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## Constitutional Law -- Ads on Busses

Michael Kent Curtis

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## Constitutional Law—Ads on Busses

In *Wirta v. Alameda-Contra Costa Transit District*<sup>1</sup> the California Supreme Court enjoined a metropolitan transit district from refusing to accept for display on its busses an advertisement critical of the war in Vietnam. The transit district is a public body which operates busses in several California counties. It sells advertising space above the passengers seats. The district had a policy of accepting only two classes of advertising: (1) advertisements for the sale of goods and services and (2) advertisements for candidates and ballot proposals at the time of a duly called election. The Women for Peace at Berkeley tried to put an advertisement on the district's busses at the standard rate. It read:

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

In keeping with its policy the district refused the advertisement.<sup>2</sup> The California Supreme Court found that the district's policy restricting advertisements was a violation of the first and fourteenth amendments.<sup>3</sup> Transit advertising, the court found, is "an acceptable and effective means of communication." By accepting advertisements the district had opened a forum for the expression of ideas: "A regulation which permits those who offer goods and services for sale and those who wish to express ideas relating to elections access to such forum while denying it to those who wish to express other ideas and beliefs, protected by the first amendment, cannot be upheld."<sup>4</sup> The dissent denied that the district had opened a forum for the expression of ideas.

Recognizing the importance of a place where the citizen has a

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<sup>1</sup>—Cal. 2d—, 434 P.2d 982, 64 Cal. Rptr. 430 (1967). For another recent case with similar facts and result see *Kissinger v. New York City Transit Auth.*, 274 F. Supp. 438 (S.D.N.Y. 1967).

<sup>2</sup>— Cal. 2d at — 434 P.2d at 984, 64 Cal. Rptr. at 432. The advertising on the busses was handled by an advertising agency which leased the space from the district and then sub-leased it. *Id.*

<sup>3</sup> *Id.* at —, 434 P.2d at 985, 64 Cal. Rptr. at 433.

<sup>4</sup> *Id.* at —, 434 P.2d at 990, 64 Cal. Rptr. at 438.

right to communicate, the courts have created<sup>6</sup> the public forum,<sup>6</sup> a place where the citizen has access to the attention of his fellows:

Traditionally our public streets, meeting halls, parks and similar places have been recognized as locations in which this sacred right may be exercised, not only because such places, being dedicated to public use, are held in trust for all citizens, but also because they are usually locations where the ears of large numbers of fellow citizens can most effectively be reached.<sup>7</sup>

The existence of a forum, or something like it, is a necessary precondition to an uninhibited, free trade in ideas. Before the public can choose among competing ideas, it must be exposed to them.<sup>8</sup> Forums have been created in streets,<sup>9</sup> parks,<sup>10</sup> railway and bus terminals,<sup>11</sup> and in public (usually school) auditoriums.<sup>12</sup> The forum is always created on public property or on private property which (under the rubric of state action) is treated as if it were public.<sup>13</sup> How the forum comes into existence and the extent to which the state may regulate it may vary with the type of property involved.

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<sup>6</sup> In *Davis v. Massachusetts*, 167 U.S. 43 (1897), the Supreme Court held that since the legislature could absolutely prohibit first amendment activities in streets and parks, it could require a license. *Id.* at 48. Later the Supreme Court reversed itself holding that such places had been used for assembly from time immemorial. *Hague v. CIO*, 307 U.S. 496 (1939); *Schneider v. New Jersey*, 308 U.S. 147 (1939). Time immemorial, as Mr. Chief Justice Traynor has noted, dates from 1939. In re Hoffman, — Cal. 2d —, —, 434 P.2d 352, 355, 64 Cal. Rptr. 97, 99 (1967).

<sup>7</sup> For a discussion of the public forum with particular emphasis on "speech plus" see H. Kalvin, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUPREME CT. REV. 1.

<sup>8</sup> *Wolin v. Port Authority*, 268 F. Supp. 855 (S.D.N.Y. 1967).

<sup>9</sup> Of course, distributing leaflets and holding meetings in school auditoriums are limited as means of getting different points of view before the public. Jerome A. Barron has criticized the Supreme Court for indifference to creating opportunities for expression. To protect an idea after it has come to the fore, he insists, is not enough. Barron, *Access to the Press*, 80 HARV. L. REV. 1641 (1967). "The test of a community's opportunities for free expression rests . . . in an abundance of opportunities to secure expression in media with the largest impact." *Id.* at 1653.

<sup>10</sup> *E.g.*, *Schneider v. New Jersey*, 308 U.S. 147 (1939).

<sup>11</sup> *E.g.*, *Niemotoko v. Maryland*, 340 U.S. 268 (1951).

<sup>12</sup> *E.g.*, *Wolin v. Port Authority*, 268 F. Supp. 855 (S.D.N.Y. 1967).

<sup>13</sup> *E.g.*, *Bynum v. Schiro*, 219 F. Supp. 204 (E.D. La. 1963); *Danskin v. San Diego Unified School Dist.*, 28 Cal. 2d 536, 171 P.2d 885 (1946).

<sup>14</sup> *Marsh v. Alabama*, 326 U.S. 501 (1946); In re Hoffman, — Cal. 2d —, 434 P.2d 353, 64 Cal. Rptr. 97 (1967). The Supreme Court has also created a limited right of access to persons at their doors. *Martin v. Struthers*, 319 N.C. 141 (1943); *Beard v. City of Alexandria*, 341 U.S. 622 (1951).

The doctrine of the public forum had its solid beginning in the case of *Schneider v. State*.<sup>14</sup> In that case the Supreme Court struck down municipal ordinances which flatly prohibited the distribution of leaflets in city streets. The object of the ordinances was to prevent littering. The Court found them a violation of the first amendment. Streets are "the natural and proper places for the dissemination of information and opinion."<sup>15</sup> The purpose of preventing littering was not sufficient to justify such an abridgement of freedom of speech.<sup>16</sup> Later cases suggested that while the state could regulate such distribution in the interest of traffic flow, it could not bar it altogether.<sup>17</sup> In cases involving the right to distribute literature on the street, two factors are important. No voluntary act by the state was required to create a public forum on the street. And while the state could regulate the forum, it could not close it at will.

At the other extreme is the public forum in school auditoriums. Dicta in court opinions suggest that the forum is created by the voluntary decision of the state to open the doors of the school to the expression of ideas,<sup>18</sup> by allowing one group with a particular point of view to use the school auditorium after school. These dicta insist that "the state need not open the doors of a school building as a forum and may at any time close them,"<sup>19</sup> if it closes them to all.

Another group of cases deals with the right to distribute leaflets in terminals.<sup>20</sup> These cases, based perhaps on a somewhat more restrictive reading of *Schneider* and its progeny, hold that regulations may be adopted to insure traffic flow, safety, etc. But, as expressed in one case,

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<sup>14</sup> 308 U.S. 147 (1939).

<sup>15</sup> *Id.* at 163.

<sup>16</sup> *Id.* at 162.

<sup>17</sup> *Marsh v. Alabama*, 326 U.S. 501 (1946); *Jaminson v. Texas*, 318 U.S. 413 (1943). *Schneider* also recognized the right of the state to regulate the streets to assure the movement of people and property. 308 U.S. 147, 160.

<sup>18</sup> *Danskin v. San Diego Unified School Dist.*, 28 Cal. 2d 536, 545, 171 P.2d 885, 891 (1946); *East Meadow Concerts Ass'n v. Board of Educ.*, 18 N.Y.2d 129, 133, 219 N.E.2d 172, 174, 272 N.Y.S.2d 341, 344 (1966).

<sup>19</sup> *Danskin v. San Diego Unified School Dist.*, 28 Cal. 2d 536, 547, 171 P.2d. 885, 892 (1946). Cases cited note 18 *supra*. Doubt has been expressed about the assertion that the state is under no duty to open up its facilities after school. *Buckley v. Meng*, 35 Misc. 2d 467, 230 N.Y.S.2d 924 (Sup. Ct. 1962).

<sup>20</sup> *Wolin v. Port Authority*, 268 F. Supp. 855 (S.D. N.Y. 1967); *In re Hoffman*, — Cal. 2d —, 434 P.2d. 353, 64 Cal. Rptr. 97 (1967).

In the absence of proof that the proposed activities . . . would obstruct or hamper the Terminal for transportation purposes, the Port Authority may not ban such activities altogether. In balancing the citizen's right to communicate ideas and views against public responsibility to maintain a free flow of traffic, the exercise of constitutional rights will be favored unless it is shown that the prohibition is essential under the circumstances to insure the operation of the Terminal for its primary purposes.<sup>21</sup>

Since it seems difficult to prove that an absolute ban on the distribution of leaflets is essential to ensure the operation of a terminal for its main purpose, the result may be that the state cannot prohibit such distribution.

The court in *Wirta* relied heavily on cases involving public school auditoriums.<sup>22</sup> These cases, as indicated above, suggest that school auditoriums need not be opened up to the public after school hours. But once the privilege of using the auditorium is made available to some in the community it cannot be denied to others for reasons that are inconsistent with the first amendment.<sup>23</sup> Such a denial is seen as censorship prohibited by the first amendment. Once

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<sup>21</sup> *Wolin v. Port Authority*, 268 F. Supp. 855, 862 (S.D.N.Y. 1967). Cf. *Brown v. Louisiana*, 383 U.S. 131 (1966).

No case seems to require that facilities be constructed so that citizens will have a place to exercise their first amendment rights. Rather, opening up a forum refers to requiring the state to allow a citizen to use a facility for the exercise of first amendment rights although others have not been allowed before to use it for that purpose.

<sup>22</sup> Cases cited notes 18 and 19 *supra*. The school cases are direct descendants of cases involving streets and parks. See *Danskin v. San Diego Unified School Dist.*, 28 Cal. 2d 536, 171 P.2d 885 (1946). When *Danskin* was decided a line of Supreme Court cases had struck down ordinances and practices which gave city officials unlimited discretion in licensing parades and in restricting use of parks. See, e.g., *Largent v. Texas*, 318 U.S. 418 (1943); cf. *Cox v. New Hampshire*, 312 U.S. 569 (1940). The reason given is that city officials must not be allowed to censor unpopular causes by controlling access to the public forum. *Largent v. Texas*, 318 U.S. 418, 422 (1943).

When city officials have (under such ordinances) attempted to pick and choose among potential users, their action has been held a violation of the first amendment. *Niemotko v. Maryland*, 340 U.S. 268 (1951). In many of these cases an attack is available under both the equal protection clause and under the first and fourteenth amendments. *Niemotko* used both. *Id.* at 273. *Fowler v. Rhode Island*, 345 U.S. 67 (1953).

<sup>23</sup> *Danskin v. San Diego Unified School Dist.*, 28 Cal. 2d 536, 171 P.2d 885 (1946). Some have interpreted these decisions as based on the equal protection clause. Van Alstyne, *Political Speakers at State Universities*, 111 U. PA. L. REV. 328, 338 (1963). While equal protection might have provided an adequate basis, they were decided on first amendment grounds. In cases of discriminatory denial of equal access to a public forum equal

the state opens a forum "it cannot demand tickets of admission in the form of convictions and affiliations that it deems acceptable."<sup>24</sup> Therefore, absent a showing of a clear and present danger, it cannot open its schools to political discussion but exclude those topics considered "subversive"<sup>25</sup> or "controversial."<sup>26</sup> This line of cases has been summarized by Judge Markel in *Buckley v. Meng*:

The principle of these cases is the simple one that what the state cannot do directly it may not do indirectly. Since there is no power in the state to stifle minority opinion directly by forbidding its expression, it may not accomplish this same purpose by allowing its facilities to be used by proponents of majority opinion while denying them to dissenters.<sup>27</sup>

Following the principle of the school cases,<sup>28</sup> the court found the advertising policy of the transit district deficient in two respects. First, by accepting only election advertisements the district was choosing between classes of ideas entitled to constitutional protection, allowing the expression of ". . . only those selected, and banning all others." "Thus," the court stated, "the district's regulation exercises a most pervasive form of censorship."<sup>29</sup> Second, the court insisted that commercial advertising is not speech protected by the

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protection and the first amendment often overlap. See Mr. Justice Black's concurring opinion in *Cox v. Louisiana*, 379 U.S. 536, 580-81 (1963); *Niemotko v. Maryland*, 340 U.S. 268 (1951).

<sup>24</sup> *Danskin v. San Diego Unified School Dist.*, 28 Cal. 2d 536, 547, 171 P.2d 885, 892 (1946).

<sup>25</sup> *Id.*

<sup>26</sup> *East Meadow Concerts Assn. v. Board of Educ.*, 18 N.Y.2d 129, 219 N.E.2d 172, 272 N.Y.S.2d 341 (1966), *on remand* 26 A.D.2d 819, 273 N.Y.S.2d 736 (1966), *aff'd per curiam*, 19 N.Y.2d 605, 225 N.E.2d 888, 278 N.Y.S.2d 393 (1967).

<sup>27</sup> *Buckley v. Meng*, 35 Misc. 2d 467 at —, 230 N.Y.S.2d 924 at 934 (Sup. Ct. 1962).

<sup>28</sup> The court in *Wirta* recognized the difference between the school cases and the case presented by the advertising policy of the transit district. "The vice is not that the district has preferred one point of view over another but that it chooses between classes of ideas entitled to constitutional protection, sanctioning the expression of only those selected, and banning all others. Thus the district's regulation exercises a most pervasive form of censorship." — Cal. 2d at —, 434 P.2d at 986, 64 Cal. Rptr. at —. To bolster its conclusion the court in *Wirta* cited the concurring opinion of Mr. Justice Black in *Cox v. Louisiana*. In *Cox*, Negro demonstrators were convicted of blocking public passageways in violation of a statute which prohibited such blockage but excluded labor unions from its operation. Mr. Justice Black found the statute "censorship in a most odious form, unconstitutional under the First and Fourteenth Amendments." 379 U.S. at 580-81.

<sup>29</sup> — Cal. 2d at —, 434 P.2d at 986, 64 Cal. Rptr. at 434.

first amendment.<sup>30</sup> On this premise the court found that the policy of accepting commercial messages in preference to protected speech violated the first amendment. The argument seems to be that since the state can prohibit commercial messages and cannot prohibit pure speech, it cannot restrict its advertising slots to purely commercial advertisements.<sup>31</sup>

The court in *Wirta* seems to have held that the advertising policy of the district had voluntarily opened its bus advertising slots as a forum for the expression of ideas. Once the characterization is accepted the result follows: to refuse the advertisement of the

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<sup>30</sup> On this point the majority and the dissent were in agreement. The conclusion seems essentially correct. Speech whose sole object is the sale of goods and services can be prohibited altogether. See note 31 *infra*. However if the speech is the type covered by the first amendment, that protection is not withdrawn simply because it is published in the form of an advertisement. *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943). The Supreme Court found that the advertisement in the *New York Times* case was not a "commercial" advertisement because, "it communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public concern." 376 U.S. at 266. The Court has recently reiterated that it does not view "purely" commercial advertising as first amendment speech, though only by way of analogy. "Material sold solely to produce sexual arousal, like commercial advertising, does not escape regulation because it has been dressed up as speech. . . ." *Ginsburg v. United States*, 383 U.S. 463, 474 n. 17 (1966). The example of commercial expression dressed up as "speech" suggested by the Court was *Valentine v. Chrestensen*, 316 U.S. 52 (1942). Cf. *Time v. Hill*, 385 U.S. 374, 381 (1967). The Court has had some difficulties in borderline cases such as *Breard v. City of Alexandria*, 341 U.S. 622 (1951). There Justice Black joined by Justice Douglas dissented on the ground that the ordinance interfered with the exercise of first amendment rights. Still, Justice Black reaffirmed his faith in the commercial non-commercial dichotomy: "Of course I believe that the present ordinance could constitutionally be applied to a 'merchant' who goes from door to door 'selling pots.'" 341 U.S. at 650. Comment, *Freedom of Expression in a Commercial Context*, 78 HARV. L. REV. 1191 (1965).

<sup>31</sup> — Cal. 2d —, 434 P.2d at 986, 64 Cal. Rptr. at 434. The court said:

Thus, although a city may not prohibit public distribution of handbills expressing protected ideas (*Schneider v. State* (1939)) . . . it may ban commercial advertising in the form of handbills (*Valentine v. Chrestensen* (1942)) . . . A distributor of notices for a religious meeting may not be barred from soliciting homeowners by an ordinance against ringing doorbells to distribute advertisements (*Martin v. City of Struthers* (1943)) . . . , but door to door solicitation for the sale of magazines may be banned (*Breard v. City of Alexandria, La.* (1951)) . . . . In the case at bar, the policy of the district reverses these acceptable priorities and perversely gives preference to commercial advertising over nonmercantile messages.

*Id.*

Women for Peace violates the first amendment. But the question which the opinion of the court leaves in some confusion is just how and why the advertising slots have become a forum for the expression of ideas. On this point the court says:

The second elementary factor we recognize is that the determination of the district to accept advertising on its motor coaches serves as its considered conclusion that this form of communication will not interfere with its primary function of providing transportation. Thus, we avoid the considerations applicable to ascertaining whether public Property must be made available as a forum for the exercise of First Amendments rights. (See *In re Hoffman* (Cal. 1967) 64 Cal. Rptr. 97, 434 P.2d 353). Here that affirmative determination has been made by the district . . .

Our problem, therefore, is reduced to a situation in which a governmental agency has refused to accept an advertisement expressing ideas admittedly protected by the First Amendment for display in forum which the agency has deemed suitable for the expression of ideas through the medium of paid advertisements. . . . We conclude that defendants, having opened a forum for the expression of ideas by providing facilities for advertisements on its busses, cannot for reasons of administrative convenience decline to accept advertisements expressing opinions and beliefs within the ambit of First Amendment protection.<sup>32</sup>

The court then proceeds to quote *Danskin v. Unified School District* as "directly in point."<sup>33</sup> The quotation includes that portion of the *Danskin* opinion which stresses that the state has no duty to make public school buildings available for public meetings.

There are two possible models the court could be using on the question of opening a forum—the school cases<sup>34</sup> and the terminal cases.<sup>35</sup> By the school cases the citizen has no right to use school facilities unless the state volunteers them by a general policy or by practices allowing groups to use them.<sup>36</sup> In the terminal cases the court requires that property be made available for the exercise of first amendment rights unless the state can show such use would interfere with the primary function of the terminal.<sup>37</sup> There is language in *Wirta* which suggests that the court might be following either model.

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<sup>32</sup> — Cal. 2d at —, 434 P.2d at 985, 64 Cal. Rptr. at 433.

<sup>33</sup> *Id.*

<sup>34</sup> Cases cited note 18 *supra*.

<sup>35</sup> Cases cited note 20 *supra*.

<sup>36</sup> Cases cited note 18 *supra*.

<sup>37</sup> Cases cited note 20 *supra*.

The school cases have the advantage of making it appear that the state rather than the court has chosen to open the forum. But it is difficult to make the school cases fit the facts in *Wirta*. Clearly there was no transit district policy (similar to the statute in *Danskin*)<sup>38</sup> opening bus advertising to political, economic, and social discussion. Of course the acceptance of election advertisements alone could be seen as "volunteering a forum." But there are problems with this line of argument. If the existence of a forum on the bus depends solely on the presence of election advertisements, then the analogy to the school cases<sup>39</sup> suggests that the forum is open only when the state decides to open it, that is, when the political advertisements are accepted at election time. During this time the district could not discriminate between election advertisements and other protected speech. Using the theory that the district had "volunteered a forum" and relying only upon the acceptance of political advertisements to prove it, the result might have been a much narrower forum than that the court found, a forum opened at the pleasure of the state for one month or so a year at election time. A second possible argument based on the school cases would be that the acceptance of commercial advertisements volunteered a forum. But it is difficult to show that the district decided to provide a place for the expression of first amendment ideas by a policy which restricted its advertising to ideas *outside* the protection of the first amendment.<sup>40</sup> In the school cases the finding that the school volunteered a forum seems to have been based on the acceptance of ideas *within* the orbit of the first amendment.<sup>41</sup>

In spite of some indications to the contrary, it seems that the court in *Wirta* was following the rule of the terminal cases. But in doing so, the court avoided any direct admission that the court's decision, rather than some action of the transit district, opened the forum. The result is a hybrid. The majority's emphasis on a voluntary decision to open a forum makes it seem that the court is relying on the school cases. But the reasons given for finding a forum

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<sup>38</sup> *Danskin v. San Diego Unified School Dist.*, 28 Cal. 2d 536, 171 P.2d 885 (1946). The statute required the governing boards of school districts to allow groups formed for political, educational, economic and other purposes to use the schools for meetings.

<sup>39</sup> Cases cited note 18 *supra*.

<sup>40</sup> The only exception to the generalization is that election advertisements were accepted at certain times.

<sup>41</sup> See cases cited note 18 *supra*.

(based on primary function<sup>42</sup> and the existence of the facility<sup>43</sup>) are taken from the terminal cases. Instead of confusing the basis of its decision with the assertion that the district had "opened a forum," the court in *Wirta* should have admitted that it was *requiring* the district to provide a forum.

In any event the rule of the terminal cases seems a sounder basis for decision than the rule of the school cases. The conclusion that the state need not make public school auditoriums available after school hours unless it lets some groups use them (and that it can withdraw them at will) is of questionable validity anyway.<sup>44</sup> Of course, there is no requirement that the state provide a facility so that it can be used as a forum. It need not build a high school auditorium so that local groups can use it after school, or a bus terminal so that leaflets can be distributed. Nor need it provide a system for placing advertising on its busses. However, once a facility exists which is an appropriate place for the exercise of first amendment rights different questions are raised. Judicial inquiry should not end with the discovery that in the memory of man no local groups have been allowed to use the local public school auditorium. Rather groups which want to use the schools after hours should be allowed to do so unless that would place an intolerable burden on school facilities and interfere with the primary function of the school.<sup>45</sup> That is the rule of the terminal cases. The same rule should be applied to advertising slots on busses. By establishing a system for

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<sup>42</sup> The court treated the district's decision to accept advertisement as proof that the acceptance of other advertisements would not interfere with the primary function of the busses. The court treats the decision to accept any advertisements as a decision that advertising will not interfere with the primary function of the bus and hence as a decision to open a forum. Since there would be no interference with primary function the conclusion based on the terminal cases is clear: the advertising slots must be provided as a forum. In addition to the primary function test there is probably also a requirement that the place be an appropriate one for the exercise of first amendment rights (or at least that it not be inappropriate). Compare *Adlerley v. Florida*, 385 U.S. 39 (1966) with *Brown v. Louisiana*, 383 U.S. 131 (1966) and *Wolin v. Port Authority*, 268 F. Supp. 855 (S.D. N.Y. 1967).

<sup>43</sup> The court's argument in *Wirta* that the district had opened a forum "by providing facilities for advertisements," — Cal. 2d at —, 434 P.2d at 985, 64 Cal. Rptr. at 433, on its busses also suggests reliance on the terminal cases. For, under the dicta of the school cases, merely providing a facility, such as a school auditorium, is not enough.

<sup>44</sup> Van Alstyne, *Political Speakers at State Universities*, 111 U. PA. L. REV. 328, 338 (1962).

<sup>45</sup> *Id.* at 339. Cases cited note 20 *supra*.

accepting commercial advertisements (like building a terminal or school auditorium) the district has provided a facility that could reasonably be used for the expression of first amendment rights. It need not establish the facility. Once it does, however, it should not be allowed to reject advertisements protected by the first amendment and for which space is available unless it can show that to accept them would intolerably burden the busses and interfere with their primary purpose for providing transportation.

MICHAEL KENT CURTIS

### Constitutional Law—Chronic Alcoholism and the Eighth Amendment in North Carolina

A man gets up in the morning and the first thing he does is to "take a drink." From that point on throughout the day he is constantly "taking a drink." By mid-afternoon or early evening, he is picked up by the police for public drunkenness. Far from being his first "offense," this series of events has happened to him many times before—sometimes ending with arrest and sometimes not. This man is a chronic alcoholic; he suffers from a disease and has no control over his behavior.<sup>1</sup> Should he be punished as a "public drunk" or is it "cruel and unusual punishment" under the eighth amendment to do so? Recently several courts across the nation have faced this question and reached conflicting results. The following is a brief attempt to highlight these decisions and some future problems raised therein.

The first such case was *Driver v. Hinnant*.<sup>2</sup> Defendant had been found guilty of a violation of a North Carolina statute making it a misdemeanor for "any person . . . [to] be found drunk or intoxicated on the public highway, or at any public place or meeting,"<sup>3</sup> and sentenced to two year's imprisonment. Driver had been convicted of the same offense over 200 times previously. On appeal, the North Carolina Supreme Court held in a per curiam opinion that the sentences were authorized by the statute and therefore that

<sup>1</sup> See authorities collected in *Driver v. Hinnant*, 356 F.2d 761, 764 n. 6 (4th Cir. 1966).

<sup>2</sup> 356 F.2d 761 (4th Cir. 1966). See also, 44 N.C.L. REV. 818 (1966).

<sup>3</sup> N.C. GEN. STAT. § 14-335 (1953). As will be shown and discussed, *infra*, this statute underwent significant amendment in 1967.