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Butler D. Shaffer

University of Nebraska College of Law

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Constitutional Law—Regulating the Use of Streets

Defendant was convicted of violating a curfew ordinance prohibiting presence on the streets after a certain hour where such presence is unconnected with some legitimate business, trade, profession, or occupation. *Held*, judgment reversed. The ordinance is invalid as an arbitrary invasion of the inherent personal rights and liberties of all citizens, and unconstitutional under the California Constitution.¹

This case was decided under the so-called "liberty clause" of the California Constitution,² which is similar to the Ninth Amendment to the United States Constitution.³ Many of the cases involving curfew and vagrancy laws, and other laws involving the use of the streets, have arisen under such clauses.⁴ Others have arisen under due process of law,⁵ privileges and immunities,⁶ and equal protection of the laws.⁷

I. "LIBERTY" CLAUSE

The cases that have arisen under the liberty clause have all come up at the state level. No cases seem to have ever been decided in the federal courts on the Ninth Amendment, which a reading of Madison's work on the drafting of the Constitution will show may have been the intended place for what is now referred to as "substantive due process."⁸ Cases decided under the state constitutional provisions have held that, although the freedom of

¹ *Alves v. Justice Court of Chico Judicial District*, 306 P. 2d 601 (1957).

² California Const. Art., 1, § 1. "All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness."

³ U. S. Const., Amend. IX. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

⁴ Arkansas Const., Art. 2, § 29. California Const., Art. 1, § 1. Kentucky Const., § 1. Missouri Const., Art. 1, § 2. Pennsylvania Const., Art. I, § 26.

⁵ California Const., Art. 1, § 13, cl. 6. Iowa Const., Art. 1, § 9. Michigan Const., Art. II, § 16. North Dakota Const., Art. I, § 13. Oklahoma Const., Art. II, § 7. Texas Const., Art. 1, § 13. U. S. Const., Amend. XIV, § 1.

⁶ Georgia Const., Art. 1, § 2-125. Indiana Const., Art. 1, § 23. Kentucky Const., § 3. Missouri Const., Art. 1, § 13. Ohio Const., Art. I, § 2. Oregon Const., Art. I, § 20. U. S. Const., Amend. XIV, § 1.

⁷ U. S. Const., Amend. XIV, § 1. Virginia Const., § 11.

⁸ 1 *Annals of Congress* 456.

locomotion is subject to proper restrictions,⁹ the municipality may not prohibit persons being on the streets, where such persons conduct themselves properly, and do not interfere with the use of the streets.¹⁰ The state may not make it an offense to associate with thieves or prostitutes with the intent to agree to commit an offense.¹¹ Cases based upon both state and federal provisions have held the people have a right to travel upon the streets,¹² although a curfew law for prostitutes has been upheld.¹³ A municipality may prohibit obscene or indecent language,¹⁴ and may impose liability on a parent for the failure of his minor children to observe curfew laws.¹⁵

II. EQUAL PROTECTION CLAUSE

Cases that have been decided under the equal protection clause of the United States Constitution permit the city to regulate the parking of vehicles,¹⁶ to prohibit displays on the streets,¹⁷ and to prohibit persons over twelve years of age from riding a bicycle on the sidewalks.¹⁸ A city may prohibit all commercial vehicles from the streets,¹⁹ along with children under a certain age selling papers on the streets, even though such prohibition interferes with a child selling religious material.²⁰ It seems well settled that the use of the streets by a common carrier is a revocable privilege.²¹ A case decided under a similar state constitutional provision upheld the right of the city to require all bicycles to have lamps.²² Cases, in which the court did not make clear which equal protection clause (state or federal constitution) was being cited, have held that a

⁹ *Commonwealth v. Doe*, 109 Pa. Super. 187, 167 Atl. 241 (1933).

¹⁰ *St. Louis v. Gloner*, 210 Mo. 502, 109 S. W. 30 (1908).

¹¹ *Ex parte Smith*, 135 Mo. 223, 36 S. W. 628 (1896).

¹² *Slusher v. Safety Coach Transit Co.*, 229 Ky. 731, 17 S. W. 2d 1012 (1929).

¹³ *Dunn v. Commonwealth*, 105 Ky. 834, 49 S. W. 813 (1899).

¹⁴ *Ex parte Slattery*, 3 Ark. 484 (1841).

¹⁵ *People v. Walton*, 70 Cal. App. 2d 862, 161 P. 2d 498 (1945).

¹⁶ *Zenith-Godley Co. Inc., v. Wiley*, 121 N. Y. S. 2d 795 (1953).

¹⁷ *People v. Friedman*, 16 N. Y. S. 2d 925 (1940).

¹⁸ *State v. Aldrich*, 70 N. H. 391, 47 Atl. 602 (1900).

¹⁹ *Garneau v. Eggers*, 113 N. J. L. 245, 174 Atl. 250 (1934).

²⁰ *Prince v. Massachusetts*, 321 U. S. 158 (1944).

²¹ *Schwartzman Service Inc. v. Stahl*, 60 F. 2d 1034, (W. D. Mo. 1932).

²² *Des Moines v. Keller*, 116 Ia. 648, 88 N. W. 827 (1902).

city may regulate the speed of autos,²³ and the transportation of commodities in the streets.²⁴ The licensing of street vendors,²⁵ and the prohibition of bicycles from the sidewalks,²⁶ have also been upheld. In a case decided under both state and federal provisions, it has been held that a city may not prohibit displays in shop windows which may be seen from the streets.²⁷

III. PRIVILEGES AND IMMUNITIES CLAUSE

In cases decided under the privileges and immunities clause of the Fourteenth Amendment to the United States Constitution, it has been held that, while the city may prevent obstruction of the sidewalks,²⁸ still, the streets must be left open for the exercise of rights of free speech and assembly.²⁹ The city may prohibit the use of the streets for the carrying on of business by commercial vehicles.³⁰ Along the lines of free speech, the city may not prohibit sound amplification devices,³¹ although it may regulate them so that they do not become public nuisances.³² Cases which have been decided under both the state and federal constitutions have affirmed the right of the citizens to use the streets,³³ although permitting reasonable regulations,³⁴ such as limiting the use of streets for public meetings,³⁵ permitting a classification of fees to be paid by motor vehicle operators,³⁶ and allowing a license tax on street peddlers.³⁷ In cases in which the court did not state the particular privileges and immunities clause being applied, the municipalities

²³ *McGuire v. Wilkerson*, 22 Okla. Crim. 36, 209 Pac. 445 (1922).

²⁴ *J. H. McLeaish & Co. v. Bindford*, 52 F.2d 151 (S. D. Tex. 1931).

²⁵ *Hughes v. Detroit*, 217 Mich. 567, 187 N. W. 530 (1922).

²⁶ *Gagnier v. Fargo*, 11 N. D. 73, 88 N. W. 1030 (1902).

²⁷ *People v. Osborne*, 17 Cal. App. 2d 771, 59 P. 2d 1083 (1936).

²⁸ *Ex parte Bodkin*, 86 Cal. App. 2d 208, 194 P. 2d 588 (1948).

²⁹ *Hague v. C. I. O.*, 307 U. S. 496 (1939).

³⁰ *Warley v. Board of Park Com'rs*, 233 Ky. 688, 26 S. W. 2d 554 (1930).

³¹ *Kovacs v. Cooper*, 336 U. S. 77 (1949).

³² *Saia v. People of New York*, 334 U. S. 558 (1948); see 28 Neb. L. Rev. 618 (1949).

³³ *Cleveland v. Tussey*, 13 Ohio Supp. 11, 39 Ohio Law Abs. 554 (1943).

³⁴ *Denny v. Muncie*, 197 Ind. 28, 149 N. E. 639 (1925).

³⁵ *Fitts v. Atlanta*, 121 Ga. 567, 49 S. E. 793 (1905).

³⁶ *W. A. Barber Grocery Co. v. Fleming*, 229 Ind. 140, 96 N. E. 2d 108 (1951).

³⁷ *Rosa v. Portland*, 86 Ore. 438, 168 Pac. 936 (1917); see 28 Neb. L. Rev. 289 (1949).

have been allowed to regulate the distribution of literature and merchandise on the streets,³⁸ and to grant exclusive privileges to operate motor carriers.³⁹

IV. SUBSTANTIVE DUE PROCESS

While the courts are getting away from "substantive due process," and starting to decide cases of this sort under the privileges and immunities clause, where at least one student of the Constitution feels it belongs,⁴⁰ still, many cases remain on the books which talk of due process in terms of substance, and not procedure. Among these are cases decided under the United States Constitution holding that the city is without power to prohibit peaceful picketing,⁴¹ although permitting prohibition of picketing which will result in violence.⁴² It has also been held that a city may not restrain the free exercise of religion by requiring a certificate to solicit funds.⁴³ Permissible regulations include making presence on the streets for an unlawful purpose a crime,⁴⁴ and prohibiting advertising vehicles from the streets.⁴⁵ A state due process case permitted the city to make consorting with gamblers grounds for vagrancy charges.⁴⁶

Cases in which no constitutional provisions were cited, but which bear resemblance to "substantive due process", have held that the city may prohibit notorious drunkenness,⁴⁷ lewd or indecent behavior,⁴⁸ fighting,⁴⁹ disorderly noise,⁵⁰ and boisterous assemblages.⁵¹ The Nebraska Court has said that a city may prohibit the use of the sidewalks for the selling of merchandise,⁵² and circulating

³⁸ *Whisler v. West Plains, Mo.*, 137 F.2d 938 (8th Cir. 1943).

³⁹ *Wolf v. Cumberland Coach Corp.*, 297 Ky. 704, 181 S. W.2d 51 (1944).

⁴⁰ 2 *Crosskey, Politics and the Constitution* (1st ed. 1953).

⁴¹ *Thornhill v. Alabama*, 310 U. S. 88 (1940).

⁴² *Milkwagon Driver's Union v. Meadowmoor Dairies*, 312 U. S. 287 (1941).

⁴³ *Cantwell v. Connecticut*, 310 U. S. 296 (1940).

⁴⁴ *McNeilly v. State*, 119 N.J.L. 237, 195 Atl. 725 (1937).

⁴⁵ *Railway Express Agency, Inc. v. New York*, 336 U. S. 106 (1949).

⁴⁶ *Morgan v. Commonwealth*, 168 Va. 731, 191 S. E. 791 (1937).

⁴⁷ *Village of Fairmont v. Meyer*, 83 Minn. 456, 86 N. W. 457 (1901).

⁴⁸ *Billington v. Hoverman*, 18 Ohio Cir. Ct. R. 637, 7 O. C. D. 358 (1927).

⁴⁹ *City of Glasgow v. Bazan*, 96 Mo. App. 412, 70 S. W. 257 (1902).

⁵⁰ *In re Bushey*, 105 Mich. 64, 62 N. W. 1036 (1895).

⁵¹ *Village of Vicksburg v. Briggs*, 102 Mich. 551, 61 N. W. 1 (1894).

⁵² *Chapman v. Lincoln*, 84 Neb. 534, 121 N. W. 596 (1909).

of handbills,⁵³ although the United States Supreme Court has taken an opposite stand on the latter issue.⁵⁴ The courts have held that a municipality may not require a permit to make a speech on public grounds,⁵⁵ although other courts have taken a different view.⁵⁶ But where courts do allow a permit as a prerequisite for a public speech, the basis for issuing or denying the permit must not be arbitrary discretion.⁵⁷ In addition to these cases, it has been held beyond the police power to prohibit being with a lewd woman.⁵⁸

V. STATUTORY CONSTRUCTION

A major problem involved in these statutes and ordinances is the judicial interpretation given them. Being penal statutes, they must be construed strictly in favor of the defendant.⁵⁹ For this reason, courts have required a strict adherence to the elements of the law.⁶⁰ A problem involved in curfew and vagrancy laws is the interpretation given the words, "visible and lawful business", found in most of these laws. Courts have generally held that these words refer to a good and sufficient reason for being on the streets, rather than a purpose based upon occupational necessity.⁶¹ The curfew laws, whose purpose is to prevent crime and immoral activity, are directed primarily to the minor, or to his parents, although some impose criminal liability on persons who would seek to persuade a person to violate the curfew laws.⁶² Where adult regulation is involved, some judges have felt that the legislature is without authority to require adults to remain indoors after a certain hour,⁶³ although such laws have been upheld.⁶⁴ The vagrancy

⁵³ *Anderson v. State*, 69 Neb. 686, 96 N. W. 149 (1903); see 9 Neb. L. Bul. 401 (1931).

⁵⁴ *Jamison v. Texas*, 318 U. S. 413 (1943); see 26 Neb. L. Rev. 656 (1946).

⁵⁵ *Sellers v. Johnson*, 163 F.2d 877 (8th Cir. 1947); see 27 Neb. L. Rev. 437 (1948).

⁵⁶ *Davis v. Massachusetts*, 167 U. S. 43 (1897).

⁵⁷ *Hord v. Ft. Myers*, 153 Fla. 99, 13 So. 2d 809 (1943).

⁵⁸ *Cady v. Village of Barnesville*, 4 Ohio Dec. 396 (1878).

⁵⁹ *State v. Suman*, 216 Minn. 293, 12 N. W. 2d 620 (1943).

⁶⁰ *Baxley v. United States*, 134 F. 2d 937 (4th Cir. 1943).

⁶¹ *Ex parte McLaughlin*, 16 Cal. App. 270, 116 Pac. 684 (1911); Pen. Code § 647 (6).

⁶² *Alves v. Justice Court of Chico Judicial District*, 306 P. 2d 601 (Cal. 1957); Chico Municipal Code, § 684a.

⁶³ Dissent in *State v. Grenz*, 26 Wash. 2d 764, 175 P. 2d 633 (1946); Rem. Rev. Stat. § 2688 (8), P. C. § 9131 (8).

laws have as their purpose, not the punishment of any acts,⁶⁵ but the prevention of crime.⁶⁶ Statutes involved in these cases have defined as vagrants, (1) people who, able to work, have no visible means of support;⁶⁷ (2) a man who refuses to provide for his family;⁶⁸ (3) persons wandering about the streets without any visible or lawful business;⁶⁹ or, (4) persons engaged in prostitution,⁷⁰ gambling,⁷¹ begging,⁷² or other various activities.

VI. CONCLUSION

The regulation of streets, though necessary, should be administered in a rational way. It should not prevent, nor hamper, the legitimate activities of the people. It is important, too, to decide these cases under the proper constitutional provisions. The courts should start determining just what the privileges and immunities of citizens are, or what acts will deprive persons of the equal protection of the laws, instead of just throwing everything into "substantive due process." If these two provisions will not contain all of the cases, then resort may be had to the liberty clause.

Butler D. Shaffer, '60

⁶⁴ *State v. Grenz*, 26 Wash. 2d 764, 175 P. 2d 633 (1946).

⁶⁵ *Commonwealth v. Diamond*, 248 Mass. 511, 143 N. E. 503 (1924).

⁶⁶ *District of Columbia v. Hunt*, 82 U. S. App. D. C. 159, 163 F. 2d 833 (D. C. Cir. 1947).

⁶⁷ *People v. Sohn*, 269 N. Y. 330, 199 N. E. 501 (1936); Code Cr. Proc. § 887 (1).

⁶⁸ *State v. Padberg*, 115 S. W. 2d 72 (1938); Mo. St. Ann. § 4333, p. 3011.

⁶⁹ *Ex parte Mc Laughlin*, 16 Cal. App. 270, 116 Pac. 684 (1911).

⁷⁰ *Valverdi v. State*, 21 Ala. App. 606, 110 So. 594 (1926); Code 1923, § 5571 (9).

⁷¹ *Rodriguez v. Culbreath*, 66 So. 2d 58 (1953); § 856.02, Florida Stat. 1951, F. S. A.

⁷² *People v. Denby*, 108 Cal. 54, 40 Pac. 1051 (1895); Pen. Code, § 647.