Kentucky Law Journal

Volume 49 | Issue 3 Article 9

1961

Constitutional Law--Freedom of the Press--Municipal Ordinance Restricting Distribution of Handbills

James H. Jeffries III
University of Kentucky

Judgments, where remainders are created in unborn children or where property is limited to the heirs of a living person, an action which would permit the unknown future owners later to re-open a contest as to the rights in the subject matter would be against a public policy which seeks certainty of title and marketability of property.[15] In face of this case, one would wonder what reliance Missouri lawyers might put in the Missouri Bar's *Title Standard 10:*

> Where a judgment or decree affecting the title to real estate has been entered of record for more than 31 years and appears in the abstract, but the remainder of the action either is not shown, or is incompletely shown, and where such judgment or decree gives full information as to the status of parties and the nature of the action, which is sufficient upon which to base an opinion as to the validity of the proceedings in question, the proceedings shall be presumed to be valid and binding as to all matters recited in the judgment or decree, and such showing shall be accepted as sufficient, unless something affirmatively appears therein, showing lack of jurisdiction of either the parties or the subject.

S. Roy Woodall, Jr.

CONSTITUTIONAL LAW—FREEDOM OF THE PRESS—MUNICIPAL ORDINANCE RESTRICTING DISTRIBUTION OF HANDBILLS—Petitioner distributed handbills in Los Angeles urging a boycott against specified merchants who carried products of manufacturers alleged to be discriminatory toward racial minorities in their employment practices. The handbills carried only the name of "National Consumers Mobilization." Petitioner was prosecuted under a city ordinance prohibiting distribution, in any place and under any circumstances, of handbills which did not have printed on them the true names and addresses of the author, distributor and sponsor.[1] Petitioner was convicted, fined $10 and exhausted his remedies by appeal to the Appellate Department of the Superior Court for the County of Los Angeles which affirmed the conviction.[2] That court rejected petitioner's seasonable contention

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[15] §87, comment *a* (1942).

[1] City of Los Angeles, Calif., Municipal Code §28.06 provides:
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.

[2] People v. Talley, 172 Cal. App. 797; 332 P. 2d 447 (1958).

that the ordinance violated his freedom of speech and press in contravention of the first and fourteenth amendments to the federal constitution, whereupon certiorari was granted. *Held:* Reversed. The ordinance was declared unconstitutional as an abridgment of freedom of speech and press, three justices dissenting. *Talley v. California,* 362 U.S. 60 (1960).

The Court discussed the history of the federal handbill rule as announced in *Lovell v. City of Griffin*[3] and found the present ordinance to be invalid within that rule unless saved by the qualification that identified handbills might be lawfully distributed. Finding, historically, that anonymous literature has been beneficial to many worthy causes, the Court concluded that the requirement of identification and fear of reprisal might deter peaceful discussion of important public matters, analogous to the principle of the *N.A.A.C.P.* cases,[4] and declared the ordinance void on its face.

Once it had been established that the first amendment prohibitions applied to the states by virtue of the fourteenth amendment,[5] and that review of municipal ordinances came within the purview of the Supreme Court,[6] there remained the difficulty of determining the scope of such freedoms, *i.e.,* drawing the line between liberty and license. Prior to the *Lovell* case municipal ordinances regulating handbills appear to have fallen into three categories:[7] First, those which prohibited any distribution of any literature;[8] second, those restricting the manner of distribution;[9] and third, those restricting or prohibiting certain types of literature.[10]

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[3] 303 U.S. 444 (1938).

[4] Bates v. City of Little Rock, 361 U.S. 516 (1960); N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958).

[5] Near v. Minnesota, 283 U.S. 697 (1931); Gitlow v. New York, 268 U.S. 652 (1925).

[6] Home T. & T. Co. v. Los Angeles, 227 U.S. 278 (1912); Raymond v. Chicago Union Traction Co., 207 U.S. 20 (1907).

[7] 5 U. Chi. L. Rev. 675 (1938).

[8] City of Chicago v. Schultz, 341 Ill. 208, 173 N.E. 276 (1930) (invalidated); People v. Armstrong, 73 Mich. 288, 41 N.W. 275 (1889) (invalidated as unreasonable); Anderson v. State, 69 Neb. 686, 96 N.W. 149 (1903) (ordinance upheld as within police power); Dziatkiewicz v. Maplewood, 115 N.J.L. 37, 178 Atl. 205 (1935) (upheld); Milwaukee v. Kassen, 203 Wis. 383, 234 N.W. 352 (1931) (upheld).

[9] San Francisco Shopping News Co. v. South San Francisco, 69 F. 2d 879 (9th Cir. 1934); Sieroty v. City of Huntington Park, 111 Cal. App. 377, 295 Pac. 564 (1931); Goldblatt Bros. Corp. v. East Chicago, 211 Ind. 621, 6 N.E. 2d 331 (1937); Allen v. McGovern, 12 N.J. Misc. 12, 169 Atl. 345 (1933); Philadelphia v. Brabender, 201 Pa. 574, 51 Atl. 374 (1902).

[10] Sieroty v. City of Huntington Park, *supra* note 9; People v. St. John, 108 Cal. App. 279, 288 Pac. 53 (1930); Wettengel v. Denver, 20 Colo. App. 552, 39 Pac. 343 (1895); Commonwealth v. Kimball, 13 N.E. 2d 18 (Mass. 1938); Almassi v. City of Newark, 8 N.J. Misc. 420, 150 Atl. 217 (1930).

Lovell obviously invalidated the first class of ordinances, but just how far its authority extended into the other classes was uncertain. Eighteen months later, as if to lay aside all doubt, the Court decided *Schneider v. State*,[11] a collection of cases involving four municipal ordinances which fell into both the latter classes, and held that *Lovell* governed. *Schneider* not only plugged the loopholes left by the *Lovell* rule, but also strengthened a doctrine first suggested in *United States v. Carolene Products Co.*[12] *Carolene* hinted, in a now famous footnote, that legislative abridgment of the freedoms of speech and press would not enjoy the same presumption of constitutionality normally accorded other municipal and state legislation.

In *Lovell, Schneider* and *Jamison v. Texas*[13] the Court seemingly ignored the "bad tendency" test laid down in *Pierce v. United States*,[14] which amounted to a test of the reasonableness, under the fourteenth amendment, of the legislation which sought to correct a substantive evil by expressly interfering[15] with free speech. Instead the Court invalidated on the basis of prior restraint amounting to censorship and/or on the objection to the broad, unlimited scope of the restrictive ordinances. Of course, both of these objections could be viewed as variations of the reasonableness test; but the Court's emphasis seemed to be on a weighing of the interests involved: the community's interest in the restraint versus the interest, both societal and individual, in the maintenance of the freedom. Such an interpretation was borne out by the later decisions in *American Communications Ass'n, CIO v. Douds*[16] and *Dennis v. United States*[17] which explicitly adopted the weighing of interests test in first amendment cases.[18]

In 1940, *Cantwell v. Connecticut*[19] held that a state may by general and non-discriminatory legislation regulate the times, the places and

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[11] 308 U.S. 147 (1939).
[12] 304 U.S. 144 (1938).
[13] 318 U.S. 413 (1943).
[14] 252 U.S. 239 (1920).
[15] In Gitlow v. New York, *supra* note 5, the Court refused to apply the "clear and present danger" test of Schenck v. United States, 249 U.S. 47 (1919), because the interfering statute in *Schenck* was a non-speech statute (an interference with speech under the Federal Espionage Act of 1917, which did not mention speech), whereas the New York Criminal Anarchy law in *Gitlow* expressly restricted speech. Presumably the analogy is applicable to *Lovell* and *Schneider* wherein the offending ordinances explicitly restricted freedom of the press.
[16] 339 U.S. 382 (1950).
[17] 341 U.S. 494 (1951).
[18] See Goldberg, "Current Limitations on Governmental Invasion of First Amendment Freedoms," 13 Ohio St. L.J. 237, 261 (1952).
[19] 310 U.S. 296 (1940).

the *manner* of solicitation and speech (and by inference, written speech) upon its streets. In 1942, *Valentine v. Chrestensen*[20] held that a municipality might prohibit the distribution upon any street or public place of commercial handbills and advertising matter even though the reverse side of the handbill carried a political protest. In 1951, *Breard v. Alexandria*[21] held that uninvited door-to-door canvassing could be completely prohibited by a city as an invasion of privacy. With these exceptions, *Lovell* and its companion cases comprised the hand bill law until the Court decided that Los Angeles' ordinance "falls precisely under the ban of our prior cases. . . ."[22]

Justice Harlan, concurring in *Talley*,[23] was unwilling to accept the majority contention that the ordinance was void on its face, but voted to reverse because he felt that the city failed to show the requisite degree of necessity "to furnish a constitutionally acceptable justification for the deterrent effect on free speech which this all-embracing ordinance is likely to have."[24]

In a vigorous dissent by Justice Clark, in which Justices Frankfurter and Whittaker joined, the majority decision is criticised on four grounds: (1) the decision abandons the weighing of interests test and disregards the city's alleged interest in restraining fraud, deceit, false advertisement, obscenity and libel; (2) the decision has the effect of shifting the burden of proof to the proponents of the ordinance; (3) the concept of a constitutional freedom of anonymity is contrary to the concept embodied in Congressional regulation of newspapers' second-class mailing privileges,[25] federal regulation of lobbying,[26] and the various state corrupt practices acts prohibiting anonymous publications in respect to political campaigns and elections; and, 4) the decision is not consistent with the regulation of handbills and solicitation permitted in *Valentine* and *Breard, supra.* It is this writer's conviction that all four objections are valid.

First, the majority summarily categorized the ordinance as class one, above, as all-prohibitive with the minor exception of identified handbills. This is an exercise in semantics. A more reasonable classification would be class three, above, a classification of the ordinance as one prohibiting only one isolated type of handbill, *i.e.*,

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[20] 316 U.S. 52 (1942).
[21] 341 U.S. 622 (1951).
[22] Talley v. California, 362 U.S. 60, 63 (1960).
[23] *Id.* at 66.
[24] *Id.* at 67.
[25] Post Office Appropriations Act of 1912, §233, 37 Stat. 533, 39 U.S.C. §233 (1952).
[26] Federal Regulation of Lobbying Act, 60 Stat. 841 (1946), 2 U.S.C. §267 (1952).

those which are anonymous. By its abrupt and arbitrary labeling of the ordinance, the Court gives short shrift to Los Angeles' avowed intention to inhibit false and misleading advertising, libel and obscenity and does damage to the healthy weighing of interests which ought to determine the extent of the freedom.

Second, the Court equates the case with the *N.A.A.C.P.* cases,[27] which is an improper comparison. In the latter cases the petitioners, in attacking the legislation requiring disclosure, sustained their burden of proof by offers of incontroverted evidence that identification in the past had led to harassment, threats of bodily harm and fear of community hostility and economic reprisal, whereas "Talley makes no showing whatever to support his contention that a restraint upon his freedom of speech will result from the enforcement of the ordinance."[28] In holding for Talley on the basis of his bare contention of infringement of first amendment rights the Court has, in effect, placed the burden upon the respondent city to show the necessity for the ordinance. This curious shifting of the burden of proof follows the line hinted at in *Speiser v. Randall*[29] where the Court concluded:

> [W]e hold that when the constitutional right to speak is sought to be deterred by a State's general taxing program, due process demands that the speech be unencumbered until the State comes forward with sufficient proof to justify its inhibition.

Third, even though the inflammatory Stamp Act of 1765 required that the name of the publisher appear on every newspaper, the same is required by modern postal regulations[30] which were ruled constitutional in *Lewis Publishing Co. v. Morgan.*[31] *New York ex rel. Bryant v. Zimmerman*[32] held that New York might properly require a chapter of the Ku Klux Klan to identify its members. A judge who heard Talley's primary appeal[33] compared this case with *N.A.A.C.P. v. Alabama*[34] and was led to remark:

> We have no clear-cut decision by the U.S. Supreme Court on the supposed right to publish anonymously; two of their cases which may bear on the question are conflicting. . . . The distinction which Mr. Justice Harlan draws between the two 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.[35]

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[27] Cases cited note 4 *supra.*
[28] Talley v. California, *supra* note 22, at 69.
[29] 357 U.S. 513, 528 (1958).
[30] Post Office Appropriations Act of 1912, §233, 37 Stat. 533, 39 U.S.C. §233 (1952).
[31] 229 U.S. 288 (1913).
[32] 278 U.S. 63 (1928).
[33] People v. Talley, 172 Cal. App. 797, 332 P. 2d 447 (1958).
[34] 357 U.S. 449 (1958).
[35] People v. Talley, 172 Cal. App. 797, ——, 332, P. 2d 447, 452 (1958).

When the *Talley* decision is compared with *Cantwell, Breard,* and *Valentine, supra,* it is small wonder that the courts and legislatures are hard put to determine just where the fine and somewhat erratic line is drawn.

In conclusion, it may be that under the circumstances presented there should be a constitutional freedom of anonymity and that the Court reached the proper result. However, it is submitted that the method whereby this result was reached has not served to clarify constitutional problems and has posed a significant threat to the weighing of interests test.

James H. Jeffries III