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Constitutional Law -- Deprivation of Due Process -- Captive Audience

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time in question *he actually suspects a defense against the instrument* or he has reason to know that it exists *by the observance of the reasonable commercial standards in any business in which he may be engaged."*[34] This would give the terms "good faith" and "notice" an "actual good faith test" when applied to laymen, but an "objective test" would be used when applied to business men.[35]

Prospectively, it may be many years before all the states will adopt the U. C. C. and the sections in point.[36] One thing is certain. If it is adopted by the states, the primary objective of developing uniformity in the law of bills and notes will have a better chance for accomplishment in respect to purchasers of negotiable paper than under the N. I. L. as nearly every purchaser would be held to an objective standard of care.

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Constitutional Law—Deprivation of Due Process—Captive Audience

The Public Utilities Commission of the District of Columbia dismissed its investigation[1] concerning the use of radios in the vehicles of Capital Transit Company,[2] and petitions of appeal were denied by the district court on the ground that no legal right of petitioning passengers had been impaired. In reversing,[3] the court of appeals held that forced listening[4] to radio commercials resulted from government action[5] and deprived a "captive audience" of liberty without due process

[34] The "objective test" as to business men under the U. C. C. and the submitted language above would result in a different application for each business field. The courts would probably find trouble in determining (or in framing questions for the jury) what activities are necessary to constitute being in business, whether a certain person is engaged in such a business, and what are the reasonable commercial standards in this particular type business. Those drafting the U. C. C. evidently thought the beneficial result would outweigh the difficulty.

[35] See note 29 *supra.*

[36] It took some 28 years for all the states to adopt the N. I. L. The U. C. C. was introduced in the New York Legislature in 1952 but no action was taken except to have it printed and circulated for the information of the bar and other interested parties. The code will be introduced there again next year.

[1] Capital Transit Co., 81 P. U. R. (N. S.) 122 (1950).

[2] "If they can hear—they can hear your commercial!" (from brochure by Transit Radio, Inc., 1949).

[3] Pollak *et al.* v. Public Utilities Comm'n of D. C., 191 F. 2d 450 (D. C. Cir.), *cert. granted,* 72 Sup. Ct. 77 (1951).

[4] Forced *hearing* would seem to be more accurate.

[5] The Fifth Amendment "relates only to governmental action, federal in character, not to action by private persons." National Fed. Rwy. Workers v. National Med. Bd., 110 F. 2d 529, 537 (D. C. Cir.), *cert. denied,* 310 U. S. 628 (1940). "But power is never without responsibility. And when authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itself." American Communications Ass'n., C.I.O. v. Douds, 339 U. S. 382, 401

of law, in violation of the Fifth Amendment.[6]

This decision interpreted the word "liberty" to include "freedom of attention," which interpretation, while not entirely novel,[7] seems to be broader than any announced previously by an important court.[8] The first of the really liberal Supreme Court proclamations in point was set forth in *Allgeyer v. Louisiana*, which declared that as mentioned in the Fourteenth Amendment liberty "means not only the right of the citizen to be free from the mere physical restraint of his person" but also the privilege (among others) "to be free in the enjoyment of all his faculties."[9] More recently, it has been held in a "sound truck" case that "the right of free speech is guaranteed every citizen that he may reach the minds of *willing* listeners. . . ."[10] [Italics supplied.] There are numerous other cases recognizing limitations upon the warranties of the First and Fourteenth Amendments[11] but especially pertinent in respect of the conflict presented in the principal case[12] is *Valentine v. Chresten-*

(1950). See also Justice Murphy's concurring opinion in Steele v. L. & N. R.R., 323 U. S. 192, 208 (1944): "Congress, through the Railway Labor Act, has conferred upon the union selected by a majority of a craft or class of railway workers the power to represent the entire craft or class in all collective bargaining matters. While such a union is essentially a private organization, its power to represent and bind all members of a class or craft is derived solely from Congress. The Act contains no language which directs the manner in which the bargaining representaive shall perform its duties. But it cannot be assumed that Congress meant to authorize the representative to act so as to ignore rights guaranteed by the Constitution. Otherwise the Act would bear the stigma of unconstitutionality under the Fifth Amedment in this respect."

[6] See Shipley, *Some Constitutional Aspects of Transit Radio*, 11 FED. COMM. B. J. 150 (1950).

[7] See Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

[8] "No occasion had arisen till now to give effect to freedom from forced listening as a constitutional right. Short of imprisonment, the only way to compel a man's attention for many minutes is to bombard him with sound that he cannot ignore in a place where he must be." Pollak *et al.* v. Public Utilities Comm'n of D. C., 191 F. 2d 450, 456 (D. C. Cir. 1951).

[9] 165 U. S. 578, 589 (1897). See also Grosjean v. American Press Co., 297 U. S. 233, 244 (1936).

[10] Kovacs v. Cooper, 336 U. S. 77, 87 (1949). "Surely there is not a constitutional right to force unwilling people to listen." Saia v. New York, 334 U. S. 558, 563 (1948) (dissenting opinion). *But see* N.L.R.B. v. Montgomery Ward, 157 F. 2d 486, 499 (8th Cir. 1946): "The First Amendment is concerned with the freedom of thought and expression of the speaker or writer, not with the conditions under which the auditor or listener receives the message. One need not, as a condition precedent to his right of free speech under the First Amendment, secure permission of his auditor. The First Amendment does not purport to protect the right of privacy, nor does it require that the audience shall have volunteered to listen." For examples of protection under the law of nuisance see Stodder v. Rosen Talking Machine Co., 241 Mass. 245, 135 N. E. 251 (1922), 247 Mass. 60, 141 N. E. 569 (1923); and Five Oaks Corp. v. Gathmann, 190 Md. 348, 59 A. 2d 656 (1948).

[11] *E.g.*, Feiner v. New York, 340 U. S. 315 (1951); Cox v. New Hampshire, 312 U. S. 569 (1941); Cantwell v. Connecticut, 310 U. S. 296 (1940); and Frohwerk v. United States, 249 U. S. 204 (1919).

[12] *I.e.*, the conflict between the protections afforded by the First and Fifth Amendments. "Freedom of speech does not import the right or license to say

sen,[13] which held, in effect, that the guarantee of freedom to communicate information does not protect purely commercial advertising.[14] It is also worthy of note that Justice Jackson has refused to recognize as a free speech issue the question of whether the use of amplifying appliances may be regulated, contending that the right comprehends only natural facilities for speech.[15]

The *Pollak* opinion (principal case) states that the profits involved[16] and the interest of willing hearers[17] cannot justify abrogating the constitutional rights of even a minority.[18] This might seem to raise an interesting problem of degree when, for example, only one passenger insists upon his right to "freedom of attention" while thirty others are bent upon their "right to hear" (and such a consideration was apparently the real basis for the Utilities Commission's decision to dismiss its investigation). But it is submitted that the court's rationalization is correct if the "captive audience"[19] was in fact captive as a result of government action,[20] since Capital Transit was under no compulsion to provide radios for its customers.

One collateral repercussion of the decision followed closely on its heels. In *Harnik v. Levine* a municipal court, discussing the complaint

whatever one pleases, to whom he pleases, and wherever he pleases. This is because the right of free speech is ony one of many rights accorded the people and in our scheme of government it is intended that each shall be exercised with regard to the others and that all are to be exercised under restraints imposed by law." Francis v. Virgin Islands, 11 F. 2d 860, 865 (3rd Cir.), *cert. denied*, 273 U. S. 693 (1926).

[13] 316 U. S. 52 (1942).

[14] "This decision applies to 'commercials' and to 'announcements.' We are not now called upon to decide whether occasional broadcasts of music alone would infringe constitutional rights." Pollak, *et al.* v. Public Utilities Comm'n of D. C., 191 F. 2d 450, 458 (D. C. Cir. 1951).

[15] "Lockport has in no way denied or restricted the free use, even in its park, of all of the facilities for speech with which nature has endowed the appellant." Saia v. New York, 334 U. S. 558, 568 (1948) (dissenting opinion). Justice Frankfurter notes that "modern devices for amplifying the range and volume of the voice, or its recording, afford easy, too easy, opportunities for aural aggression." *Id.* at 563 (dissenting opinion).

[16] There was no evidence in the principal case that profits were large enough to have any effect on fares. A similar (abortive) attempt to "capture" the attention of Grand Central Station's daily throngs provoked several perceptive editorial attacks. Of the argument that revenues provided by the sale of commercial time helped defray station clean-up expenses, one editor said, in view of the fact that Beech-Nut Gum was an advertiser: "In other words, the Voice of Grand Central is urging five hundred thousand people a day to buy chewing gum so that the management will have enough money to sweep up gum wrappers." 25 New Yorker 11 (Dec. 31, 1949).

[17] "Withdrawing this particular entertainment will no more deprive willing hearers of liberty than excluding a man from a particular place imprisons him." Pollak *et al.* v. Public Utilities Comm'n of D. C., 191 F. 2d 450, 457 n. 14 (D. C. Cir. 1951).

[18] "They suffer not only the discomfort of hearing what they dislike but a sense of outrage at being compelled to hear whatever Transit and Radio choose." *Id.* at 457.

[19] The transmitting station advertised it as a "guaranteed audience." THE 1949 RADIO ANNUAL, p. 363.

[20] See note 5 *supra*.

of an autoist "imprisoned" by double-parking, stated that "questions of law, however new, strange, or unusual, are matters for judicial determination. Embattled passengers of a transit company in our nation's capital recently became tired of listening to commercial radio broadcasts while traveling in public conveyances; the [court] did not hesitate to uphold the right of the public to be free from bombardment of sound which could not be ignored. . . . If a 'captive audience' has a right to complain of its plight and to pray for relief, so also may a 'captive motorist.' "[21] Such an observation would appear to ignore the requisite of government action, either state or federal.[22]

The problem analogous to the one in the principal case was presented in *Murdock v. Pennsylvania*.[23] In that case the conviction of eight Jehovah's Witnesses under an ordinance requiring licenses for persons soliciting orders was reversed, and the ordinance declared violative of freedom of press, freedom of speech, and freedom of religion—which freedom were said to be in a "preferred position."[24] Justice Jackson dissented vigorously, however, and cited the nature of the "Watch Tower Campaign" which had been instituted in the city concerned and which in certain respects resembled the *Pollak* situation.[25] He reasoned that "for a stranger to corner a man in his home, summon him to the door and put him in the position either of arguing his religion or of ordering one of unknown disposition to leave is a questionable use of religious freedom."[26] And a similar case[27] arising in 1951 found only a minority adhering to the "preferred position philosophy" while the majority adopted the views of the former dissenters. Thus one more nail has been driven in the coffin of constitutional absolutism, as applied to the First Amendment.

Interesting analogies are also afforded in the areas of labor relations,[28] wiretapping,[29] and undesired publicity.[30] In the latter two re-

[21] 106 N. Y. S. 2d 460, 462 (Mun. Ct. N. Y. 1951). The decision was not on this basis.

[22] "The Fifth and Fourteenth Amendments of the Constitution are designed to protect the individual from invasion of his rights, privileges and immunities by the federal and the State governments respectively." Schatte v. International Alliance of Theatrical Stage Employees and Moving Picture Operators, 70 F. Supp. 1008, 1010 (S. D. Cal. 1947), *aff'd mem.*, 165 F. 2d 216 (9th Cir.), *cert. denied*, 334 U. S. 812 (1948).

[23] 319 U. S. 105 (1943).

[24] *Id.* at 115.

[25] "God's faithful servants go from house to house to bring the message of the kingdom to those who reside there, omitting none. . . . They do not loot nor break into the houses, but they set up their phonographs before the doors and windows and send the message of the kingdom right into the houses into the ears of those who might wish to hear; and while those desiring to hear are hearing, some of the 'sourpusses' are compelled to hear," *Id.* at 172 (dissenting opinion, quoting from J. F. Rutherford's RELIGION).

[26] *Id.* at 181 (dissenting opinion).

[27] Breard v. Alexandria, La., 341 U. S. 622 (1951).

[28] See Note, 25 N. C. L. REV. 216 (1947).

liance is usually placed upon the so-called "right of privacy"[31] or "right to be let alone."[32]

The conflict is not a new one. Heraclitus of Ephesus wrote, in 500 B.C.: "The major problem of human society is to combine that degree of liberty without which law is tyranny with that degree of law without which liberty becomes license."[33] The *Pollak* case demonstrates once more the interpretive pliability of our Constitution in dealing with that problem—whatever the setting. The Bill of Rights "can keep up with anything an advertising man or an electronics engineer can think of."[34]

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Criminal Law—Pleas and Defenses—Nolo Contendere

Answers to a recent inquiry directed to many of the solicitors and judges of North Carolina reveal an astonishing variety of opinions as to the significance of the plea of nolo contendere.[1] There are almost

[29] See Zeni, *Wiretapping—The Right of Privacy versus the Public Interest*, 40 J. CRIM. L. 476 (1949).

[30] See Sidis v. F-R Pub. Corp., 113 F. 2d 806 (2d Cir.), *cert. denied*, 311 U. S. 711 (1940); and Jones v. Herald Post Co., 230 Ky. 227, 18 S. W. 2d 972 (1929).

[31] The "right of privacy" has been defined as "the right to live one's life in seclusion, without being subjected to unwarranted and undesired publicity. In short, it is the right to be left alone." Rhodes v. Graham, 238 Ky. 225, 228, 37 S. W. 2d 46, 47 (1931).

[32] Justice Jackson uses this phrase in his dissent in the *Murdock* case, *supra* at 166.

[33] Quoted by Palmer in *Liberty and Order: Conflict and Reconciliation*, 32 A. B. A. J. 731, 732 (1946).

[34] Pollak *et al.* v. Public Utilities Comm'n of D. C., 191 F. 2d 450, 456 (D. C. Cir. 1951). In "determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the framers were not familiar. For in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses." United States v. Classic, 313 U. S. 299, 316 (1941). "In considering this question, then, we must never forget that it is a constitution we are expounding." M'Culloch v. Maryland, 4 Wheat. 316, 407 (U. S. 1819).

Addendum: The supreme court opinion reversing the court of appeals in the *Pollak* case was handed down after this note went to press. 20 L. W. 4343, May 26, 1952.

[1] In November, 1952, the editor of this REVIEW wrote fifty-five judges and solicitors of the recorder's and superior courts and requested that they send the REVIEW a statement setting forth their opinion (without any research) as to the significance, essential requirements, and effects of the plea nolo contendere as used in North Carolina. We wish to express our appreciation to the twenty judges and solicitors who replied to this request for their contribution to this note.

In these twenty replies, some fifty-nine or sixty different points of view were expressed. The differences between some of the views are only shaded, but the opinions on some points are diametrically opposed to the law as laid down by the supreme court.

Some of the views which do not seem to have judicial sanction are as follows: "I have never looked into the law but have depended upon a general impression"; "I am not guilty but cannot contend with the State"; the defendant "is, therefore, admitting that the evidence is sufficient to warrant a conviction, although he is rather weakly saying that he is not admitting he is guilty"; "the defendant says