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Constitutional Law - Free Speech - Public Transit Advertising - Wirta v. Alameda-Contra Costa Transit Dist., 434 P.2d 982 (Cal. 1966)

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break in the traditional preoccupation of the courts with the protection of the broker, and is a further step in a growing trend toward protection of the consumer in his dealings with commercial specialists whose services are required but not understood.

TERRY B. LIGHT

Constitutional Law—FREE SPEECH—PUBLIC TRANSIT ADVERTISING. In *Wirta v. Alameda—Contra Costa Transit Dist.*,¹ an association known as "Women for Peace" sought to buy bus advertising space to place a message advocating a negotiated settlement to the Vietnam War.² Defendant transit company refused the request, stating that their policy was to allow only commercial advertisements for the sale of goods and services, except during elections.³ An action was brought by the association alleging that defendants' refusal had deprived them of their rights of free speech and equal protection under the First⁴ and Fourteenth⁵ Amendments to the Constitution.

The Court of Appeals rejected the association's allegations, finding that the defendants' advertising policy was neither arbitrary nor discriminatory but rather in the public interest.⁶ The California Supreme Court, in reversing the lower court's decision, held that by allowing commercial advertising, the transit district had opened their facilities as a "forum for the expression of ideas," and therefore they could not

1. 64 Cal. Rptr. 430, 434 P.2d 982 (1967).

2. The text of the proposed advertisement was:

"Mankind must put an end to war or war will put an end to mankind."

President John F. Kennedy.

Write to President Johnson: Negotiate Vietnam.

Women for Peace

P.O. Box 944, Berkeley.

Id., at 432, 434 P.2d at 984.

3. *Id.* Defendants were a public transit district and a private corporation. The corporation leased advertising space from the district and re-leased it to advertisers under an agreement where advertisements on controversial subjects were not acceptable unless approved by the district.

4. U.S. CONST. amend. I: "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

5. U.S. CONST. amend. XIV: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: . . . nor deny to any person within its jurisdiction the equal protection of the laws."

6. *Wirta v. Alameda-Contra Costa Transit Dist.*, 61 Cal. Rptr. 419 (Ct. App. 1967).

“for reasons of administrative convenience decline to accept advertisements expressing opinions and beliefs within the ambit of First Amendment protection.”⁷

The United States Supreme Court has characterized the freedoms of speech, religion, and press as the fundamental rights and liberties at the foundation of the democratic form of government.⁸ Even where these rights are in conflict with the powers of the state, they have a preferred position,⁹ except when there is a “clear and present danger” to the public interest.¹⁰ Though commercial advertising is not within the purview of the First Amendment,¹¹ the word “commercial” has been given a narrow meaning, and the fact that an advertisement has been paid for does not in itself make it commercial in the context of First Amendment protection.¹² Instead, there must be a showing that the purpose of the enterprise was profit-inspired.¹³ However, the freedoms of press and speech have been extended to include every publication which constitutes a vehicle for information and opinion.¹⁴ Thus, statutes restricting and regulating the commercial use of handbills,¹⁵

7. *Wirta v. Alameda-Contra Costa Transit Dist.*, 64 Cal. Rptr. 430, 433, 434 P.2d 982, 985 (1967).

8. *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939).

9. *Thomas v. Collins*, 323 U.S. 516 (1945); *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943).

10. *Schenck v. United States*, 249 U.S. 47 (1919). The classic example used as a “clear and present danger” is the scream of “fire” in a crowded movie theater. *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950), *aff’d* 341 U.S. 494 (1951). Courts must weigh the “evil” to be curbed against the invasion of free speech.

11. *Valentine v. Chrestensen*, 316 U.S. 52 (1942); *Supermarkets Gen. Corp. v. Sills*, 93 N.J. Super. 326, 225 A.2d 728 (1966); *Barron, Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1668 (1967). See also *Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005, 1027-1038 (1967).

12. *N.Y. Times v. Sullivan*, 376 U.S. 254, 265-266 (1964).

13. *Long v. Anaheim*, 63 Cal. Rptr. 56 (Ct. App. 1967); *Bowling Green v. Lodico*, 11 Ohio St.2d 135, 228 N.E.2d 325 (1967).

14. *E.g.*, *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964) (newspaper); *Red Lion Broadcasting Co. v. FCC*, 381 F.2d 908 (D.C. Cir. 1967) (radio); *Weaver v. Jordan*, 64 Cal.2d 235, 411 P.2d 289, 49 Cal. Rptr. 537 (1966) (television). *But see* *Mid-West Elec. Co-operative, Inc. v. Chamber of Commerce*, 369 S.W.2d 842 (Tex. Civ. App. 1963). See generally *Barron, Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

15. *Martin v. Struthers*, 319 U.S. 141 (1943); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Valentine v. Chrestensen*, 316 U.S. 52 (1942); *Hague v. CIO*, 307 U.S. 496 (1939); *Lovell v. Griffin*, 303 U.S. 444 (1938); *Herschel v. Dyra*, 365 F.2d 17 (7th Cir. 1966).

billboards,¹⁶ loudspeakers,¹⁷ and the sale of magazines¹⁸ are constitutional; but the same statutes are unconstitutional in their application to messages of a political or religious nature.

This principle has also been extended to those statutes which grant wide discretionary powers in the free speech area to governing bodies. Consequently, the Supreme Court has held that although a governing body is under no duty to open its facilities to the public, if it does, it must grant the use of them in a nondiscriminatory, nondiscretionary manner.¹⁹ In *Cox v. Louisiana*,²⁰ appellant had been charged with violating an obstruction of public passages statute while leading a demonstration protesting segregated lunch counters. The Supreme Court dismissed the action, finding that although the statute was valid on its face because governmental authorities have the duty and responsibility to keep the city's streets open for the convenience and safe use of its citizens,²¹ it was unconstitutional as applied, in that it permitted public officials to use their unfettered discretion in authorizing parades and other assemblies.²²

*Wirta v. Alameda-Contra Costa Transit Dist.*²³ is similar to *Cox* in that the defendants had used their discretion to bar political views. In finding for the association, the court took the view that by opening its facilities to advertising, the transit district did not have the right to favor one group over another,²⁴ or commercial ideas over political

16. Compare *State v. Diamond Motors, Inc.*, 429 P.2d 825 (Hawaii 1967), and *Ghaster Properties, Inc. v. Preston*, 176 Ohio St.2d 425, 200 N.E. 2d 328 (1964), with *Peltz v. South Euclid*, 11 Ohio St.2d 128, 228 N.E.2d 320 (1967).

17. In *Chester Branch, NAACP v. Chester*, 253 F. Supp. 707 (E.D. Pa. 1966), an ordinance governing sound trucks was found to be constitutional since (1) it was based on clear nondiscretionary standards beyond the control of any local official, and (2) it reflected the concern of a government for the peace and tranquility of its community. However, a \$25 fee for a permit to use sound equipment was unconstitutional since it was an interference with the freedom of speech.

18. *People v. Krebs*, 54 Misc.2d 578, 282 N.Y.S.2d 996 (Crim. Ct. 1967); *Bowling Green v. Lodico*, 11 Ohio St.2d 135, 228 N.E.2d 325 (1967).

19. *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Hague v. CIO*, 307 U.S. 496 (1939); *Danskin v. San Diego Unified School Dist.*, 28 Cal.2d 536, 171 P.2d 885 (1946); *Madole v. Barnes*, 20 N.Y.2d 169, 229 N.E.2d 20, 282 N.Y.S.2d 225 (1967); *Community Concerts Ass'n v. Board of Education*, 18 N.Y.2d 129, 219 N.E.2d 172, 272 N.Y.S.2d 341 (1966); cf. *Adderly v. Florida*, 385 U.S. 39 (1966).

20. 379 U.S. 536 (1965).

21. *Id.* at 553-558.

22. *Cox v. Louisiana*, 379 U.S. 536 (1965); *Hammond v. State College*, 272 F. Supp. 947 (S.C. 1967); cf. *Hamer v. Musselwhite* 376 F.2d 479 (5th Cir. 1967).

23. 64 Cal Rptr. 430, 434 P.2d 982 (1967).

24. *Danskin v. San Diego Unified School Dist.*, 28 Cal. 2d 536, 171 P.2d 885 (1946);

ones,²⁵ no matter how objectionable they might be to the district's customers,²⁶ unless there was a showing of a clear and present danger.²⁷

Although the California Court has not changed any basic interpretations of the First Amendment's protected freedoms, it has extended them to another public medium of communication. While the minority felt that the district should not be compelled to subject itself and its customers to controversial and objectionable ideas,²⁸ the majority followed the prevailing view in the United States that a function of free speech is to invite dispute, create dissatisfaction, and stir people to anger.²⁹

The courts have opened virtually all forms of public communications media to political and religious expression. By requiring an entirely commercial but public transit district to accept political advertising, the courts may be setting a trend requiring private communications media to be forums for the free expression of beliefs and ideas.

JOEL H. SHANE

Constitutional Law—EQUAL PROTECTION OF ILLEGITIMATE CHILDREN. In *Levy v. Louisiana*,¹ a suit was brought on behalf of five illegitimate children for the wrongful death of their mother.² The Louisiana District Court dismissed the suit,³ finding that "child" un-

Community Concerts Ass'n v. Bd. of Education, 18 N.Y.2d 129, 219 N.E.2d 172, 272 N.Y.S.2d 341 (1966); *Madole v. Barnes*, 20 N.Y.2d 169, 229 N.E.2d 20, 282 N.Y.S.2d 225 (1967).

25. *Thomas v. Collins*, 33 U.S. 516 (1945).

26. *Terminiello v. Chicago*, 337 U.S. 1 (1949).

27. In *Kissinger v. N.Y.C. Transit Authority*, 274 F. Supp. 438 (S.D.N.Y. 1967), a case very similar to *Wirta*, defendant transit authority contended that Vietnam peace signs in subways would endanger the safety of its customers. The court held that this raised a question of fact as to the "clear and present danger" of such signs, and thus it was for a jury to decide. *Weaver v. Jordan*, 64 Cal.2d 235, 411 P.2d 289, 49 Cal. Rptr. 537 (1966).

28. *Wirta v. Alameda-Contra Costa Transit Dist.*, 64 Cal. Rptr. 430, 438, 434 P.2d 982, 990 (1967).

29. *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). See also *Schneider v. New Jersey*, 308 U.S. 147 (1939).

1. 192 So.2d 193 (La. Ct. App. 4th Cir. 1966).

2. The children, who were raised by the mother, sued for: (1) damages to them for loss of their mother; and (2) damages based on the survival of a cause of action which the mother had at the time of her death for pain and suffering.

3. No. 430-566 (Civ. Dis. Ct. for the Parish of Orleans, 196-).