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State Licensing of the Distribution of Literature and Freedom of the Press and Religion

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judicial determination, hurried on by the centrifugal force of the demand for a readjustment of labor's status which began a decade or more ago, continues to swing in labor's favor. When it is to spend itself, and reach a stable position—the *via media* of employer-employee-third party relationships—only time and the judges themselves can tell.[62]

STATE LICENSING OF THE DISTRIBUTION OF LITERATURE AND FREEDOM OF THE PRESS AND OF RELIGION†

Striking a balance between the legitimate exercise of a state's police power and the protection of constitutional liberties is perhaps one of the most delicate operations which the Supreme Court is called upon to perform. The state interest to be served by the exercise of the police power is an obvious and justifiable consideration. Where the state interest involves a fundamental need, the Court seems inclined to permit the state a greater latitude.[1] Thus, the state's

Wagon Drivers Union v. Meadowmoor Dairies, 312 U. S. 287 (1941); Milk Wagon Drivers Union v. Lake Valley Farm Prod. Co., 311 U. S. 91 (1940); Thornhill v. Alabama, 310 U. S. 88 (1940).

60. "In the circumstances of our times, the dissemination of information concerning the facts of labor union disputes must be regarded as within that area of free discussion that is guaranteed by the Constitution." Murphy, J., in Thornhill v. Alabama, 310 U. S. 88, 95 (1940).

61. 312 U. S. 321, 326 (1940).

62. Since the completion of this article, the United States Supreme Court has decided, in a case brought before the Court on a writ of certiorari from the Court of Appeals of New York [Wohl v. Bakery & Pastry Drivers Union, 284 N. Y. 788, 31 N. E. (2d) 765 (1940)] that: ". . . one need not be in a 'labor dispute' as defined by state law to have a right under the Fourteenth Amendment to express a grievance in a labor matter by publication unattended by violence, coercion, or conduct otherwise unlawful or oppressive." Bakery & Pastry Drivers, etc. v. Wohl, 314 U. S. 701, 62 Sup. Ct. 816, 818 (1942).

In this case the Supreme Court has determined that the right of peaceful picketing in industrial disputes is guaranteed by the Fourteenth Amendment and may not be restrained regardless of the degree of interest of the parties to the controversy. The legality of peaceful picketing in a particular case therefore becomes a question of constitutional interpretation. A finding of "unity of interest" in a "labor dispute" becomes irrelevant as far as the ultimate question of the right to picket as an exercise of free speech is concerned. What then becomes of the law of "secondary boycott"? [Goldfinger v. Feintuch, 276 N. Y. 281, 11 N. E. (2d) 910 (1937).] Of what effect are the provisions of the anti-injunction statute guaranteeing the right of peaceful picketing if it can be established that a "labor dispute" exists under the statute? *Cf.* also in this regard, A. F. of L. v. Swing, 312 U. S. 321, 326 (1941).

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1. See Mr. Justice Frankfurter: "We are dealing with an interest inferior to none in the hierarchy of legal values." Minersville School District v. Gobitis, 310 U. S. 586, 595 (1940).

interest in self-protection empowers it to declare criminal the publication of certain language deemed by the legislature to be inimical to the state's survival.[2] The same consideration permits a state to require a course in military science as a condition upon which free education will be granted.[3] Religious practices may be outlawed, if the legislature considers such practices to be socially undesirable institutions.[4] And similarly, the state's interest in national unity enables the state to require observance of the allegiance pledge ceremony as a condition upon which free education will be granted.[5]

But even where fundamental state needs are involved, safeguards for constitutional liberty are required. Thus where the advocacy of subversive doctrines is made criminal, a conviction under such a statute may be sustained only by proof of advocacy of such doctrines, and not by a showing of association with an organization known to espouse such doctrines.[6]

Where the state interest served is of lesser moment, greater safeguards may be judicially required for the protection of constitutional liberties, and the police power may be more restricted. It is submitted that, while the last statement appears to summarize the trend of the Court's decisions, the language of the decisions does not always reveal such a conscious philosophy concerning the matter. The broad language of Holmes, J.,[7] quoted with approval by Mr. Justice White in 1897, is illustrative: "For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house."[8] Such language formulates in terms of property rights the requirement of a license from a city official as a condition precedent to speaking on the public streets. And such language therefore appears to overlook the conflict between a state's interest in regulating traffic on its streets, and the individual's constitutional rights of free speech and assembly. It would seem, however, that some of the state courts qualified the broad language quoted above. For some state courts appear to have required that the issuance of such licenses must be made to depend only upon considera-

2. Gitlow v. New York, 268 U. S. 652 (1925); Whitney v. California, 274 U. S. 357 (1927).

3. Hamilton v. Regents, 293 U. S. 245 (1934).

4. Reynolds v. United States, 98 U. S. 145 (1878). Indeed, the Reynolds case drew a distinction between religious practices with which the government could interfere, and religious beliefs with which it could not. *Id.* at 166. Also *cf.* Davis v. Beason, 133 U. S. 333 (1890); Mormon Church v. United States, 136 U. S. 1, 50 (1889); and see Coleman v. City of Griffin, 302 U. S. 636 (1937).

5. Minersville School District v. Gobitis, 310 U. S. 586 (1940).

6. De Jonge v. Oregon, 299 U. S. 353 (1937); Stromberg v. California, 283 U. S. 359 (1931); Herndon v. Lowry, 301 U. S. 242 (1937); and see Thornhill v. Alabama, 310 U. S. 88 (1940).

7. Commonwealth v. Davis, 162 Mass. 510, 39 N. E. 113 (1895).

8. Davis v. Massachusetts, 167 U. S. 43 (1897).

tions of proper traffic regulation. And the courts offered to grant relief against discriminations by the licensing officials.[9]

The Supreme Court itself has recently declared void on its face an ordinance requiring a permit as a condition precedent to holding a public meeting on the public streets, and vesting excessive discretion in the granting official.[10] An oblique dictum seems to cast doubt upon the broad language of *Davis v. Massachusetts*.[11] And in the more recent case of *Cox v. New Hampshire*[12] upholding a statute requiring a license as a condition precedent to conducting a parade in the public streets, no reference was made to the *Davis* case. It is also worthy of notice that the court relied upon an express finding to the effect that the licensing board was not vested with "arbitrary power or unfettered discretion."[13]

The conflict between a state's interest in regulating the traffic on its streets and the individual's freedoms of assembly and speech seems readily apparent. But more subtle conflicts arise between state interests and the individual's exercise of his constitutional right of freedom of the press. The distribution of literature has been held to be an exercise of the right of freedom of the press.[14] Such distribution may conflict with (a) the state's interest in keeping its streets clean or (b) the state's right to regulate intrastate business, if the pamphlets are distributed for a consideration.

Concerning the first conflict, the Court has made several refinements. In *Lovell v. City of Griffin*,[15] the Court held void a statute which prohibited the distribution of literature "of any kind, whether delivered free or whether the same are being sold" anywhere within the city limits, without written permission of the city manager.[16] Such a statute, said the Court, "strikes at the very foundation of freedom of the press by subjecting it to license and censorship."[17] But a holding based on so broad a statute could easily be distinguished. And indeed, within the same year, Massachusetts upheld a statute prohibiting the distribution of "any placard, handbill, flyer, poster, advertisement, or paper of any description" upon any street.[18] The *Lovell* case was distinguished upon the

9. See City of Duquesne v. Fincke, 269 Pa. 112, 112 Atl. 130 (1920); People v. Atwell, 232 N. Y. 96, 101, 133 N. E. 364, 366 (1921), *app. dismissed on other grounds* 261 U. S. 590 (1923); Commonwealth v. Egan, 113 Pa. Super. 375, 173 Atl. 764 (1934). It is to be noted that discrimination in the administration of a police statute or ordinance had earlier been held by the Supreme Court to void the statute or ordinance. Yick Wo v. Hopkins, 118 U. S. 356 (1886). Nevertheless, the broad language of Davis v. Massachusetts, 167 U. S. 43 (1897) seemed to be at war with the assertion of any individual rights.

10. Hague v. C. I. O., 307 U. S. 496 (1939); and *cf.* Cantwell v. Connecticut, 310 U. S. 296 (1940).

11. 307 U. S. 496, 515.

12. 312 U. S. 569 (1941).

13. Cox v. New Hampshire, 312 U. S. 569, 576.

14. Lovell v. City of Griffin, 303 U. S. 444 (1938).

15. *Ibid.*

16. *Id.* at 447.

17. *Id.* at 451.

18. Commonwealth v. Nichols, 301 Mass. 584, 18 N. E. (2d) 166 (1938).

ground that the Griffin ordinance involved distribution anywhere in the city, whereas the Massachusetts ordinance covered only the city streets. The California Superior Court, and the Supreme Court of Wisconsin came to the same conclusion in upholding very similar ordinances.[19] But the ground was soon cut from under this logomachy. On appeal, the Supreme Court of the United States reversed the Massachusetts, California, and Wisconsin decisions, stating that the "purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on the public street from handing literature to one willing to receive it."[20] On the other hand, freedom of speech would not prevent municipal authorities from prosecuting a group of distributors who formed a cordon and allowed no pedestrian to pass who did not accept a tendered leaflet; "nor does the guarantee of freedom of speech or the press deprive a municipality of power to enact regulations against throwing literature broadcast in the streets. Prohibition of such conduct would not abridge the constitutional liberty since such activity bears no necessary relationship to freedom to speak, write, print, or distribute information or opinion."[21]

But in settling one problem the Court raised two others. Under the same title, which involved a hearing of four cases, the Court held invalid an ordinance requiring a permit as a condition precedent to canvassing from house to house for the distribution of literature.[22] This holding has given rise to further refinement in ordinance-drafting. New ordinances declare guilty of disorderly conduct any person who, without the consent of the occupant previously given, enters on private residential property for certain purposes including the distribution of handbills. These ordinances have been upheld in the courts as valid measures for the protection of private property rights.[23] And, justified on such a ground, such ordinances appear difficult to consider violations of the right of free speech.

A more difficult problem arises out of the following language used by the Court in *Schneider v. State*: "The ordinance is not limited to those who canvass for private profit, nor is it merely the common type of ordinance requiring some form of registration or license of hawkers, or peddlers.[24] Section 318 of

19. People v. Young, 33 Cal. App. (2d) 747, 85 P. (2d) 231 (1938); Milwaukee v. Snyder, 230 Wis. 131, 283 N. W. 301 (1939).

20. Nichols v. Massachusetts, People v. Young, Milwaukee v. Snyder, *sub. nom.* Schneider v. State (Town of Irvington), 308 U. S. 147, 162 (1939).

21. *Id.* at 160-1.

22. The New Jersey Court of Errors and Appeals had distinguished Lovell v. City of Griffin, 303 U. S. 444, on the ground that the Irvington ordinance required a permit only for canvassing. Town of Irvington v. Schneider, 121 N. J. Law 542, 3 Atl. (2d) 609 (1939). The ordinance also required that the granting official satisfy himself of the good character of the applicant. The Supreme Court did not appear to adopt this wide discretionary power as a ground for its decision.

23. Buxbom v. City of Riverside, 29 F. Supp. 3 (1939); People v. Bohnke, 287 N. Y. 154, 38 N. E. (2d) 478 (1941).

24. 308 U. S. 147, 163.

the New York Sanitary Code prohibits the distribution of any circular on the public streets and other public places, but expressly restricts the operation of the ordinance to "commercial and business advertising matter." In *Valentine v. Chrestensen*,[25] the respondent distributed without a license, a two faced handbill, one side of which advertised respondent's vessel, while the other consisted of a political protest against the City Dock Department. The Court held this to be an attempt to evade the ordinance, and held the handbill to be commercial literature. Further said the Court: "We are equally clear that the Constitution imposes no such restraint on government [against unduly burdening or proscribing the dissemination of opinion] as respects purely commercial advertising."[26] It is submitted that, while the instant case appears easy of determination, the problem of determining what constitutes "commercial literature" is not an easy one.[27] And it seems unfortunate that the Court offered no standards for delineating the limits of the doctrine.

The problem of commercial literature has another facet, suggested by the conflict noted at (*b*) *supra*.[28] Literature advertising a private enterprise may be distributed free. Such literature would fall under the doctrine of the *Valentine* case. But suppose political or religious literature is distributed for a price. Should such distribution be considered a business and hence subject to licensing and taxing provisions which the state applies to all businesses?

Newspapers appear clearly to be businesses devoted to the dissemination of ideas. As such they appear to be subject to ordinary business taxes and licensing provisions.[29] But where the licensing provision or tax discriminates against newspapers, or against newspaper circulation, such regulation or tax is invalid as a violation of the right of freedom of the press.[30]

The distribution of pamphlets is also an exercise of the right of freedom of the press.[31] Non-discriminatory ordinances requiring licenses for the distribution of pamphlets have been held valid exercises of the police power of the state.[32] Where, however, the license is granted only upon a condition precedent established to discriminate against a special group, the enforcement of the ordinance against that group may be enjoined.[33]

25. Valentine v. Chrestensen, 316 U. S. 52 (1942).

26. *Id.* at 54.

27. See note on Lovell v. Griffin (1938) 5 U. OF CHI. L. REV. 675.

28. See *supra*, p. 306.

29. See Associated Press v. N. L. R. B., 301 U. S. 103, 111 (1937); Giragi v. Moore, 49 Ariz. 74, 64 P. (2d) 819 (1937), *app. dismissed* 301 U. S. 670 (1937); Snyder, *Freedom of the Press—Personal Liberty or Property Liberty?* (1940) 20 B. U. L. REV. 1.

30. Grosjean v. American Press Co., 297 U. S. 233 (1936).

31. Lovell v. Griffin, 303 U. S. 444, 452 (1938).

32. City of Manchester v. Leiby, 117 F. (2d) 661 (C. C. A. 1st, 1941); *cert. denied*, 313 U. S. 562 (1940); and see Hanaan v. City of Haverhill, 120 F. (2d) 87 (C. C. A. 1st, 1941).

33. Kennedy v. City of Moscow, 39 F. Supp. 26 (D. C. Idaho 1941); Reid v. Borough of Brookville, Pa., 39 F. Supp. 30 (D. C. Pa. 1941); Douglas v. City of Jeannette, Pa., 39 F. Supp. 32 (D. C. Pa. 1941).

Many small towns have ordinances requiring peddlers and hawkers to secure a permit before pursuing their business in the town. The group known as Jehovah's Witnesses considers it a religious obligation[34] to convert people to their views. And they therefore engage in the practice of attempting to convert strangers, by speaking to them on the street or by canvassing from house to house. In the course of such activities they frequently offer pamphlets and books in return for contributions. Sometimes these publications are left without charge; sometimes they are sold, the pamphlets being sold at from two to five cents, the books at from twenty-five cents to a dollar each. Even where the group has charged for the pamphlets or books distributed, the lower courts have generally held the sect to be outside the scope of licensing requirements for peddlers and hawkers. Such ordinances as applied to them have been held unconstitutional.[35]

But in a recent decision, the Supreme Court held that such activities by the same group constituted a business and was therefore within the purview of the ordinances regulating peddlers and hawkers. Under the title of *Jones* v. *City of Opelika*,[36] three cases were heard. All three involved members of the sect of Jehovah's Witnesses who were convicted under ordinances requiring a license and the payment of a license fee as conditions precedent to peddling or hawking in the particular city. The fees were as follows: City of Opelika, Alabama, $10 per year, and $5 per year for transients; City of Fort Smith, Arkansas, $25 per month, $10 per week, $2.50 per day; City of Casa Grande, Arizona, $25 quarterly. In addition, the Opelika ordinance provided that the license could be revoked by the city official without notice. The sect members involved in the three cases were selling pamphlets at from two to five cents each, and a book at twenty-five cents per copy. The majority, speaking through Mr. Justice Reed, held that these members of the sect were conducting a business and hence were within the scope of the ordinances. "It is enough," said the Court, "that money is earned by the sale of the articles."[37] The Court further held that the

34. An interesting paradox arises since the group does not consider their faith a religion. Religion they consider "a snare and a racket". The paradox was neatly resolved by the following holding: "The facts here show that plaintiff's faith, according to our laws and all our information, is a religion. Individuals are free to define or classify it as they please, but whether it is legally a religion rests with the courts." Borchert v. City of Ranger, Tex., 42 F. Supp. 577, 580 (D. C. Tex. 1941).

35. Thomas v. City of Atlanta, 59 Ga. App. 520, 1 S. E. (2d) 598 (1939); Village of South Holland v. Stein, 373 Ill. 472, 26 N. E. (2d) 868 (1940); Tucker v. Randall, 18 N. J. Misc. 675, 15 A. (2d) 324 (1940); State v. Stark, 196 La. 307, 199 So. 129 (1940); Cincinnati v. Mosier, 61 Ohio App. 81, 22 N. E. (2d) 418 (1939); Donlevy v. City of Colorado Springs, 40 F. Supp. 15 (D. C. Colo. 1941); Zimmerman v. Village of London, Ohio, 38 F. Supp. 582 (D. C. Ohio, 1941); Borchert v. Ranger, Tex. 42 F. Supp. 577 (D. C. Tex. 1941); and see People v. Banks, 168 Misc. 515, 6 N. Y. S. (2d) 41 (1938); *contra*: Commonwealth v. Pascone, 308 Mass. 591, 33 N. E. (2d) 522 (1941); City of Pittsburgh v. Ruffner, 134 Pa. Supp. 192, 4 A. (2d) 224 (1939).

36. 316 U. S. ——, 62 S. Ct. 1231 (1942).

37. *Id.* at ——, 62 S. Ct. at 1239. Compare Cantwell v. Connecticut, 310 U. S. 296,

fees were non-discriminatory. And the *Lovell* case was distinguished on the ground that the instant case involved discretion in revocation rather than in the issuance of the license.[38]

It appears that such grounds for the decision are susceptible of criticism.[39] But aside from the criticisms made by the dissenting Justices, it is submitted that the majority failed to offer any means of distinguishing religious practitioners from hawkers and peddlers. When is "money earned"? As ordinarily used, the phrase "money earned" indicates that income exceeds cost of operation. In the instant case, the majority appears content with a finding that money was *collected*. The court seemed to make no inquiry into whether income actually exceeded expenditure.

If it be assumed that the sect was in fact profiting financially from their activities, other problems arise. While upon such an assumption the license fees would appear non-discriminatory, they appear sufficiently large in the instant case to be prohibitive. Hence the taxes would appear to curtail the exercise of freedom of the press and of religion. It seems safe to assume that even lesser taxes would be prohibitive to an enterprise so unrewarding in pecuniary return.

It is submitted, therefore, that the majority opinion in the instant case fails to recognize the need for a refined adjustment between the state's power to tax business and the individual's right of freedom of press and of religion. Faced with such a problem of adjustment in its new guise, the majority opinion seems to fall into the language justifying the state's power to tax business. In this respect, it is analogous to the language of private property employed by the Court in the *Davis* case discussed *supra*. And it is to be hoped that, just as the language of private property gave way to the language of adjustment between freedom and regulation in that connection, so here too, will the language of business taxation give way to the language of the adjustment between licensing and freedom.[40]

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60 S. Ct. 900 (1940) granting wider latitude to religious practitioners in the determination of language constituting an incitement to the breach of peace.

38. This distinction, analogous to the common law distinction between conditions precedent and conditions subsequent, was rejected in Herder v. Shahadi, 125 N. J. Law 153, 14 A. (2d) 475 (1940).

39. For criticisms of the majority view, see the dissenting opinion of Mr. Justice Stone, 316 U. S. at ——, 62 S. Ct. at 1240; and of Mr. Justice Murphy, *id.* at ——, 62 S. Ct. at 1245; see also (1942) 42 COL. L. REV. 1200; Fraenkel, *Civil Liberties Decisions of the Supreme Court* (1942) 91 U. OF PA. L. REV. 1, 17. Mr. Justice Murphy pursues the argument further, and urges that since the motives of the sect were religious and not commercial, no tax should be levied against them.

40. Significant of the importance of the principal case, as a possible device to suppress the freedom of religion, is the separate appended dissent of Justices Black, Douglas and Murphy. Therein they state that the instant case extends Minersville School District v. Gobitis, 310 U. S. 586 (1940). Then follows the frank admission of these three Justices, who joined in support of the majority opinion in the Gobitis case, that they "now believe that it was