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Freedom of Speech and Press - Anonymous Communication

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CASE COMMENT

FREEDOM OF SPEECH AND PRESS – ANONYMOUS COMMUNICATION

The defendant was convicted of violating a city ordinance[1] which prohibited the distribution of any handbill that did not indicate on its face the name and address of the author and identity of the individual sponsoring its distribution. The purpose of the handbill was to urge a boycott against certain merchants who would not offer equal employment opportunities to persons of various races, and to solicit membership in a consumer organization to fight this evil. The defendant urged that the ordinance violated his freedom of speech and press. The Superior Court of Los Angeles affirmed the conviction[2] and the United States Supreme Court granted certiorari.[3] The Supreme Court held that the ordinance was unconstitutional as an abridgment of freedom of speech and press secured against state invasion by the fourteenth amendment. *Talley v. California*, 80 Sup. Ct. 536 (1960).

Freedom to communicate for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the due process clause of the fourteenth amendment.[4] It is commonplace that the printed or spoken word may not be the subject of prior restraint or subsequent punishment unless it creates a substantial manifested or anticipated evil that the state has power to prevent.[5]

The policy toward restrictive "handbill" legislation[6] has been set forth in numerous Supreme Court decisions. An ordinance forbidding any distribution of circulars, handbills or literature of any kind within a city limit without the permission of the city manager is an unlawful abridgment of freedom of the press.[7] So also are ordinances which forbid, without exception, any distribution of handbills on the streets,[8] even where this distribution involves a trespass upon private property in a company-owned town[9] or in a government-owned housing development.[10] Religious sects may not be obstructed under a broad statute from exercising the privilege of

1 Los Angeles, Calif. Municipal Code § 28.06 (1932), which reads: "No person shall distribute any handbill in any place under any circumstances, which does not have printed on the cover, or 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 handbill shall also appear thereon." See Denver, Colorado, Revised Municipal Code § 352.13 (1951) (Distribution of Handbills).

2 332 P.2d 447 (Cal. App. 1958).

3 360 U.S. 928 (1959).

4 Cantwell v. Connecticut, 310 U.S. 296 (1940); Thornhill v. Alabama, 310 U.S. 88 (1940); Schneider v. Irvington, 308 U.S. 147 (1939). Gitlow v. New York, 268 U.S. 652 (1925) (The First amendment is secured against state infringement by the fourteenth). See also Corwin, The Constitution and What it Means Today, 252 (11th ed. 1954).

5 Sweezy v. New Hampshire, 354 U.S. 234 (1957) (compelling interest of the state). *But see* Dennis v. United States, 341 U.S. 494 (1951) (emphasis placed upon serious danger); Bridges v. California, 314 U.S. 252 (1941). Schenck v. United States, 249 U.S. 47 (1919) (opinion by Holmes, J.).

6 The "Handbill" cases, *infra* notes 7, 8, 9, 10, 11. See also the list of preferred position cases identified by Frankfurter in his opinion in Kovacs v. Cooper, 336 U.S. 77 (1949).

7 Largent v. Texas, 318 U.S. (1943); Schneider v. Irvington, 308 U.S. 147 (1939); Lovell v. City of Griffin, 303 U.S. 444 (1938).

8 Jamison v. Texas, 318 U.S. 413 (1943). Schneider v. Irvington, 308 U.S. 147 (1939).

9 Marsh v. Alabama, 326 U.S. 501 (1946).

10 Tucker v. Texas, 326 U.S. 517 (1946).

door-to-door distribution[11] or solicitation,[12] though door-to-door peddling and distribution of purely commercial advertising matter could be lawfully restrained.[13] In *Schneider v. Irvington*,[14] efforts were made to distinguish four broad restrictive ordinances from those previously struck down, on the grounds of prevention of frauds, disorder and littering within the city limits.[15] In refusing to uphold the ordnances, the Court pointed out that there were other means available to accomplish these aims without abridging personal freedom of communication.[16]

The broad ordinance in the instant case falls squarely within the ban of the previous "handbill" cases and is declared void because of unlimited restriction of distribution.[17] The ordinance did not restrict what could be said, who could say it, or where it could be said. The only condition to free distribution of the matter was the identity of the publisher and distributor which created the possibility that someone might hesitate to publish if he must identify himself with his own statements.

The Court had before it, in resolving the familiar problem of individual freedom versus state police power,[18] the question of whether the freedom to communicate also contains the freedom to communicate anonymously.

The Supreme Court has at least three times considered the "right to remain anonymous."[19] While the Court has mentioned the guaranty of freedom of speech in the course of its opinions, the decisions have rested primarily upon the constitutional right of freedom of association,[20] the anonymity in these cases pertaining to privacy within a group. The earliest case, *Bryant v. Zimmerman*,[21] upheld a New York statute which required secret organizations such as the Ku Klux Klan to file membership rosters with the state.[22] Two more recent decisions, *NAACP v. Alabama*[23] and *Bates v. City of Little Rock*[24] (both completely opposite from Zimmerman) held that a state may not compel members of a lawful group engaged in the dissemination of ideas to be publicly identified. The Court reasoned that identification and fear of reprisal might deter perfectly peaceful discussions of public importance.[25]

11 Martin v. City of Struthers, 319 U.S. 141 (1943).
12 Murdock v. Pennsylvania, 319 U.S. 105 (1943).
13 Beard v. City of Alexandria, 341 U.S. 622 (1951); Valentine v. Chrestensen, 316 U.S. 52 (1942).
14 Schneider v. Irvington, 308 U.S. 147 (1939).
15 Schneider v. Irvington, 308 U.S. 147 (1939) (ordinances from Milwaukee, Wisc.; Worchester, Mass.; Los Angeles, Calif. and Irvington, N.J. were tried together on the basis of unlimited restriction of distribution).
16 Schneider v. Irvington, *supra* note 14 at 162.
17 Jamison v. Texas, 318 U.S. 413 (1943); Schneider v. Irvington, 308 U.S. 147 (1939); Lovell v. City of Griffin, 303 U.S. 444 (1938).
18 Thomas v. Collins, 323 U.S. 516, 529 (1945) (the court recognized the frequency with which this problem arises and the delicacy of its solution).
19 Bates v. City of Little Rock, 80 Sup. Ct. 412 (1960) (disclosure of membership lists would interefere with members' freedom of speech and association); NAACP v. Alamaba, 357 U.S. 449 (1958) (NAACP not required to divulge membership); Communist Party v. Subversive Activities Control Bd., 223 F.2d 531 (D.C. Cir. 1954) *rev'd on other grounds*, 351 U.S. 115 (1956) (statute compelling the Communist party to submit membership lists . . . clear and present danger); United States v. Rumely, 345 U.S. 41 (1953) (concurring opinion, lists of puurchasers should not be required to be divulged); Bryant v. Zimmerman, 278 U.S. 63 (1928) (statute requiring disclosure of membership lists valid).
20 American Communications Ass'n. v. Douds, 339 U.S. 382 (1950) (opinion suggested identification as members of a grouup could have coercive effects on constitutional rights).
21 Bryant v. Zmmerman, 278 U.S. 63 (1928); *State Control Over Political Organization*, 66 Yale L.J. 545 (1957).
22 The Court construed that the statute exempted labor unions and benevolent associations as beneficial, but the potentialities of evil secret societies to render harm brought them necessarily within state control.
23 NAACP v. Alabama, 357 U.S. 449 (1958).
24 Bates v. City of Little Rock, 80 Sup. Ct. 412 (1960).
25 Bates v. City of Little Rock, *supra* note 24 at 416. See also DeJonge v. Oregon, 299 U.S. 353 (1937) (the government remains responsible to the will of the people and peaceful change is effected).

The distinguishing feature of this group of cases appears to be that the degree of privilege is contingent upon the nature of the group, the Ku Klux Klan being more of a threat to peaceful societal existence than the other group.[26]

Justice Black, a known crusader of human liberty,[27] in writing the majority opinion in the instant case, decided that the right of anonymous communication exists, but he has not limited the extent of that right. Surely the Court does not propose to announce a new absolute, namely, that even those groups which have no freedom to speak, or those types of speech which are not privileged can now be uttered anonymously. Since all justices agree, despite the first amendment, that freedom of speech is not absolute, the question becomes one of deciding what and when speech is not protected by the amendments.[28] There is no clear cut rule to determine this nor should there be any mechanical device to dispense justice in such cases.[29] Viewed in the light of past decisions, the court must be merely clarifying that which has been in existence since the adoption of the Bill of Rights—where one is free to speak he is also free to speak anonymously.[30] The effect of the instant holding will remain to be seen in future cases where government regulated communication arises.[31]

Dissenting Justice Clark, joined by two others,[32] sought to limit the "handbill" doctrine to its present bounds by assertng that the Constitution says nothing about freedom of anonymous speech. Further, the Supreme Court itself has upheld an act of Congress requiring any newspaper using second class mail to publish the names of the editor, owner and stockholders.[33] It has upheld the Federal Lobbying Act[34] requiring those engaged in direct lobbying activities to divulge their identities. Statutes in a majority of states prohibit the distribution of anonymous publications that refer to political candidates.[35] Similarly, the Supreme Court has held constitutional city ordinances which prohibit the distribution of leaflets and door-to-door canvassing for purely commercial purposes, the use of sound trucks being operated on the city streets using instruments to emit

26 Judge Swain, Los Angeles Superior Court, concurring in the instant case: "The distinction between the two seems to be that the members of the NAACP are good guys and the members of the Ku Klux Klan are wicked men," 332 P.2d at 452 (Cal. App. 1958). See also United States v. Rumely, 345 U.S. 41 at 57 (1953) the Court did not consider the constitutional question but the concurring opinion, and said, "Once the government can demand of a publisher the names of the purchasers of his publications, the free press as we know it disappears."

27 Justices Black and Douglas, and perhaps Chief Justice Warren, are known as the libertarian element of the Supreme Court, Berns, Freedom, Virtue and the First Amendment, 196 (1957).

28 Kingsley Books Inc. v. Brown, 354 U.S. 436 (1957); American Communications Ass'n v. Douds, 339 U.S. 392 (1950).

29 The line between speech unconditionally guaranteed and speech which will be legitimately regulated, suppressed and punished is finely drawn, Speiser v. Randall, 357 U.S. 513 (1958); Corwin, *Bowing Out "Clear and Present Danger,"* 27 Notre Dame Law. 325 (1952) (the status of the danger rule is subject to doubt). American Communications Ass'n v. Douds, 339 U.S. 382 (1950) ("clear and present danger" is not a mechanical test in every case touching the first amendment).

30 Anonymous writings are far from uncommon in American tradition. See Bleyer, Main Currents in the History of American Journalism 56-57, 79-82, 102 (1927).

31 See generally Mehler, *Constitutional Free Speech v. State Police Power,* 33 DICTA 145 (1956).

32 Justices Frankfurter and Whittaker join dissenting. Justice Frankfuruter is part of the well-known liberalist element of the Supreme Court, Berns, Freedom, Virtue and the First Amendment 197 (1957).

33 Lewis Publishing Co. v. Morgan, 229 U.S. 288 (1913).

34 2 U.S.C. §§ 261-70 (1952); United States v. Harriss, 347 U.S. 612 (1954) (but the statute is narrowly construed).

35 Thirty-six states have statutes prohibiting anonymous distribution of materials relating to elections; see Colo. Rev. Stat. § 49-21-39 (1957), which states, "Whoever willfully publishes or distributes any card, pamphlet, circular, poster, dodger, advertisement or other writing relating to or concerning any person who has publically declared his intention to seek election . . . which does not contain the names of the persons, associations [etc.] . . . responsible for the publication or distribution of the same . . . shall . . . be fined . . . (no Colorado decisions). See also Kan. G. S. § 25-1714 (1949), held constitutional in State v. Freeman, 143 Kan. 315, 55 P.2d 362 (1936).

"loud and raucous noises,"[36] and publications containing fraudulent, deceitful, libelous words that cause injury.[37] Ordinances prohibiting obscene statements[38] and false advertising[39] also have been sustained. It was said that Talley's handbill designed to injure a businessman was no more comportable with the first amendment than these. The city was merely acting in the public welfare.

The cases cited on both sides can clearly be distinguished. Each of the "handbill" cases involved a broad ordinance proscribing distribution of all handbills or leaflets, not limiting the matter to that of a commercial or possibly injurious content. The restriction by broad sweep also silenced individuals or groups seeking to further an idea by distribution of material solely devoted to information or public protest.[40]

Those cases which upheld seemingly more restrictive ordinances than in the *Talley* case, dealt with specific legislation within the power of the state to control. The legislation was pointed at a particular type of communication leaving little doubt of the evil or prospective evil sought to be prevented.[41] Clearly, the *Talley* case should not be included with this group unless those dissenting are ready to acknowledge that all speech is to be state regulated.

The purpose of the ordinance provision in the instant case is fairly obvious; it was to make it easy for the city or any individual injured by a publication to place the blame on a particular individual.[42] It is suggested that the prohibition of Talley's anonymous publication in no way restricts his freedom of expression, but merely imposes on the advocate the responsibility necessarily associated with a well-ordered society,[43] the theory being that we should have nothing to hide from one another.[44]

This view overlooks or disregards the long history behind the basic constitutional freedoms[45]—the fact that free discussion of the problems of society is a cardinal principle of Americanism[46] and that the validity of our civil and political institutions depends upon such discussion. Accordingly, a function of free speech and free press under our system of government is to invite dispute. "Its highest purposes are sometimes served when a condition of unrest creates a dissatisfaction with conditions as they are or even stirs people to anger."[47] It was this sort of speech that the Bill of Rights was designed to protect. Those utterances of a purely orthodox nature need no protection.

With this in mind, justification for the "right to remain anonymous" becomes apparent. Few would rigorously assert beliefs if

36 Kovacs v. Cooper, 336 U.S. 77 (1949).
37 Beauharnais v. Illinois, 343 U.S. 250 (1952); Chaplinsky v. New Jersey, 315 U.S. 568 (1942); Near v. Minnesota, 283 U.S. 697 (1931); Robertson v. Baldwin, 165 U.S. 275 (1897).
38 Roth v. United States, 354 U.S. 476 (1957).
39 Valentine v. Chrestensen, 316 U.S. 52 (1942) (a state may regulate commercial advertising in the public interest).
40 Bridges v. California, 314 U.S. 252 (1941). See also Thornhill v. Alabama, 310 U.S. 88 (1940).
41 United States v. International Union, 352 U.S. 567 (1957), the regulation measure must be narrowly drawn to meet the evil that the government can control.
42 People v. Talley, 332 P.2d 447, 453 (Cal. App. 1958).
43 Beauharnais v. Illinois, 343 U.S. 250 (1952), 291 ("Ordered Liberty," Jackson, J. dissenting); State v. Freeman, 143 Kan. 315, 55 P.2d 362 (1936).
44 We still believe in a secret ballot; some of the most worthwhile literature in American history was written under a pen name. Bleyer, Main Currents in the History of American Journalism, 56-57, 79-82, 102 (1927).
45 Near v. Minnesota, 283 U.S. 697, 813-23 (1931). See generally Douglas, We the Judges 307-28 (1956); See also 5 Encyc. Soc. Sci. 455-59.
46 Pennekamp v. Florida, 328 U.S. 331 (1946).
47 Termuriello v. Chicago, 337 U.S. 1, 4 (1949).

life and lives of family members would be endangered thereby, or if ill will and hostility of the community would be the inevitable result.[48]

It may be urged that if the individual is not required to reveal himself when he speaks and does not accept the responsbility for what he says, the community will not be able to protect itself from injurious frauds, libels and obscenity that would result.[49] The aims of the Los Angeles ordinance may have indeed been worthy ones, but the fact that the liberties may be abused by a miscreant few does not make any less the necessity of immunity of the individual from previous restraint.[50] It must be remembered that the Bill of Rights was added to the original Constitution in the conviction that too high a price may be paid even for the unhampered enforcement of the law and that, in its attainment, other social objects of a free society should not be sacrificed.

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BAR BRIEFS

REPORT OF LEGAL FEE REVIEW COMMITTEE TO THE COLORADO BAR ASSOCIATION

Gentlemen:

The Colorado Bar Association, at its 1959 annual meeting, authorized the creation of a Legal Fee Review Committee, to serve the public, clients and attorneys, in the adjustment of controversies concerning legal fees, without resort to the costly, protracted and drastic remedies previously available. That Committee has been organized recently and is now in functioning order.

The services of the Committee are available to all clients of all lawyers actively engaged in practice in Colorado, whether members of the Association or not and to the lawyers themselves.

The Committee is composed of one member of the Colorado Bar Association from each judicial district in Colorado appointed by the President of the Association. To insure continuity, one-third of the Committee serves for one year, one-third for two years, and one-third for three years. It meets as determined by the Committee or upon call of the Chairman, who is appointed for a period of one year by the President of the Association.

The Committee functions in the following manner. A complaint in a controversy over legal fees is filed by either the client or the attorney with the Colorado Bar Association. The Secretary immediately notifies both parties that the matter will be held in abeyance for 30 days to allow the parties an opportunity to settle their differences. Upon notice by either party that the controversy has not been settled within the 30-day period, it is then referred to the Com-

48 NAACP v. Alabama, 357 U.S. 449, 462 (1958); People v. Talley, 332 P.2d 447, 453 (Cal. App. 1958) (dissenting opinion).

49 The state contended that the ordinance was aimed at prevention of "fraud, deceit, false advertising, negligent use of words, obscenity and libel," 80 Sup. Ct. 536, 539 (1960).

50 Near v. Minnesota, 283 U.S. 697, 720 (1931).