LEGISLATIVE NOTE

THE ABOLITION OF ANONYMITY: DISTRIBUTION OF PUBLICATIONS ACT

In 1971, the Tennessee General Assembly enacted a criminal statute providing: "The publication and distribution of any circular, poster, hand bill, newspaper, or magazine without the name of the publisher or person responsible for the contents being shown thereon is prohibited."[1] Violation of the statute constitutes a misdemeanor.[2]

This statute prohibits anyone from publishing or distributing the enumerated literature anonymously in all cases regardless of content or purpose. No reason or justification for such a total elimination of a traditional method of expression[3] is stated in the statute or in its official legislative history.[4] The sponsors of the statute indicate that its function is to identify the author or publisher of possibly libelous publications.[5]

While anonymity is not accorded absolute constitutional protection,[6] a statute that abolishes anonymous literature in all cases seemingly oversteps the limits of the first amendment.[7] This principle was

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1. TENN. CODE ANN. § 39-5201 (Supp. 1972).

2. "Any person who shall violate this section is guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than five hundred dollars ($500) nor more than one thousand dollars ($1000) or imprisoned in the county jail or workhouse for a period of not less than ten (10) days nor more than thirty (30) days or both in the discretion of the judge." *Id.*

The minimum penalty of this statute is far in excess of similar offenses in other jurisdictions. *See In re* Kay, 1 Cal. 3d 930, 934 n.2, 464 P.2d 142, 144 n.2, 83 Cal. Rptr. 686, 688 n.2 (1970).

3. "Anonymous writings have long played an important role in the expression of ideas. Anonymous pamphlets have been used in England since the beginning of printing. . . . Between 1789 and 1809 no fewer than six presidents, fifteen cabinet members, twenty senators, and thirty-four congressmen published political writings either unsigned or under pen names." Comment, *The Constitutional Right to Anonymity: Free Speech, Disclosure and the Devil*, 70 YALE L.J. 1084-85 (1961).

4. [1971] TENN. PUB. ACTS ch. 171.

5. Interview with Fred O. Berry, Sr., Tennessee State Senator, in Knoxville, September 29, 1972. The intent of the statute was in no way designed to impose criminal penalties on the content of the specified publication; it was designed solely for identification purposes.

6. Branzburg v. Hayes, 92 S. Ct. 2646 (1972) (requiring newsman's disclosure of his source of information). "[A]nonymity of those confidential informants involved in actual criminal conduct . . . is hardly deserving of constitutional protection." *Id.* at 2661.

7. *See generally* M. SHAPIRO, FREEDOM OF SPEECH (1966) [hereinafter cited as

clearly established by the Supreme Court in *Talley v. California*,[8] declaring "void on its face" a Los Angeles ordinance that barred the distribution of all anonymous handbills.[9] In the language of the Court, "there are times and circumstances when States may not compel [persons] engaged in the dissemination of ideas to be publicly identified."[10]

The Los Angeles ordinance could not stand since a requirement of disclosure of those distributing handbills in every situation would be a public identification with no limitations. Furthermore, the whole thrust of the all-embracing ordinance abolishing anonymous handbills was against the historical traditions of our nation.[11] The Court in *Talley* based its holding on three of its earlier decisions that had imposed a ban on statutes designed to prohibit[12] or license[13] the distribution of literature. The Los Angeles ordinance came within that ban because its compulsory "identification requirement would

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SHAPIRO]; *Comment, The Constitutional Right to Anonymity: Free Speech, Disclosure and the Devil*, 70 YALE L.J. 1084 (1961).

8. 362 U.S. 60 (1960); *accord*, City of Bogalousa v. May, 252 La. 629, 212 So. 2d 408 (1968); *In Re* Phillips, 82 Nev. 215, 414 P.2d 949 (1966); People v. Mishkin, 17 App. Div. 2d 243, 234 N.Y.S.2d 342 (1962), *aff'd*, 15 N.Y.2d 671, 204 N.E.2d 209, 255 N.Y.S.2d 881 (1964), *aff'd*, 383 U.S. 502 (1965); 60 COLUM L. REV. 1173 (1960); 1961 U. ILL. L.F. 169; 13 VAND. L. REV. 392 (1960); 6 WAYNE L. REV. 420 (1959).

9. LOS ANGELES MUNICIPAL CODE § 28.06 provides that:

> No person shall distribute any handbill 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:
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> (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.

362 U.S. at 60-61.

10. 362 U.S. at 65.

"[I]nfringements on anonymity . . . when they are designed as punishments or intimidations . . . are wrong [but] when they simply provide additional, useful information, they are permissible." SHAPIRO at 161-62.

11. "The old seditious libel cases . . . show the lengths to which government had to go to find out who was responsible for books that were obnoxious to the rulers." 362 U.S. at 64. *See also* text accompanying note 3 *supra*.

12. Jamison v. Texas, 318 U.S. 413 (1943); Schneider v. State, 308 U.S. 147 (1939). *See also* Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); Food Employees Union v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968). *But see* Lloyd Corp. v. Tanner, 92 S. Ct. 2219 (1972) (private shopping center may prohibit distribution of handbills).

13. Lovell v. Griffith, 303 U.S. 444 (1937); *accord*, Niemotko v. Maryland, 340 U.S. 2268 (1951); Wulp v. Corcoron, 454 F.2d 826 (1st Cir. 1972); City of Elizabeth v. Sullivan, 100 N.J. Super. 51, 241 A.2d 41 (L. Div. 1968). "The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets." 303 U.S. at 452.

tend to restrict freedom to distribute information . . . ."[14] Justice Black, delivering the majority opinion, believed that a restriction on the distribution of literature would be the practical result of forced disclosure as identification and the possible fear of reprisal[15] would inhibit unpopular minority groups from voicing their opinion, thereby restricting freedom of speech and press.

Once a statute is determined to impinge on first amendment freedoms, it may still be sustained, if "the governmental interest asserted to support such impingement is compelling."[16] In *Talley*, the state urged that the ordinance was drafted to provide a means of identifying those responsible for fraud, false advertising, and libel. The Court, however, held that the ordinance itself was in no manner so limited, nor was there any legislative history indicating any such purposes.[17] Thus, the ordinance was overbroad and, in addition, provided no constitutional justification for its deterrent effect on free speech because the state failed to assert any patent "compelling interest."[18]

The dissenters in *Talley* objected to the majority's analysis. They felt that the "Constitution says nothing about freedom of anonymous speech."[19] Even accepting the compelling interest test (which they denied the State has the burden of meeting), public policy, according to the *Talley* dissent, demanded a "responsibility in writing that is present in public utterance."[20] The dissenters felt that similar statutes[21] with more limited bounds had been upheld, and yet all were designed to prevent the same abuse as the Los Angeles ordinance,

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14. "Liberty of circulating is as essential to [freedom of press] as liberty of publishing; indeed, without circulation, the publication would be of little value." 362 U.S. at 64, *citing* Lovell v. Griffin, 303 U.S. 444, 452 (1937).

15. The fear of reprisal may only be justified for individuals and weaker groups since larger organizations, which can better protect themselves, have little to fear and thus disclosure may be required. Riss & Co. v. Association of Am. Railroads, 187 F. Supp. 306 (D.D.C. 1960) (railroads); Huntley v. Public Utilities Comm'n, 69 Cal. 2d 67, 442 P.2d 685, 69 Cal. Rptr. 605 (1968) (television advertisers).

16. 362 U.S. at 66 (concurring opinion); Bates v. Little Rock, 361 U.S. 516 (1960); N.A.A.C.P. v. Alabama, 357 U.S. 449 (1957). *See generally* Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962).

17. 362 U.S. at 64. *See* text accompanying note 4 *supra*.

18. "[I]t will not do for the state simply to say that the circulation of *all anonymous handbills* must be suppressed in order to identify the distributors of those that may be of an obnoxious character." 362 U.S. at 66 (concurring opinion) (emphasis added).

19. *Id.* at 70 (dissenting opinion).

20. *Id.* at 71.

21. *See* note 42 *infra*.

namely libel, slander, and false accusation. Therefore, the latent "compelling interests" of the *Talley* ordinance with its practical applications certainly should have sustained the ordinance.[22] The principle objection to the majority opinion was that a fear of reprisal, when balanced with the public interest, was not of sufficient weight to void the ordinance since, in *Talley,* the defendant had not even demonstrated that there would be any economic reprisal or public hostility as a result of his identification.[23] Justice Clark, writing for the dissent, stood "second to none in supporting Talley's right of free speech—but not his freedom of anonymity."[24]

Yet *Talley* did not create an absolute constitutional right to anonymity; rather, the case was an objection to an overly broad ordinance.[25] The Tennessee Distribution of Publications Statute is subject to the same infirmities as the *Talley* ordinance since it is similarly overbroad. As in *Talley,* the Tennessee statute offers no patent "compelling interest" for its justification.[26] It also prohibits the mere publication of anonymous literature, a form of prohibited prior censorship.[27] In addition, the Tennessee statute is vague[28] as to who must be identified on a publication since a fictitious or "pen name" may meet the statutes identification requirement for a "publisher or person responsible."[29] Lastly, the statute may run afoul of the due process and equal protection clauses of the fourteenth amendment, for it does not include within its proscription other forms of media.[30] Seemingly, *Talley* stands for the proposition that a total elimination

22. "Is Talley's anonymous handbill, designed to destroy the business of a commercial establishment, passed out at its very front door . . . more comportable with First Amendment Freedoms? I think not." 362 U.S. at 71 (dissenting opinion).

23. *Id.* at 69.

24. *Id.* at 70.

25. *Id.* at 65.

26. *See* text accompanying note 4 *supra.*

27. New York Times Co. v. United States, 403 U.S. 713 (1971); Near v. Minnesota, 283 U.S. 697 (1931).

28. *See* Zwickler v. Koota 389 U.S. 241 (1967) which defines a vague statute as one "which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application . . . ." *Id.* at 249. An overbroad statute is distinguished as one that "offends the constitutional principle that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *Id.* at 250.

The Tennessee statute thus appears subject to vagueness and overbreadth, as it meets both criteria.

29. TENN. CODE ANN. § 39-5201 (Supp. 1972).

30. *See* 362 U.S. at 62 n.2.

of a form of anonymous literature without limitations expressly stated within the statute will not be tolerated.[31] The Tennessee statute, although enumerating even more forms of literature, falls within the ambit of the *Talley* prohibition, and in its present form should be considered invalid.[32]

A statute requiring the disclosure of those responsible for a publication must specifically justify its function with a "compelling reason" for deterring free speech.[33] The legislature, still desiring to identify libelous publications, may wish to redraft the Distribution of Publications statute and identify libel as the justification for the Act. A similar New York disclosure law,[34] couched in terms of identifying obscenity, could be used as a model since libel,[35] like obscenity,[36] does not enjoy first amendment protection. The Supreme Court has held, however, that a statute of this sort may not be enacted if there are other narrower ways of achieving such aims without abridging first amendment freedoms.[37]

Furthermore, authorship of a libelous publication can be readily determined without resorting to a criminal statute forcing disclosure of the authorship of every piece of anonymous literature regardless of content. This may be achieved by a suit against anyone distributing an anonymous publication as such distribution could be considered the "publication" necessary to maintain a libel action.[38] Conse-

31. *Id.* at 65. "[T]he distribution of leaflets in the public forum [is] so basic a right that it cannot be burdened with even the modest sanction of compulsory disclosure of sponsorship." Kalven, *The Concept of the Public Forum*, in 1965 SUP. CT. REV. 1, 20.

32. Why the legislature enacted a statute of a type declared unconstitutional some twelve years earlier is not clear.

33. *See* note 16 *supra*.

34. N.Y. GEN. BUS. LAW § 330 (McKinney 1968). "Every publication . . . which is so composed or illustrated as a whole to be devoted to the description or portrayal of bondage, sadism, masochism or other sexual perversion or to the exploitation of sex or nudity and published in this state shall conspicuously have imprinted on . . . the publication the true name and address of the publisher or printer." This statute previously did not have a specific reference to obscenity and as such was declared unconstitutional. People v. Mishkin, 17 App. Div. 2d 243, 234 N.Y.S.2d 342 (1962), *aff'd*, 15 N.Y.2d 671, 204 N.E.2d 209 (1964), *aff'd* 383 U.S. 502 (1965). *See* Talley v. California, 362 U.S. 60 (1960).

35. Beauharnais v. Illinois, 343 U.S. 250 (1952). *See also* Rosenbloom v. Metromedia, 403 U.S. 29 (1971); New York Times Co. v. Sullivan, 376 U.S. 254 (1964). *See generally* Noel, *Defamation of Public Officers and Candidates*, 49 COLUM. L. REV. 875 (1949); Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation*, 49 CORNELL L.Q. 581 (1964).

36. Roth v. United States, 354 U.S. 476 (1957).

37. Shelton v. Tucker, 364 U.S. 479, 488 (1969); Schneider v. State, 308 U.S. 147 (1939).

38. W. PROSSER, THE LAW OF TORTS § 113, at 766 (4th ed. 1971).

quently, the wide scope of discovery procedure and subpoena power[39] would be available to the offended party to identify the real source of the literature. Since current law offers an adequate remedy against surreptitious libel, a general criminal disclosure law is unnecessary.[40]

The Distribution of Publications Statute is but a broader extension of a similar Tennessee criminal statute, which compels the disclosure of authors of publications that make "reference to any person who is a candidate for a public office."[41] This latter statute is typical of similar laws enacted in many states.[42] The purposes of these campaign statutes require identification of authors so that "the electorate may be better able to evaluate campaign material by examination of the competence and credibility of its source, . . . irresponsible attacks will be deterred . . . [and] candidates may be better able to refute or rebut charges—so that elections will be the expression of the

39. TENN. R. CIV. P. 30.01-37.04, 45.01-.06 (1971). *See also* Cervantes v. Time, Inc. 464 F.2d 986 (8th Cir. 1972). "Thus, if, in the course of pretrial discovery, an allegedly libeled plaintiff uncovers substantial evidence tending to show that the defendant's published assertions are so inherently improbable that there are strong reasons to doubt the veracity of the defense informant . . ., the reasons favoring compulsory disclosure [of the author] . . . should become more compelling." *Id.* at 994.

40. The Court "retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel." Beauharnais v. Illinois, 343 U.S. 250, 263 (1952).

41. "All written or printed circulars, advertisements or other statements with reference to any person who is a candidate for any public office in this state shall be signed by the writer thereof, or, if the same purport to be issued by any committee, organization or other similar associations, the same shall be signed with the names of the principal officers of such association. Any person or persons violating this section shall be guilty of a misdemeanor." TENN. CODE ANN. § 2-1920 (Supp. 1972).

42. "Thirty-six states [in 1960] have statutes prohibiting the anonymous distribution of materials relating to elections." 362 U.S. 60, 70 n.2 (1960) (dissenting opinion). There is also a similar federal statute, 18 U.S.C. § 612 (1970), which imposes criminal penalties for anonymous publication of a "statement relating to or concerning any person who has publicly declared his intention to seek the office of President, or Vice President of the United States, or Senator or Representative . . . ." It has been upheld by a lower federal court, United States v. Scott, 195 F. Supp. 440 (D.N.D. 1961). *See* Note, *Prohibitions on the Publication or Distribution of Anonymous Campaign Literature*, 60 MICH. L. REV. 506 (1962).

There are other federal statutes requiring disclosure: Federal Corrupt Practice Act, 2 U.S.C. § 241 *et seq.* (1970), *upheld in* Burroughs & Cannon v. United States, 290 U.S. 534 (1934); Federal Regulation of Lobbying Act, 2 U.S.C. § 261 *et seq.* (1970), *upheld in* United States v. Harriss, 347 U.S. 612 (1954). *But see* Lamont v. Postmaster General, 381 U.S. 301 (1965), which held that the addressee of mail has a constitutional right to anonymity. "[T]he right to receive publications is . . . a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them." 381 U.S. at 308 (concurring opinion).

will of an undeceived, well informed public."[43] Prior to *Talley*, these statutes were uniformly upheld,[44] but the trend since that case has been to find them unconstitutional as an abridgement of first amendment freedoms.[45] The campaign statutes or corrupt practice acts[46] have not been tested by the Supreme Court,[47] but its recent decisions tend to allow more disclosure based on new found "compelling interests."[48]

Apparently a rash of scurrilous literature by surreptitious authors has prompted criminal sanctions in Tennessee to force the authors to identify themselves. The dangers inherent in any compulsory disclosure law, whatever its limitations, are that, by selective enforcement,[49] disfavored groups with no other effective means for voicing their opinions will be silenced.[50] In general, that effect seems to be too high a price to pay for the amelioration of a tort action.

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43. Canon v. Justice Court, 61 Cal. 2d 446, 452, 393 P.2d 428, 431, 39 Cal. Rptr. 228-31 (1964). This case declared the California campaign statute unconstitutional only in so far as it applied to other than California voters. This was due to a discrepancy in the wording of the statute which was subsequently corrected, CAL. ELECTIONS CODE § 12047 (West Supp. 1972), and not to the function of the statute. The court did not recognize *Talley* as controlling.

44. *Ex parte* Hawthorne, 116 Fla. 608, 156 So. 619 (1934); State v. Freeman, 143 Kan. 315, 55 P.2d 362 (1936); State v. Babst, 104 Ohio 167, 135 N.E. 525 (1922); Commonwealth v. Acquaviva, 187 Pa. Super. 550, 145 A.2d 407 (1959); Commonwealth v. Evans, 156 Pa. Super. 321, 40 A.2d 137 (1945).

45. Zwickler v. Koota, 290 F. Supp. 244 (E.D.N.Y. 1968), *rev'd as moot sub nom.* Golden v. Zwickler, 394 U.S. 103 (1969); Canon v. Justice Court, 61 Cal.2d 446, 393 P.2d 428, 29 Cal. Rptr. 228 (1964); People v. Bongiorni, 205 Cal. App. 2d 856, 23 Cal. Rptr. 565. (1962); State v. Barney, 92 Idaho 581, 448 P.2d 195 (1968).

46. Annot., 96 A.L.R. 582 (1935).

47. Golden v. Zwickler, 394 U.S. 103 (1969). The court specifically reserved this question.

48. Branzburg v. Hayes, 92 S. Ct. 2646 (1972); Communist Party v. SACB, 367 U.S. 1 (1961). "The first Amendment, after all, is only one part of an entire Constitution." New York Times Co. v. United States, 403 U.S. 713, 761 (1971) (dissenting opinion). *See also* Becker, *The Supreme Court's Recent "National Security" Decisions: Which Interests are Being Protected?* 40 TENN. L. REV. 1 (1972).

49. "[C]ertain exposure requirements are purely coercive and designed to drive the speaker out of the market by tacitly threatening him with the official and non-official harrassment that would follow the breaching of his anonymity." SHAPIRO at 161-62.

50. Any criminal statute admittedly may be used in this manner but courts particularly scrutinize bad faith prosecutions based on statutes that impair first amendment freedoms. Younger v. Harris, 401 U.S. 37 (1971); Dombrowski v. Pfister, 380 U.S. 479 (1965).