of the increased restriction on free speech inherent in a broad ordinance as compared with a narrower ordinance, against the increased efficacy in eliminating the evil which would be provided by a broad ordinance. However, the absence of any indication that the Court intends to weigh the relative efficiency and restrictiveness of varying ordinances against the apparent difficulty of effectively identifying persons responsible for the dissemination of defamatory or obscene literature by less inclusive means, suggests that this interpretation is not likely. Thus, if the Court is requiring a more limited ordinance when it would be impractical, and perhaps impossible, to draft one that will effectively eliminate the undesired materials, the opinions might be interpreted as adopting the principle that any restriction that includes within its purview inoffensive as well as offensive material is invalid, without regard to the decreased effectiveness or total ineffectiveness of a more limited ordinance. This analysis, of course, would explain the Court's failure to discuss the Lobbying Act case[51] since that act was not applicable to any situations not within its objectives.

Depending on how the *Talley* and *Mishkin* cases are interpreted, they may cast doubt on the validity of state statutes requiring identification of campaign materials and other limited statutes. If the statutes in *Talley* and *Mishkin* were invalidated because they were applicable to all handbills and all books,[52] then the election statutes may be distinguished on the ground that they are applicable to a much smaller class of communication. However, if the Court is

[49] Talley v. California, *supra* note 44, at 64.
[50] People v. Mishkin, *supra* note 43, at 244, 234 N.Y.S.2d at 344.
[51] United States v. Harriss, 347 U.S. 612 (1954).
[52] See text accompanying note 48 *supra.*

invalidating all restrictions on free speech that include within their scope inoffensive as well as offensive material, without regard to the diminished effectiveness of a narrower statute, then it would seem that these election laws are violative of free speech, since they require identification of all campaign material, even though the vast majority of it is not objectionable. If, on the other hand, the Court's decision is based on some implicit or incorporated weighing process, then it merely serves to indicate the great importance which is ascribed to anonymity as an essential element in the exercise of first amendment rights. Then the election laws could be upheld by emphasizing the paramount public interest in safeguarding the election process.[53] This, as well as the possibility that future cases may involve compelling public interests advanced in justification of laws that control the distribution of inoffensive along with offensive material, makes it desirable that future decisions interpreting these cases not view them as having eliminated the weighing approach from the law governing the exercise of first amendment rights.

The scope of protection of anonymity remains to be seen, since the cases recognizing it have involved statutes which were excessively broad or disclosure requirements not reasonably related to the purposes they were asserted to serve. The main problem in applying precedents such as *Talley* and *Mishkin* will be the determination of when discosure requirements are sufficiently specific to avoid unconstitutionality. There is no doubt that the requirement that a person be identified with his expression is in itself a substantial restriction on freedom of speech and press. It is obvious that in a great many situations, people will speak anonymously that which they would dare not utter if their identity were known. One has only to look back into history to see that anonymous written material has played an important role in the formation of the political ideas and principles of both the United States and Great Britain. *The Federalist* of Madison, Hamilton, and Jay,[54] the letters and handbills of Thomas Paine,[55] and the even now anonymous *Letters to Junius*[56] are graphic examples of the value of anonymously written materials. The restriction in the *Mishkin* case is not necessary to prevent danger to the state; neither are those concerning libel, false advertising or fraud. They are already subject to criminal penalties, and it is difficult to see how such a statute would help prevent obscenity. A person who is anonymously publishing obscenity will not comply with this statute at the risk of being subjected to greater criminal penalties. This statute, therefore, merely increases the penalty on persons convicted of such acts; an increase which, if necessary, could be added to the existing penalties for such crimes without restricting the freedoms of speech and press as this statute did. Even if it be argued that there would be compliance with the statute, then undoubtedly, allowing for the free distribution of anony-

[53] *Cf.* United Pub. Workers v. Mitchell, 330 U.S. 75, 95-96 (1947); Burroughs v. United States, 290 U.S. 534 (1934).

[54] These papers not only had much to do with the eventual adoption of our Constitution, but they have also been called "the best commentary on the principles of government which has ever been written." 5 WRITINGS OF THOMAS JEFFERSON 52 (Ford ed. 1895).

[55] For discussion of these works of Paine, see BLEYER, HISTORY OF AMERICAN JOURNALISM 90-93 (1927).

[56] For discussion of these writings, see BLEYER, *op. cit. supra* note 55, at 23, 79.

mous materials will somewhat hinder civil and criminal action against those responsible for libelous, fraudulent or obscene literature. Yet, in balancing the conflicting interests in this area, it is important not to overlook the nature of the individual who desires to speak his mind on a controversial subject.