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ABSTRACT

Legal issues surrounding the distribution of nonsubscription newspapers are examined in this paper. The paper first discusses selected United States Supreme Court cases that pertain to the circulation of printed materials. It then explores recent state court decisions pertaining to the area of distribution law as it applies to nonsubscription newspapers, and it examines the history of distribution in California, since that state has emerged as an important testing ground for the nonsubscription newspaper. Finally, the paper examines the practical effects of enforcement of city ordinances restricting distribution, based on interviews with authorities in several California cities. The paper concludes that although the California Supreme Court has ruled against ordinances that unfairly restrict distribution of nonsubscription materials, a number of California cities have enacted ordinances that clash with the Court's opinion. (GT)

The First Amendment Right to Distribute Non-Subscription Newspapers

by

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Introduction

An area of press freedom that is sometimes overshadowed by more controversial and publicized areas involves the right to circulate and distribute printed materials. Without protection for distribution, publication would be of little value. The First Amendment guarantee of freedom of the press does include the right to distribute. But at the same time, it is a legitimate function of governments to protect the privacy, safety, and welfare of individuals most affected by such distribution.

The courts have dealt with the issue of distribution from several perspectives. The question is not so much whether one can distribute printed matter, but rather when and where and what kind of matter may be distributed. A number of U. S. Supreme Court cases recognize the right of distribution, and the state courts also have made several definitive statements on the issue.

One aspect of the conflict between the right of distribution and the rights of government to restrict such distribution is whether publishers have the right to distribute non-subscription newspapers, commonly called "throwaways," without restriction. Thus, this paper will focus on the legal issues surrounding such distribution by discussing selected U. S. Supreme Court cases that pertain to circulation of printed materials. It will then explore recent state court decisions pertaining to the area of distribution law as it applies to non-subscription newspapers. In addition, the paper will examine the history of distribution in California, since that state has emerged as an important testing ground for the non-subscription newspaper. And finally, the paper will examine the practical effects of enforcement of city ordinances restricting distribution, based on interviews with authorities in several California cities.

U.S. Supreme Court and Distribution

The U.S. Supreme Court first ruled on distribution in two Jehovah's Witness cases, Lovell v. City of Griffin[1] in 1938 and Schneider v. State[2] in 1939. The Lovell case involved Alma Lovell, a Witness who was arrested for failing to gain permission from the city manager to disseminate religious pamphlets in Griffin, Georgia. In ruling the ordinance invalid, the court said that such an ordinance "strikes at the very foundation of freedom of the press by subjecting it to license and censorship." The court went on to say:

> The ordinance cannot be saved because it relates to distribution and not to publication. Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.[3]

However, the court stressed that it was not prohibiting all ordinances of this kind. The court said that it did not mean to limit "ways which might be regarded as inconsistent with the maintenance of public order or as involving disorderly conduct, the molestation of the inhabitants, or the misuses or littering of the streets."[4]

The implications of the court's exceptions were to appear the next year in Schneider, which differed from the Lovell case because distribution was prohibited by city ordinances preventing littering of the streets. Schneider incorporated four state cases, each involving the distribution of information via handbills, leaflets, and flyers. The U.S. Supreme Court, in settling the issue, stated: "To require a censorship through license which makes impossible the free and unhampered distribution of pamphlets strikes at the very heart of the constitutional guarantees."[5] As in Lovell, the court held that the city ordinances were invalid because they restricted the free flow of information.

Two years later, the U.S. Supreme Court, in Martin v. City of Struthers,[6]

early framers intended that such dissemination be encouraged. In fact, the court, through Justice Hugo Black said that it was lawful to summon the inmates of a residence to the door for the purpose of receiving leaflets. It said:

> Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside responsible police and regulations of time and manner of distribution, it must be fully preserved.[7]

Once again the court supported the distribution but at the same time made it clear that some restriction was permissible in order to protect society. In dictum, the court acknowledged that there reamined "with the homeowner himself" the power to decide "whether distributors of literature may lawfully call at a home." The court suggested that the city could still make it an offense "to ring the bell of a householder who has appropriately indicated that he is unwilling to be disturbed."

In another 1943 case, Largent v. Texas,[8] the court ruled that an ordinance permitting the mayor to issue a permit to distributors of pamphlets or handbills was unconstitutional. The opinion stated that when the dissemination of ideas depends upon the approval of the distributors by an official, it is administrative censorship in an extreme form. Similarly, in Murdock v. Pennsylvania the same year, the court struck down a city ordinance that imposed a license tax for all persons engaged in soliciting or canvassing for orders for goods, wares, or merchandise of any king.

In two 1946 cases involving distribution of religious literature, the court again relied primarily on its earlier rulings in this area. In Marsh v. Alabama[10] and Tucker v. Texas,[11] the court held steadfast to its ruling that

> . . . neither a State nor a municipality can completely bar the distribution of literature containing religious or political ideas on its streets, sidewalks and public places or make the right to distribute on a flat license tax or permit to be issued by an official who could deny it at will.[12]

A significant point in the Marsh case is that the court permitted distribution in a privately owned town, which constituted distribution on private property.

Nearly twenty years later, the U.S. Supreme Court reinforced the constitutional right of distribution in Talley v. California, a case in which the court overturned a Los Angeles City ordinance restricting the distribution of anonymous handbills. Justice Black, for the court, summarized the history of pamphleteering in the United States and concluded that pamphlets are crucial to democracy.[6]

Although the court was solid in its support for protecting the right of distribution of "editorial" materials, it did from time to time refer to permissible bounds of police power of a municipality. One area where certain controls have been permitted by the court involves distribution or circulation of materials to a captive audience. This area relates directly to the distribution of non-subscription newspapers.

Concern for the captive audience was first voiced in a dissent by Justice William O. Douglas in 1952 in Public Utilities Commission v. Pollak.[13] Justice Douglas, in his dissent in this case which upheld the right of a city transit company to play radio news, music, and advertising over loudspeakers in buses and streetcars, said,

> One who tunes in on an offensive program at home can turn it off or tune in another station as he wishes. One who hears disquieting or unpleasant programs in public places, such as restaurants, can get up and leave. But the man on the streetcar has no choice but to sit and listen, or perhaps to sit and try not to listen.[14]

And similarly in Lehman v. City of Shaker Heights[15] in 1974, the court upheld a municipal ordinahce banning noncommercial display placards in city transit vehicles. The opinion relied in part on captive audience concerns and said, "There is no difference when the message is visual not

auricular (as was the case in Pollak). In each the viewer or listener is captive."

The rights of unwilling recipients of printed material were made clear in Rowan v. Post Office[16] in 1970 when the court ruled that homeowners could impose their own prior restraint on materials they did not want. In this case, the court upheld a statute that allowed homeowners who had received advertisements for "erotically arousing or sexually provacative" material to instruct the Post Office to forbid the mailer to send any more material to the addresses. Chief Justice Warren Burger, who relied heavily on the concept that "a man's house is his castle" said that to require homeowners to receive offensive mail would be to "license a form of trespass and would make hardly more sense than to say that a radio or television viewer may not twist the dial to cut off an offensive or boring communication and thus bar its entering his home." [17]

Such rulings in the area of the "captive audience" relate directly to the right of publishers to distribute non-subscription newspapers to homeowners who have not requested or who object to such delivery. Today's cities and towns can approach this problem of the circulation of non-subscription newspapers through a sampling of litigation and by applying principles from U. S. Supreme Court cases relating to distribution of printed materials. However, state courts have ruled on the right of distribution during the past two years.

Although the U. S. Supreme Court has clearly stated that the right of distribution of printed materials is protected by the First Amendment, it also has proceded with some caution. The court made its view clear in a distribution case involving commercial material. It said "Freedom of speech or press does not mean that one can talk or distribute where, when

and how one chooses. Rights other than those of the advocates are involved. By adjustment of rights, we can have both full liberty of expression and an orderly life."[18]

Restrictions were placed on the distribution of non-subscription newspapers, according to the related cases decided by the U. S. Supreme Court. However, it is helpful to examine recent state court decisions in order to get rulings relating specifically to non-subscription newspapers in the lower courts.

1978-79 Distribution Decisions

State courts, too, have recognized the importance of the right to distribute materials. At the same time, however, state courts in recent decisions have permitted certain restrictions that were imposed by city ordinances. In most instances the court showed no concern about content of the material but did express concern about when, where, and how the material was distributed.

In 1978, a Pennsylvania township ordinance banning distribution of "advertising material" to residences without the consent of the resident was reviewed by the Pennsylvania Supreme Court. The ordinance prohibited any firm or person from distributing advertising material "unless the person, firm or corporation distributing such advertising material does so based upon the affirmative request or consent of the person occupying the residence."[19] In Pennsylvania v. Sterlace, the Supreme Court held that the ordinance had not unduly burdened protected speech. It said that other means of distribution existed and that such an ordiance did not ban all distribution. The court said it was reasonable to require to impose restriction in the form of prior consent because:

> When it is known that these materials are desired, there is ample reason to believe that homeowners in the area will both collect these materials before they can become either litter or eyesores and assume the responsibility, as they do with newspapers and other home doorstep deliveries, to suspend delivery or to arrange for these materials to be picked up in their absence.[20]

The court justified its decision, then, on the basis of not only reducing the risk of crime but also litter and eyesores.

In another case, H & L Messengers v. Brentwood, the Tennessee Supreme Court invalidated a city ordinance because its provisions allowed for restriction on distribution based on the content of the matter. The city of Brentwood adopted a rule which said commercial handbills could not be delivered in any public place, but newspapers, political or religious material could be delivered in this manner. The ordinance, which was designed for purposes of preventing litter, protecting against invasion of privacy, and guarding against burglary, placed different restrictions on material based on content. The court said that such provisions were vague and overbroad and failed to achieve their stated objectives.[21]

Similarly, a federal district court in New Mexico held that an Alamogordo city ordinance which exempted religious and charitable organizations from a general ban on door-to-door solicitations was invalid because it allowed the city manager discretion in determining what is and what is not a religious cause. The court, in Weissman v. Alamogordo,[22] said that this was a content consideration. This 1979 decision once again reinforced the earlier holdings that if city ordinances contain provisions that restrict distribution of printed materials, only when, where, and how can be part of those provisions.

Content consideration was a factor in a 1978 Wyoming case, Love v. Mayor, City of Cheyenne, Wyoming. In a factual setting very similar to

that in the Weissman case, the Unification Church sought to engage in a campaign of "literature evangelism" in which members of the church were to go from door to door speaking with local residents about religious matters, distributing church literature, and soliciting donations. Such activities, however, were prohibited by a Cheyenne city ordinance--identical to the ordinance in the above Weissman case. The district court held that the ordinance as applied to the Church was unconstitutional because it failed to distinguish between commercial and non-commercial activity. The Church, it said, was engaged in non-commercial activity and was protected in its activities.[23]

Finally, in a 1979 Florida case, Golden Palm Publishing v. City of West Palm Beach, a Florida Circuit Court invalidated a city ordinance holding that it was unconstitutional. The ordinance required that the publisher of non-subscription newspapers or shoppers obtain the consent of the distributee in advance of the distribution of the newspaper to him. The publisher contended that such an ordinance amounted to confiscation of the newspaper because the cost of obtaining consent initially would prohibit the obtaining of it.[24]

In reaching its decision, the court reviewed recent commercial advertising cases (the shopper in question contained no non-commercial material) that held First Amendment protection for commercial speech.[25] It also reviewed similar cases which prohibited prior consent clauses in ordinances restricting distribution of printed materials. Finally, the court said that the ordinance was overbroad and could be more narrowly drawn to "simply prohibit a distributor from delivering material to any occupant who has expressed an objection to such distribution."[26]

California Distribution Rights

Because a number of city ordinances containing certain restrictions on distribution of printed materials were challenged in California courts, California has emerged as an important testing ground for non-subscription newspapers and printed material. As early as 1930 the publishers of the Down Town Shopping News in Los Angeles challenged a city ordinance which prohibited distribution of all literature of an advertising nature upon property, public or private. Even citizens who requested the shopper were not permitted to receive it. The city claimed that other means of distribution were available; the appellate court agreed and upheld the validity of the ordinance.[27]

The next year in Sieroty v. City of Huntington Park, the publisher of Better Homes Furnishing Facts contested Huntington Park's 1929 ordinance forbiding the circulation of all advertising carriers, including newspapers, in yards, on porches, in autos, or in receptacles that were not controlled by the distributors. Material clearly protected by the First Amendment was included in the ban. Yet, the state court of appeals held that the city was operating within its proper power.[28]

The decision of the court in Sieroty forecast the reasoning of future courts. It held:

> . . . there is nothing to prevent distribution to the householder at the door if he is interested in the publication, or to individuals, and appellant could probably obtain the consent of interested householders to deposit the publication.[29]

Thus, the issue of prior consent being part of a requirement for the legal distribution of printed matters emerged and was to become a part of city ordinances throughout the state.

California had yet another case prior to Lovell v. Griffin decision by the U.S. Supreme Court. In People v. Armentrout in 1931, the California court of appeal recognized the importance of circulating and publishing. It said that workmen engaged in industrial disputes have the right to spread news of the dispute and may "hire a hall or print a paper."[30] Although this case does not deal directly with a non-subscription newspaper, it does point out the court's desire to encourage free and open debate.

Still in the pre-Lovell period, a federal court of appeals in 1934 reinforced the Sieroty decision discussed above when it upheld a San Francisco ordinance, almost identical to the Huntington Park law.[31] Thus, the courts in the cases prior to Lovell recognized the value of distribution but ruled in favor of the municipality to control such distribution in the manner it felt important to the safety and welfare of the people.

In the first post-Lovell case in California, a California District Court ruled on the constitutionality of a Riverside ordinance that made it unlawful to throw a newspaper upon private property without consent of the occupant. The court, in Buxbom v. City of Riverside, upheld the ordinance and said: "The right to speak freely does not imply the right to force one's speech on another's private premises." The court then drew parallels between the right to distribute newspapers on private property to other constitutional restraints on the distribution of certain messages. It said:

> If governmental agencies may aid the enjoyment of people's homes by zoning ordinances; if the erection of bill boards may be made dependent upon consent of owners of property in the neighborhood; and even solicitation of custom or patronage in railroad stations or on public streets in front of them may be prohibited or be made dependent upon consent of the railroad

> or abutting owner, it is incomprehensible how the right to print and distribute freely may be broadened into absolute freedom to invade another's property rights by littering his premises without his consent.[32]

Here, the court felt that the right of the individual to protect his property from unrequested matter outweighs the right to distribute such matter.

In a later case, the California Supreme Court addressed the issue of distribution with respect to sound trucks, but much of the decision served as precedent to later cases involving print publications. In Wollam v. City of Palm Springs,[33] the court ruled on a city ordinance greatly restricting the use of sound trucks to disseminate messages. The plaintiff attacked the ordinance as unconstitutional and the trial court upheld the contention upon the ground that the ordinance unconstitutionally sought to prevent stationary use of sound trucks. The purpose of the ordinance, according to the city, was to prevent unreasonably loud, raucous, jarring disturbing noise and to prevent a nuisance to persons within the area of audibility.

The Supreme Court, however, concurred with the trial court and said that ordinances may regulate the use of sound trucks. But, the court added, such ordinances must be narrowly drawn to avoid specific evils, such as raucous noise or traffic congestion, for "An ordinance which indiscriminately sweeps within its ambit an inhibition of the communication of a message invades the right of free speech."[34] The Palm Springs ordinance, the court said, fell into the latter category and could not stand.

Thus, the court indicated that the rights of the listener are indeed important, but such rights must not be protected at the expense of the message, which does have First Amendment protection. Later cases agreed with this in part but placed greater emphasis on the rights of

the listener.

A case five years later dealt specifically with the issue of distributing newspapers and other printed matter on the premises of private residences without the consent of the resident. The case, Di Lorenzo v. City of Pacific Grove[35] in 1968, involved City Ordinance 534 N.S. that said:

> . . .the practice of throwing newspapers and other advertising media on private residential property creates a serious police problem and a threat to the public safety in that residents are unaware that such material is going to be thrown on their premises and are unable to make proper provisions for the stopping of such throwing material on their property so that their absence may be inadvertently advertised to persons of dissolute or criminal propensities as a result of the accumulation of advertising matter, handbills, and old newspapers on their property . . . .[36]

The ordinance then went on to provide that: "It shall be unlawful for any person, firm, or corporation . . . to throw into, leave upon, or scatter onto any residential property in the City of Pacific Grove without the consent of the owner . . . any newspaper . . ."[37] Thus, the ordinance requires publishers to acquire prior consent before legally distributing printed matter, including non-subscription newspapers.

The Court of Appeal, in relying on the 1939 Buxbom opinion, noted the dearth of authority directly relating to this area of distribution. After a discussion of U.S. Supreme Court opinions relating to distribution, the court emphasized those quotes in which justices indicated an interest in protecting the safety and welfare of the individual. In citing Breard v. Alexandria, the court acknowledged that one cannot talk or distribute where, when and how one chooses. It then upheld the constitutionality of the Pacific Grove ordinance, saying:

> . . . we conclude that the ordinance in question has no First Amendment or other constitutional taint. It appears to be reasonably and narrowly drawn. It does not . . . bring about the practical prohibition of the conveyance of a message to the public. Plaintiff is permitted to hand her newspaper to any Pacific Grove householder who will accept it, and to solicit consent to thereafter throw the paper onto the premises.[38]

Here again, in a case which relied on the only other California case that involved non-subscription newspapers, the court ruled that ordinances with "prior consent" clauses were constitutional. Thus, publishers were required in some cities to obtain prior consent from occupants of residents before distributing certain printed matter.

However, the "prior consent" restriction was re-evaluated in a 1971 California case, Van Nuys Publishing Company v. City of Thousand Oaks.[39] This case is authoritative at this time because it is the most recent and reflects the view of the California Supreme Court.

The case grew out of an "anti-littering" ordinance in Thousand Oaks that provides:

> No person may throw, cast, distribute, scatter, deposit, pass out, give away, circulate or deliver any handbill, dodger, circular, newspaper, paper, booklet, poster . . . in the yard or grounds of any house, private property without having first obtained permission of the owner or of an adult resident or occupant thereof.[40]

The ordinance, like those in the above cases, required consent of occupants of residences before a publisher could distribute non-subscription newspapers.

The Van Nuys Publishing Company brought a suit against the city to stop enforcement of the ordinance on the ground that it constituted an unconstitutional abridgement of First Amendment rights. After initially issuing an order to stop enforcement, the trial court ruled in favor of the city, upholding the constitutionality of the ordinance.

The California Supreme Court, in its review, discussed the U.S. Supreme Court distribution decisions, examined the earlier California distribution cases, and finally reversed the trial court. The court recognized that the right to distribute newspapers, pamphlets, or protected material does not imply the right to litter. But the court said that the Thousand Oaks ordinance was overbroad in its attempt to stop littering. The ordinance, the court said, " . . . goes far beyond proscribing those activities which constitute littering or necessarily cause litter." The court went on to say that:

> . . . the ordinance does not limit its criminal sanction to those who strew papers on lawns or sidewalks but by its terms covers those who merely enter on property to distribute pamphlets to others who may be there, as well as those who, in delivering pamphlets, take care to secure their messages so as to eliminate the hazards of litter. [41]

The court, then, objected to the ordinance's requirement that prior consent be obtained from residents.' Such consent, the court reasoned, served as a severe restriction on the distribution of materials protected by the First Amendment.

In overturning the California Court of Appeal's 1968 Di Lorenzo ruling concerning a similar ordinance, the Supreme Court noted that "in order for one to reach the minds of willing listeners . . . the disseminator of ideas must be given an opportunity to win their attention." Such prior consent greatly restricts reaching willing listeners simply because many individuals may not be present to give consent, the court said.

At the same time, the court recognized that the state does have a legitimate interest in protecting individuals from having undesired material forced upon them. The court pointed out that "the city's professed goal of protecting 'unwilling listeners' could be equally served by a more narrowly drawn provision, which simply prohibited a distributor from delivering material to any occupant who had expressed an objection to such distribution.

The case, then, clarified California law with respect to distribution of

non-subscription newspapers. The Supreme Court recognized the state's right to protect the homeowner against undesired material, but such protection must not be obtained from overbroad ordinances that unfairly restrict distribution of such materials. The court has ruled that "prior consent" clauses in ordinances are overbroad and unconstitutional, but that publishers must be sensitive to those occupants that object to the delivery of undesired materials. Yet, California cities maintain on the books and enforce ordinances that do in fact require "consent" prior to distribution. Also, a number of cities have rewritten ordinances that require publishers to discontinue distribution to residences where occupants have objected to such distribution. A summary of city ordinances helps clarify this point.

Distribution Ordinances

City governments may legitimately protect the rights of residents by using specific ordinances. However, a survey of California city ordinances has shown that certain of these are overbroad and do, in fact, infringe on the First Amendment, based on the California Supreme Court's opinion in Van Nuys.

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Two main types of ordinances which regulate the distribution of non-subscription newspapers are enforced by California city government. The most common type of ordinance establishes a procedure for individuals who wish to file an "objection to distribution" with the city clerk. Distribution to these individuals is then prohibited. The second type of ordinance is the one of major concern. It forbids distribution to all persons except to those who have given their "prior consent" to receive such a newspaper.

As pointed out by Justice Tobriner in Van Nuys, an ordinance "which does not ban all distribution, but 'merely' conditions distribution on the prior consent of the occupant of the property where distribution is to take place

. . . will, as a practical matter, frequently operate to curtail completely this means of communication." Furthermore, it was a major finding of this case that:

> A proper accommodation of competing First Amendment and privacy values raised by an ordinance prohibiting distribution of printed matter on private property without the owner's consent, requires that, in the case of private residences, the initial burden be placed on the homeowner to express his objection to the distribution.

Therefore, it would seem that the above mentioned "objection to distribution" city ordinance is within the court's guidelines while the above mentioned "prior consent" city ordinance is not. Nevertheless, the survey of "litter" or "handbill" ordinances of California cities turned up cities with "prior consent" ordinances. Four cities that have such ordinances are Millbrae, Reedley, Fullerton, and Salinas.

Millbrae's ordinance, now part of its Municipal Code, title 7, chapter 4, specifies that "Any newspaper . . . for which no charge is made . . . shall be placed into the hand of the intended recipient, or placed through a slot or opening in a front entry door, or within a receptacle for such items located upon the property." Such provisions as "into the hand," "through a slot," and "within a receptacle" indicate an indirect way of requiring prior consent. Such prior consent in the Thousand Oaks' ordinance was found to be in violation of the First Amendment in the Van Nuys case.

When the city clerk of Millbrae was asked to comment on Millbrae's ordinance that "regulates the distribution of non-subscription newspapers," she proclaimed, "We don't have an ordinance like that." After the ordinance was read to her, she then said, "We have been going around with that paper (the Peninusla Advisor) for some time. They are not distributing it according to the letter of the law. The city attorney and chief of police have been talking to them."

Calling her city "a relatively affluent community with a lot of retired people who travel," the clerk said, "People were very vocal about that type of distribution (free distribution without restriction)." She said community sentiment disfavors "both advertising material and newspapers."

In addition to the "prior consent" clause in the Millbrae ordinance, it also includes an "objection to distribution" clause. It specifies that an individual may file an affidavit with the city clerk refusing to consent to the distribution of any handbill or newspaper for which no charge is made. The clerk said that that portion of the ordinance is "more easily enforced."

As to the "prior consent" clause, the clerk showed some concern. "There was some concern that it was going to be tested. Right now our police department is trying to enforce it on a one-to-one basis," she noted.

The Peninusla Advisor's circulation manager, Jim McGowan, said, "We have a list of people we can't deliver to. As for the others, the Post Office says we can't use the mail box, so we try to get the paper on the front porch. We try to keep it low key. We're actually violating their law."

According to McGowan, "The heat we're getting is from the other paper there, the Millbrae Sunleader." The Sunleader is a twice weekly subscription newspaper. Although McGowan was the only newspaper person who would go on record, three other newspersons from cities with restrictive ordinances said the same thing -- ordinances to restrict distribution of non-subscription newspapers were instigated and supported by competing newspapers that were concerned about advertising revenues.

The "handbill" ordinance in the city of Reedley is an example of another restrictive ordinance. Ordinance 587, chapter 9, states:

> It shall be unlawful for any person, either directly or indirectly, to distribute . . . any handbill . . .in such a manner as to allow the matter to scatter or blow.. . .The provisions of this Section shall not be deemed to prohibit . . .distributing of any handbill to the . . .occupant . . .with his consent.

In effect, what this ordinance means, according to City Clerk Ray Medcalf, is that "the person distributing must knock on the door," thereby obtaining the necessary consent. According to publisher Dave Hostler of the Reedley Exponent, a subscription weekly delivered by mail, and the Exponent Shopper News, a non-subscription weekly, the ordinance is not being enforced. "I tried to get an interpretation of the ordinance from the city council, but they wouldn't give it to me. If they don't bother me, for obvious reasons I'm not going to challenge it."

The ordinance in Fullerton, Chapter 7.30 of the municipal code, is entitled "Restriction on the Distribution of Newspapers, Magazines, Handbills, and other Papers on Private Residential Property." It includes both the "objection to distribution" and "prior consent" clauses. The Fullerton ordinance says that it is:

> . . . unlawful for any person to distribute . . .any newspaper. . . .for which no charge is made . . .except with the prior consent of the owner or occupant and into the hand of a person at such property or through a slot or opening in a front entry door, or within a receptacle for such items located upon such property. (my underline)

It is important to note the "and" in this law, because it makes the provisions "into the hand," "through a slot," or "within a receptacle" mere amplifications of the central provision of this law requiring "prior consent." And, as noted earlier, it was the "prior consent" clause in the Van Nuys case which the Supreme Court found to be unconstitutional.

According to Fullerton's city attorney, Kerry Fox, "We use that ordinance

in a funny way; we pursue voluntary compliance." At another point, Fox said, "We don't pay too much attention to that ordinance. When asked why there was a long silence followed by, "I don't think it's legal." He said that the "problems of enforcement are horrendous."

While "prior consent" ordinances might be considered illegal by certain city attorneys and unconstitutional by the Supreme Court, most attorneys said that they are difficult to enforce. The problem of enforcement is also the case with the "objection to distribution" ordinances.

Among the cities with "objection" clauses in their ordinances are Thousand Oaks, Rialto, San Marino, Pleasanton, Arcadia, and La Habra. The above cities said they had patterned their ordinances after Thousand Oaks', which revised its ordinance following the Supreme Court decision. Cities with "objection" clauses have established a procedure whereby distribution is prohibited to those specific individuals who have filed an objection to the distribution, to those who state that they do not want to receive non-subscription newspapers and other materials. In Arcadia and La Habra, violation of the ordiance is punishable by six months in jail, $500, or both imprisonment and the fine.

La Habra's ordinance goes a step further. It requires distributors to be licensed. The fee is $10 a day, $50 for six months, or $100 for a year's license. The California Supreme Court, in citing the U.S. Supreme Court's decision in Schneider v. State, said in Van Nuys that a local ordinance which required house-to-house distributors of pamphlets to obtain a license piror to disseminating the material was incompatible with the First Amendment.

But, as can be seen from the number of ordinances requiring "prior consent," the legality or constitutionality of an ordinance apparently doesn't seem to be the primary concern of a city when it decides to restrict

distribution. Small papers aren't likely to challenge city ordinances because of financial considerations. But sometimes as a result of restrictive ordinances, non-subscription newspapers' growth and acceptability in a community are restricted because of ordinances with limitations. It is significant to note that the twice-weekly "throw away" newspaper involved in Van Nuys Publishing has grown since 1971, the year of the case. Now the newspaper is called the Valley News and is considered to be one of the two main competitors to the L.A. Times in the Los Angeles metropolitan area.[43]

CONCLUSIONS

Although the California Supreme Court has issued a clear ruling on the matter of ordinances relating to non-subscription newspapers, a number of California cities have enacted ordinances that clash with the court's opinion in Van Nuys Publishing. Of course such ordinances, if challenged, most likely would lose in the courts. But such a court battle can take much time and cost a great deal of money -- money that small fledgling publishers do not have. Thus, publishers attempt to function outside the law in hopes of going unnoticed by city attorneys.

The main point is that many times it is necessary for a small community newspaper to gain the attention of potential readers by free and mass distribution, as was the case with the Van Nuys newspaper. If a newspaper is able to gain both advertising and reader support, it then can generate greater income permitting it to become a viable information source in the community. The next step by the publisher would be to increase frequency of publication and to require a subscription fee. Yet the newspaper that is now twice weekly and that requires a subscription fee gained a foothold as a non-subscription

newspaper. If ordinances are designed to curb such evolution, the information source has been denied a right given to it by the First Amendment.

Perhaps the ordinance that includes the "objection to distribution" clause, which has been ruled constitutional, is within the realm of possible compliance by publishers, but even that clause creates problems. Singling out individual residences that have been listed as objecting to delivery of a publication is difficult because of the mode of distribution used by most non-subscription newspaper publishers. Teen age carriers and car delivery is efficient for newspapers thrown from home to home. But when time must be taken to determine which house or apartment is on a list, efficiency of distribution is hurt and costs go up. Once again, such restriction cuts into the distribution of printed matter protected by the First Amendment.

The main reason given by city councils for enacting city ordinances that restrict distribution is that such distribution is detrimental to the public safety and welfare because of the potential of alerting burglars that certain residences are temporarily unoccupied because of vacation or business trips. Statistics to support whether such a belief is true are impossible to gather. But many city councils support such a contention. It would appear that this problem could be remedied by the occupant without city interference into the distribution of constitutionally protected matter.

Overall, distribution of non-subscription newspaper has not generated a great deal of attention because there have been few legal battles in this area. However, there have been a large number of cases involving distribution of printed matter, and the courts have reasoned that the First Amendment does protect such distribution. The U.S. Supreme Court has ruled that only "reasonable" restrictions that are narrowly drawn can be enforced in order to protect the privacy, safety, and welfare of the individual. Apparently city government

interprets "reasonable" restrictions in an overbroad manner as evidenced by current ordinances. Yet, courts have not supported such overbroad ordinances and have said that provisions should be narrowly drawn regulating time, place, and manner without regard to content. In addition, courts have not been sympathetic with ordinances requiring prior consent but have supported those requiring distributors to stop distribution to those residents who object to material circulated.

Endnotes

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

2 Schneider v. State, 308 U.S. 147 (1939).

3 Lovell v. Griffin at 451.

4 Lovell v. Griffin at 452.

5 Schneider v. State at 164.

6 Martin v. City of Struthers, 319 U.S. 141 (1943).

7 Ibid., at 146-147.

8 Largent v. Texas, 318 U.S. 419 (1943).

9 Murdock v. Pennsylvania, 319 U.S. 105 (1943).

10 Marsh v. Alabama, 326 U.S. 501 (1946).

11 Tucker v. Texas, 326 U.S. 517 (1946).

12 Ibid., at 520.

13 Public Utilities Commission v. Pollak, 343 U.S. 451 (1952).

14 Ibid., at 469.

15 Lehman v. City of Shaker Heights, 418 U.S. 298 (1974).

16 Rowan v. Post Office, 397 U.S. 728 (1970).

17 Ibid., at 737.

18 Breard v. Alexandria, 341 U.S. 622 (1951).

19 Pennsylvania v. Sterlace, 4 Med. L. Rptr. 2014 (1978).

20 Ibid., at 2016.

21 H & L Messengers v. Brentwood, 4 Med. L. Rptr. 2471 (1979).

22 Weissman v. Alamogordo, 5 Med. L. Rptr. 1585 (1979).

23 Love v. Mayor, City of Cheyenne, Wyoming, 448 F. Supp. 128 (1978).

24 Golden Palm Publishing v. City of West Palm Beach, Case No. 7883, (1979).

25 Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council 425 U.S. 748 (1976); Linmark Associates v. Willingboro, 431 U.S. 85 (1977).

26
Golden Palm Publishing at 15.

27
People v. St. John, 288 P. 53 (1930).

28
Sieroty v. City of Huntington Park, 295 P. 564 (1931).

29
Ibid., at 566.

30
People v. Armentrout, 118 C.A. Supp. 761 (1931).

31
San Francisco Shopping News Co. v. City of South San Francisco, 62 F. 2d 879 (1934).

32
Buxbom v. City of Riverside, 29 F. Supp. 3 (1939).

33
Wollam v. City of Palm Springs, 59 C. 2d 276 (1963).

34
Ibid, at 278.

35
Di Lorenzo v. City of Pacific Grove, 260 C.A. 2d 68 (1968).

36
Ibid., at 69.

37
Ibid., at 70.

38
Ibid., at 74.

39
Van Nuys Publishing Company v. City of Thousand Oaks, 5 C.3d. 817 (1971).

40
"An Ordinance of the City of Thousand Oaks Declaring the Throwing or Distributing of Printed Matter on Public and Private Property Without Consent to be a Public Nuisance and Unlawful," Ordinance 98, Section 4.

41
In some cities an ordinance remains an ordinance, while in others it becomes a part of the municipal code. For clarity, this paper will refer to all such city laws as ordinances.

42
Interview with Bruce Winters, editor of Valley News, on October 3, 1979; Interview with source within Los Angeles Times, January 11, 1980.