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# A Legal Leper

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# A Legal Leper

By FRANK SWANCARA*

*"The foxes have holes, and the birds of the heaven have nests; but the Son of man hath not where to lay his head."* Luke 9:58.

With one exception, recent rulings and opinion of the Supreme Court of the United States show that that tribunal protects the constitutional right of free speech regardless of the character, popularity, or criminality of the person appealing for protection. Charles Smith, alone, was told, in effect, that he "hath not where to lay his head" in any judicial asylum.

Angelo Herndon's case received consideration,[1] and three of the Justices would have granted relief. Dirk De Jonge was convicted under the Criminal Syndicalism Law of Oregon, and was able to obtain a reversal of the state court's judgment.[2]

In the first of the recent series of cases involving municipal ordinances affecting freedom of speech, where the Supreme Court took jurisdiction, the victim of city action and state decision was Alma Lovell who regarded herself as sent "by Jehovah to do his work." She was convicted in Griffin, Georgia, of the violation of a city ordinance which prohibited the distribution of "literature of any kind" without a permit. The evidence was that without a permit she distributed matter in the nature of religious tracts. The Supreme Court, reversing the state court, held the ordinance void on its face as abridging freedom of the press.[3]

At Irvington, New Jersey, Clara Schneider, one of "Jehovah's Witnesses," called at residences at all hours of the day and night, offering booklets. She was convicted of the violation of an ordinance which prohibited "canvassing" and distribution of circulars without a permit from a police official. The highest court of the state, attempting to distinguish *Lovell v. Griffin*, affirmed. The Supreme Court of the United States held the ordinance void as to defendant's conduct.[4] Companion cases were disposed of in the same opinion, the court reversing a judgment of conviction of Kim Young who had distributed handbills advertising a proposed discussion of the war in Spain, and reversing the conviction of Harold F. Snyder who had distributed circulars while acting as a labor picket in Milwaukee. The same opinion reverses the Massachusetts court which upheld the conviction of two women under

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[1]Herndon v. Georgia, 295 U. S. 441.
[2]De Jonge v. Oregon, 299 U. S. 353.
[3]Lovell v. Griffin, 303 U. S. 444.
[4]Schneider v. State of New Jersey, 60 S. Ct. 146.

a handbill ordinance. The state tribunal thought itself supported by *Davis v. Massachusetts*,[5] which apparently held that a city could legislate as it pleases with reference to the use of its streets, particularly as to who may, and when, use a street for public speaking.

Prior to *Lovell v. Griffin*, and in 1934, Charles Smith appealed to the Supreme Court, complaining of an ordinance affecting oral discussion on the streets, but that tribunal only said: "The appeal is dismissed for the want of a substantial federal question."[6] The "question" was actually the same, practically if not identically, with the issue involved in the 1939 ordinance cases where the court took jurisdiction "on account of the importance of the question."[7]

Charles Smith, now editor of *The Truth Seeker* (N. Y.), undertook publicly to defend the materialistic philosophy of Clarence Darrow and was, as a result, convicted "of expounding atheism in the street without . . . a permit."[8] The ordinance did not require a permit where one sought to speak on other secular topics. The Court of Appeals of New York upheld the ordinance on the theory that the legislative discrimination was really a valid classification because, it was said, a discussion of Smith's subject might arouse "passion, rancor and malice" on the part of listeners. The Supreme Court of New Jersey later followed the reasoning of that decision, citing it, in holding that Norman Thomas could not compel the Director of Public Safety of Jersey City to issue a permit to hold what would be "a socialist meeting in Journal Square."[9] The California court used the Smith case as a prop in upholding the ordinance involved in *Young v. People*.[10]

The courts found no other objection to Smith's possible speeches than that they might arouse "passion, rancor and malice" in his non-agreeing listeners. Countless other persons have irritated, even angered, hearers, and were protected either by law or by non-existence of any applicable law. Moreover, if no "rancor" is produced by an address, no one objects to its delivery, in which event no constitutional or other legal protection is needed.

The Special Committee on the Bill of Rights, of the American Bar Association, as Friends of the Court, filed a brief in the *Hague* case and there said:

> "So long as the purpose of the meeting is lawful, . . . law-abiding speakers and their supporters should not be deprived of the great American institution of assemblage in the open air be-

[5]167 U. S. 43.
[6]Smith v. New York, 292 U. S. 606.
[7]Note, 60 S. Ct. 146, 147.
[8]Peo. v. Smith, 263 N. Y. 255, 188 N. E. 745.
[9]Thomas v. Casey, 121 N.J.L. 185, 1 A. 2d 866.
[10]—— U. S. ——; s.c. 85 P. 2d 231.

cause other persons are intolerant and ready to violate the law against assault and battery. Such a doctrine would mean that a citizen loses his constitutional rights because his opponent threatens to commit crimes.

"Surely a speaker ought not to be suppressed because his opponents propose to use violence. It is they who should suffer for their lawlessness, not he. Let the threateners be arrested for assault, or at least put under bonds to keep the peace."

The Jersey City ordinance prohibited any "public assembly" on a street without a permit from the Director of Public Safety. The Supreme Court of the United States held this ordinance void on its face because it provided for previous administrative censorship of the exercise of the right of speech and assembly in appropriate public places.[11]

Frankfurter, J., took no part in *Hague v. C.I.O.*, possibly because of former connection with the *American Civil Liberties Union*, one of plaintiffs. Butler, J., dissented on the authority of *Davis v. Massachusetts*. That case had become a *stare decisis* teat for state courts. The Supreme Court rightly weaned itself because—

"The Davis case dammed the flow of a stream of precedents that had the earmark of giving a reasonable easement of assemblage in public places."[11a]

The *Davis* decision was not wholly bad, for the ordinance there upheld provided that "*no* person shall . . . make any public address, discharge any cannon . . . "except with a permit. In *People v. Smith* the ordinance singled out only those persons intending to expound "atheism," thus making a patent discrimination. That is obviously worse, constitutionally, than an ordinance which only allows, but does not require, administrative discrimination, such as the Jersey City ordinance which was invoked against C.I.O. speakers. It is bad enough to leave speakers at the mercy of police "discretion," where officials are impartial, but it is worse where pressure groups intervene, as they did in Jersey City, to influence the way in which such discretion is to be exercised, and worse yet is a legislative fiat, exhibited in Smith's case, which bars the expression of some ideas, but not of others, in a public place.

The highest tribunal in Massachusetts, mother of the *Davis* opinion, recently said:[12]

"Freedom of the press is a necessity in our political system. It must be sedulously guarded against subtle encroachments under the guise of specious pretexts."

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[11]Hague v. C.I.O., 307 U. S. 496. The brief, above quoted, was filed in s.c. 101 Fed. 2d 774.

[11a]Clark, J. in C.I.O. v. Hague, 25 F. Supp. 127, 151. But a good case, refusing to follow the Davis case, is Anderson v. Tedford (Fla.), 85 So. 673, 10 A.L.R. 1481. As to street speaking cases in general, see notes, 10 A.L.R. 1483 and 25 A.L.R. 114.

[12]Commonwealth v. Nichols, 18 N. E. 2d 166.

Less fragrant is the "but" of this judicial cigar, for the Court adds:

> "But like other constitutional rights it is subject to reasonable rules formulated to serve the public interest . . ."

In spite of aversion to "specious pretexts," *Lovell v. Griffin* was distinguished and rules were found to uphold the handbill ordinance.

Sacred, and "a necessity," is the right of free speech if it is to be exercised according to prevailing public opinion or by spokesmen for a pressure group, but it must be subordinated to "the public interest" if a lone, unpopular speaker is claiming the right. Courts have had solicitude for the rights of the Salvation Army,[13] and for labor pickets,[14] but in some cases, where a solitary "Socialist" complained, it seems that they but gave lip-service to free speech in the abstract while administering poison in the concrete.[15]

Many state courts had acquired the habit of repeating, parrot-like, formulas to uphold legislation impairing freedom of speech. One court would scratch the back of another, that is, approvingly cite or quote a case in a different state. The opinions often seem like essays on "the police power," and create sufficient fog to obscure constitutional rights. No lone agitator, nor speaker for a minority group, should complain of any court's power to declare legislation unconstitutional, for oppression has resulted from failure to use such power, and unpopular minorities will be the chief beneficiaries of the recent Supreme Court action, reversing state decisions, and disapproving, if not preventing, "administrative censorship."[16]

It might be added, parenthetically, that censorship is not always enforced by arrest and prosecution. In at least one case it was done by having the fire department use an engine and hose to wash a speaker off the street.[16a] The New Jersey courts upheld this practice.

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[13]Chicago v. Trotter, 136 Ill. 430, 26 N. E. 359; Anderson v. Wellington, (Kan.) 19 Pac. 719; In re Garrabad, 54 N. W. 1104.

[14]Peo. v. Harris, 104 Colo. 386. But see City v. Snyder, 230 Wis. 131, 283 N. W. 301; Peo. v. Young, 85 P. 2d 231, both of which had to be reversed by the U. S. Supreme Court.

[15]Buffalo v. Till, 182 N. Y. S. 418; Fitts v. Atlanta, 121 Ga. 567, 49 S. E. 793; Peo. ex rel. v. Atwell, 232 N. Y. 96, 133 N. E. 364.

[16]C.I.O. v. Hague, 25 F. Supp. 127, 150 uses that phrase. Some state courts recognize that a street-speaking ordinance giving "uncontrolled discretion" to officials to grant or refuse permits to speak is "unreasonable" and may be void on that account. Anderson v. Tedford (Fla.), 85 So. 673, 10 A.L.R. 1481; Pound, J., in Peo. ex rel. v. Atwell, 232 N. Y. 96, 133 N. E. 364.

[16a]Harwood v. Trembley, 97 N. J. L. 173, 116 A. 430. Here the mayor feared that a Socialist speaker might debate "the propriety of the World War" and thereby irritate war veterans whereby "a riot might ensue." The case was lately cited against Norman Thomas. Thomas v. Casey, 1 Atl. 2d 866. The fire-hose or water-cure case was also cited against a Communist who distributed circulars on a highway. Almassi v. Newark, 150 Atl. 217. Same case was also used as a thorn upon reformers issuing pamphlets "which criticized the municipal administration." Coughlin v. Sullivan, 126 Atl. 177. It was a "see, also," in Coughlin v. Chicago Park Dist., 4 N. E. 2d 1, 8.

Plainly the recent Supreme Court decisions in favor of the C.I.O., the "Jehovah's Witnesses," and the labor pickets, overrule, among others, the state decisions against Charles Smith and those against the "Socialists." Smith's legal efforts and futile appeal have been herein discussed to point out, and protest against, judicial non-action possibly caused by some lone litigant's obscurity or unpopularity.

When it is observed that the Supreme Court gave asylum to Ozie Powell, alleged rapist,[17] Dirk De Jonge, Communist,[18] and Joe Strecker,[19] and several "Jehovah's Witnesses," acknowledging that each had a federal question, one may well wonder why the court should have made of the lone Charles Smith a legal leper, giving him a judicial snub in the form of a fiat that he had no "substantial federal question." The fact that Smith was an "atheist" should have made no difference, for Mr. Justice Holmes had kind words for Rosika Schwimmer, another "atheist."[20] When the Socialist, Thomas F. Doyle, violator of a street-speaking ordinance, appealed, his federal question was perceived, but a jurisdictional question intervened.[21]

Principles of free speech which Charles Smith, in 1934, offered to the builders of constitutional law, were brought again by the C. I. O., and its ally *pro tem*, the A. B. A. Committee, and this time accepted, as evidence in *Hague v. C.I.O.*

*"The stone which the builders rejected*
*Is become the head of the corner."*

[17]Powell v. Alabama, 287 U. S. 45.
[18]De Jonge v. Oregon, 299 U. S. 353.
[19]Kessler v. Strecker, 397 U. S. 22.
[20]U. S. v. Schwimmer, 279 U. S. 644, 653. Mrs. Schwimmer was described as "an absolute atheist" in Macintosh v. U. S., 42 Fed. 2d 845, 849.
[21]Doyle v. Atwell, 261 U. S. 590.

## Petit Jury Dispensed With

Major Goodman, of the Clerk's office, states that the Judges have voted to dispense with the petit jury for the last two weeks in May, and for the entire month of November during this year.

## Notice to Attorneys

The Secretary's office desires to emphasize as strongly as possible the absolute necessity that members of the bar associations pay their dues promptly. There are many members in arrears, and it costs stationery, postage and the time of the officers of the association to continue to check delinquents and send notices. Attorneys are requested to send in their checks without further delay.