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## Freedom Of Attention For Transit Riders

William C. Beatty

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## NOTE

## FREEDOM OF ATTENTION FOR TRANSIT RIDERS

Early in 1949 the patrons of public transportation in several large American cities found themselves lurching forward to the accompaniment of soft FM radio music liberally interspersed with short commercial announcements.<sup>1</sup> Reactions among the passengers were varied. Many felt that the music had "a soothing relaxing effect,"<sup>2</sup> but others were vociferous in disapproval, and feared that the cacophony of music and audible advertisements was "a dark plot against sanity."<sup>3</sup> Transit Radio, Incorporated, the Cincinnati firm which pioneered the idea, felt that it had launched a highly promising commercial venture, and as one periodical put it, "If the newly formed Transit Radio, Inc., has its way, straphangers all over the nation will soon be bouncing along to the strains of the 'Missouri Waltz' and 'Pepsi-Cola Hits the Spot'."<sup>4</sup>

Transit Radio's hope for business success was predicated on a scheme whereby it could guarantee to a group of advertisers the ear of an audience which would have no choice but to listen. In the usual arrangement, it would install radio receivers in the vehicles of a public transit firm and agree to pay a fixed fee plus a percentage of the receipts from advertisers for an exclusive broadcast franchise. Then it would make an agreement with a local FM radio station to conduct programs of music, news, and advertising designed especially for the commuter. Since the receivers in these busses and streetcars were tuned to the one station and could not be turned off or controlled from the vehicles, the transit riders became a captive audience in the sense that they must either listen or get off.<sup>5</sup>

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<sup>1</sup>Business Week, Feb. 5, 1949, p. 64, col. 3 (Radios for Busses).

<sup>2</sup>News Week, Nov. 7, 1949, p. 54, col. 2 (The Sound and the Fury). These words were reported as being spoken by a witness at a hearing held by the Washington, D. C. Public Utilities Commission in an attempt to determine whether transit broadcasting was consistent with "public convenience, comfort and safety." This hearing is discussed at a later point in this comment. See *infra* p. 49.

<sup>3</sup>News Week, Nov. 7, 1949, p. 54, col. 2 (The Sound and the Fury).

<sup>4</sup>Business Week, Feb. 14, 1948, p. 38, col. 2, 3, p. 40, col. 3 (Transit Lines Woo Riders and Dollars).

<sup>5</sup>Such a project presented a delightful prospect for the advertiser, for the transit company, and for Transit Radio, but to elements of the riding public and to some members of the press the outlook was disturbing. The New Yorker commented that "An audience in captivity is a new stunt in this republic, although it

Finally, as was to be expected, the critics of transit broadcasting determined to seek legal protection from this assault on their attention. The natural resort was to attempt to fit the new and unfamiliar situation into the scope of existing legal remedies. This treatment suggested three possible attacks.<sup>6</sup> First, from the tort aspect, transit radio could conceivably be termed a nuisance. Second, with public transportation already closely regulated by legislatively created administrative bodies, relief might be had by application to a local public service commission. Third, in a broader sense the captive listener might successfully charge that transit broadcasting was a violation of the constitutional guarantees of the Free Speech Clause of the First Amendment and the Due Process Clause of the Fifth Amendment.

*The common law nuisance argument:* Those desiring to put an end to transit broadcasting could not rely on the law of *private* nuisance because it applies only to an interference with a right in real property,<sup>7</sup> and no such offense had been committed against the captive listener. *Public nuisance*, however, has been broadly defined as "an act or omission which obstructs or causes inconvenience or damage to the public in exercise of rights common to all."<sup>8</sup> It includes interferences with the public peace by loud and disturbing noises.<sup>9</sup> The late Justice Cardozo remarked that "The organs of smell and hearing, assailed by sounds and odors too pungent to be borne, have been ever favored of the law,"<sup>10</sup> and in the same opinion he pointed out that the test for nuisance by sound was the "effect of the offensive practice upon the reasonable man or woman of average sensibilities."<sup>11</sup> It is apparent that transit broadcasting could logically be attacked as a noise disturbing to the public peace, but a question remains as to whether under the Cardozo test

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is old stuff elsewhere. Hitler captured his audience and found it quite useful while it lasted. The Soviet leaders have their audience nailed down fast and are currently finding it useful." *New Yorker*, Dec. 10, 1949, p. 29, col. 2 (Notes and Comments). The widely circulated *Readers' Digest* deplored: "This is almost an hour a day that thousands of students count upon for study, and millions of other folks use for reading or for quiet and relaxation. It is their time, but it no longer is theirs to use as they wish. It has been stolen from them and sold for commercial profit." *Harvey, Must We All Join The Captive Audience?*, *Readers' Digest*, July, 1951, pp. 20, 21.

<sup>6</sup>These approaches were suggested and analyzed by at least two legal writers. See Shipley, *Some Constitutional Aspects of Transit Radio* (1950) 11 *Fed. Com. B. J.* 150; Note (1951) 51 *Col. L. Rev.* 108.

<sup>7</sup>Restatement, *Torts* (1939) c. 40, Intro. Note.

<sup>8</sup>Prosser, *Torts* (1941) 566.

<sup>9</sup>*Town of Davis v. Davis*, 40 *W. Va.* 464, 21 *S. E.* 906, 909 (1895); *People v. Rubenfeld*, 254 *N. Y.* 245, 172 *N. E.* 485, 486 (1930).

<sup>10</sup>*People v. Rubenfeld*, 254 *N. Y.* 245, 172 *N. E.* 485, 486 (1930).

<sup>11</sup>*People v. Rubenfeld* 254 *N. Y.* 245, 172 *N. E.* 485, 487 (1930).

the broadcasting would be declared to be offensive to the sensibilities of the reasonable man. Even if this uncertainty were to be determined in favor of an aggrieved listener, he would still have to show special damages distinct from those sustained in common with the general public before he would be allowed to maintain an action at law for damages<sup>12</sup> or to seek equitable relief by injunction<sup>13</sup> from the public nuisance. Furthermore, mental distress would likely be the damage alleged and, inasmuch as a majority of courts have refused to allow recovery upon such ground without attendant physical consequences,<sup>14</sup> tort redress does not appear feasible. Accordingly, it became necessary for the transit riders to consider the other remedies that had been suggested.

*Attack through the regulatory commission:* Public service commissions in most of the states have been given control over the services rendered by street railway companies,<sup>15</sup> with power to prescribe standards "for safety, speed, regularity, and general regulation of transportation companies."<sup>16</sup> If transit radio could be shown to be an undue hindrance to the proper operation of a public transit system, a public service commission would order a cessation of the broadcasting. Moreover, the regulatory commission provided a remedy that was more easily

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<sup>12</sup>"Tort liability for public nuisance seems to have originated in 1536, when it was first held that the action would lie if the plaintiff could show that he had suffered special damage over and above the ordinary damage caused to the public at large by the nuisance. This qualification has persisted, and it is uniformly held that a private individual has no action for the invasion of the purely public right, unless his damage is in some way to be distinguished from that sustained by other members of the general public. Redress of the wrong to the community must be left to its appointed representatives. The best reason that has been given for the rule is that it relieves the defendant of the multiplicity of actions which might follow if everyone were free to sue for the common harm." Prosser, *Torts* (1941) 569, 570.

<sup>13</sup>McClintock, *Equity* (2d ed. 1948) §165.

<sup>14</sup>See note (1951) 51 *Col. L. Rev.* 108, 113; Prosser, *Torts* (1941) §11.

<sup>15</sup>Mosher and Crawford, *Public Utility Regulation* (1933) 173.

<sup>16</sup>Mosher and Crawford, *Public Utility Regulation* (1933) 173. Many states have modeled their laws establishing utility commissions along the lines of the Wisconsin and New York statutes. Therefore the sections of those statutes pertinent to control over rapid transit are set out here. The Wisconsin statute provides: "Whenever the commission shall find any existing rate, fare, charge, or classification, or any joint rate, or any regulation or practice affecting the transportation of persons or property, or any service in connection therewith is unreasonable or unjustly discriminatory or any service is inadequate it shall determine and by order fix a reasonable rate, fare, charge, classification, joint rate, regulation, practice or service to be imposed, observed and followed in the future, in lieu of that found to be unreasonable or unjustly discriminatory or inadequate." *Wis. Stat.* (1947) 195.05 (1). The New York law as to street railroads provides: "Every corporation, person or common carrier . . . shall furnish . . . such service and facilities as shall be safe and adequate and in all respects just and reasonable." *New York Public Service Law* (1945) §26.

available than that provided by the law of nuisance approach. Therefore, the first attack on transit broadcasting was instituted in the District of Columbia Public Utilities Commission against the Capital Transit Company of Washington, D. C., in October of 1949.<sup>17</sup> The hearing was limited to the single determination as to whether radio receivers in streetcars and busses were "consistent with public convenience, comfort, and safety."<sup>18</sup> The Commission concluded that the broadcasting in no way constituted a violation of the provisions of the Act requiring adequate service; in fact, the Commission decided that service was made better by the entertainment provided the riding public.<sup>19</sup> Thus, the attack through the regulatory commission failed.

*The constitutional argument:* The objecting passengers at the Washington hearing had maintained that the use of radio receivers deprived the riders of freedom to listen or not to listen in violation of the First Amendment of the United States Constitution, and that it also encroached upon their liberty and deprived them of their property in violation of the Due Process Clause of the Fifth Amendment. However, the Commission ignored these arguments as being irrelevant to the issue of whether the broadcasts impaired public safety or comfort.<sup>20</sup> After the final administrative order was entered dismissing this investigation, an appeal was prosecuted to the United States District Court for the District of Columbia,<sup>21</sup> but the court thought that "there is no legal right of the petitioners that has been invaded, threatened or violated,"<sup>22</sup> and consequently the petition was dismissed. Appeal was then taken to the United States Court of Appeals.

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<sup>17</sup>Re Capital Transit Company, 81 P. U. R. ( N. S.) 122 (1950). Although the Commission on its own motion issued the order instituting the investigation somewhat earlier, the formal hearings were not begun until October, 1949.

<sup>18</sup>Re Capital Transit Company, 81 P. U. R. ( N. S.) 122, 123 (1950).

<sup>19</sup>Re Capital Transit Company, 81 P. U. R. (N. S.) 122, 126 (1950).

<sup>20</sup>Re Capital Transit Company, 81 P. U. R. (N. S.) 122, 123, 124 (1950).

<sup>21</sup>"Any public utility or any other person or corporation affected by any final order or decision of the Commission, other than an order fixing or determining the value of the property of a public utility in a proceeding solely for that purpose, may . . ." appeal to the District Court of the United States for the District of Columbia, and "Any party, including said Commission, may appeal from the order or decree of said court to the United States Court of Appeals for the District of Columbia . . ." D. C. Code (1940) §43-705. Under this section Franklin S. Pollak and Guy Martin, who had been allowed to intervene in the hearing held before the Commission, prosecuted an appeal as "persons affected." It was held in *United States v. Public Utilities Commission of District of Columbia*, 151 F. (2d) 609 (App. D. C. 1945) that the term "person affected" includes a consumer of a public utility company.

<sup>22</sup>As quoted in *Washington Post*, June 2, 1951, p. 1, col. 1. There is no report available.

Recently in *Pollak v. Public Utilities Commission*<sup>23</sup> the Court of Appeals unanimously held in favor of the appellant transit riders. The holding was based entirely on the deprivation of liberty argument which was found to be so compelling that the court did not deem it necessary to discuss the abridgement of speech<sup>24</sup> or the deprivation of property<sup>25</sup> arguments. Judge Edgerton declared: "In our opinion Transit's broadcasts deprive objecting passengers of liberty without due process of law. Service that violates constitutional rights is not reasonable service. It follows that the Commission erred as a matter of law in finding that Transit's broadcasts are not inconsistent with public convenience, in failing to find that they are unreasonable, and failing to stop them."<sup>26</sup>

Since the *Pollak* case is a case of first impression recognizing an important new constitutional right of freedom from forced listening or freedom of attention, it becomes extremely important that close scrutiny be given to the reasoning which led to the conclusion reached.

The court started with the well established principle that the constitutional guarantees of liberty are directed only against governmental action.<sup>27</sup> Here the court found governmental action involved in the sense that Congress granted a franchise to the transit company by which, for all practical purposes, it became a monopoly, thereby making it necessary for the members of the public who depended on the

<sup>23</sup>191 F. (2d) 450 (C. A. D. C. 1951). The Supreme Court granted a petition for review on writ of certiorari on October 15, 1951.

<sup>24</sup>Since the Supreme Court had recognized the right to receive a protected communication in *Martin v. Struthers*, 319 U. S. 141, 143, 63 S. Ct. 862, 863, 87 L. ed. 1313, 1316 (1943), it was argued that this "right appears to include the negative freedom not to receive the communication." Note (1951) 51 Col. L. Rev. 108, 116. The analogy was drawn to *McCullum v. Board of Education*, 333 U. S. 203, 68 S. Ct. 461, 92 L. ed. 649 (1948) wherein the constitutional guarantee of freedom of religion was held to include freedom not to have a religion.

<sup>25</sup>"... If the attention of the transit riders is of commercial value to the FM station and its advertisers, it would seem to be another class of intangible property having sufficient value to the individual to come within the protection of the Constitution." Shipley, *Some Constitutional Aspects of Transit Radio* (1950) 11 Fed. Com. B. J. 150, 160.

<sup>26</sup>*Pollak v. Public Utilities Commission of the District of Columbia*, 191 F. (2d) 450, 458 (C.A.D.C. 1951). It should be noticed that the court held that the commission erred as a matter of law. In determination of an appeal from an order or decision of the commission, the review is limited to questions of law. D. C. Code (1940) §43-706.

<sup>27</sup>"The Fifth Amendment 'is a limitation only upon the powers of the General Government,'... and is not directed against the action of individuals." *Corrigan v. Buckley*, 271 U. S. 323, 330, 46 S. Ct. 521, 523, 70 L. ed. 969, 972 (1926). The Fourteenth has "reference to State action exclusively, and not to any action of private individuals." *Virginia v. Rives*, 100 U. S. 313, 318, 25 L. ed. 667, 669 (1880).

company for transportation to ride in the vehicles in which the offending sounds were present. Hence, the forced listening resulted from governmental action. The court cited no authority, but its proposition can be substantiated by analogy to *Shelley v. Kraemer*<sup>28</sup> where state action was found in the judicial enforcement of a restrictive covenant between private parties. In the transit radio situation it can be said that the congressionally sanctioned monopoly enabled the privately operated transit firm to recruit a captive audience, "supported," as the *Shelley* case said, "by the full panoply of state power."<sup>29</sup> Furthermore, the court pointed out that the utilities commission, an agency of government, sanctioned the broadcast when its negative order dismissed the investigation and allowed the forced listening to continue.<sup>30</sup>

Once it had been found that there was governmental action involved in the transit radio scheme, the next step was to decide if any constitutional right had been violated by this action. There was no direct authority to cover the assault by decibel on a captive group, but there were a number of cases which had vaguely intimated that the Due Process Clauses of the Fifth and Fourteenth Amendments might be broad enough to include a freedom of attention. As early as 1897 in *Allgeyer v. Louisiana* the United States Supreme Court clearly recognized that the "liberty" mentioned in the Due Process Clauses is "deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties . . ."<sup>31</sup> Shortly thereafter, Brannon reiterated this principle and cited copious case authority to show that the word liberty was a generic term embracing "almost all the essential rights of the person."<sup>32</sup> In 1928 Justice Brandeis, speaking in a dissent in *Olmstead*

<sup>28</sup>334 U. S. 1, 68 S. Ct. 836, 92 L. ed. 1161 (1948). See Note (1949) 6 Wash. and Lee L. Rev. 192.

<sup>29</sup>*Shelley v. Kraemer*, 334 U. S. 1, 68 S. Ct. 836, 845, 92 L. ed. 1161, 1183 (1948). The power used in the Pollak case was that of the federal government and therefore the court was called on to enforce the safeguards of the Due Process Clause of the Fifth Amendment.

<sup>30</sup>The court quoted the Supreme Court to the effect that "An order . . . dismissing a complaint on the merits and maintaining the *status quo* is an exercise of administrative function, no more and no less, than an order directing some change in status." *Rochester Telephone Corporation v. United States*, 307 U. S. 125, 142, 59 S. Ct. 754, 763, 83 L. ed. 1147, 1159 (1939). Justice Frankfurter gives an extensive discussion of so-called negative orders.

<sup>31</sup>165 U. S. 578, 589, 17 S. Ct. 427, 431, 41 L. ed. 832, 835 (1897). Although this was the first case in which clear recognition was given to such a definition of liberty, it was not the first case to indicate that liberty might be so broadly construed. See Justice Bradley's concurring opinion in *Butchers' Union Slaughter House v. Crescent City Live-Stock Landing Company*, 111 U. S. 746, 760, 762, 4 S. Ct. 652, 656, 657, 28 L. ed. 585, 588, 589 (1884).

<sup>32</sup>Brannon, *A Treatise on the Rights and Privileges Guaranteed by the Fourteenth Amendment to the Constitution of the United States* (1901) 115.

*v. United States*, insisted that the makers of the Constitution "sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."<sup>33</sup>

In a dissent in *Martin v. Struthers*, a case which struck down an ordinance forbidding house-to-house canvassing as a violation of freedom of speech and press, Justice Reed was insistent in asserting that "The First Amendment does not compel a pedestrian to pause on the street to listen to the argument supporting another's views of religion or politics. Once the door is opened, the visitor may not insert a foot and insist on a hearing."<sup>34</sup>

More recently Justice Frankfurter in a dissent in *Saia v. New York*,<sup>35</sup> in which Justices Reed and Burton concurred, gave concrete form to this concept of freedom of attention. So pertinent was the language that it might have been designed and phrased to cover the transit raido situation:

"The native power of human speech can interfere little with the self-protection of those who do not wish to listen. They may easily move beyond earshot, just as those who do not choose to read need not have their attention bludgeoned by undersired reading matter. And so utterances by speech or pen can neither be forbidden nor licensed, save in the familiar classes of exceptional situations. . . . But modern devices for amplifying the range and volume of the voice, or its recording, afford easy, too easy, opportunities for aural aggression. If uncontrolled, the result is intrusion into cherished privacy. The refreshment of mere silence, or meditation, or quiet conversation, may be disturbed or precluded by noise beyond one's personal control."<sup>36</sup>

The latest pronouncement from the Court on the right of freedom of attention was made in *Kovacs v. Cooper*,<sup>37</sup> a decision which upheld a municipal ordinance prohibiting the operation from vehicles upon city streets of sound amplifiers which emitted "loud and raucous" noises. Justice Reed, a staunch proponent of freedom of attention, spoke for three justices:

"The unwilling listener is not like the passer-by who may be offered a pamphlet in the street but cannot be made to take

<sup>32</sup>77 U. S. 438, 471, 478, 48 S. Ct. 564, 570, 572, L. ed. 944, 953, 956 (1928).

<sup>33</sup>19 U. S. 141, 154, 157, 63 S. Ct. 862, 869, 870, 87 L. ed. 1313, 1323, 1324 (1943).

<sup>34</sup>44 U. S. 558, 562, 68 S. Ct. 1148, 1151, 92 L. ed. 1574, 1578 (1948).

<sup>35</sup>*Saia v. New York*, 334 U. S. 558, 562, 563, 68 S. Ct. 1148, 1151, 92 L. ed. 1574, 1578, 1579 (1948).

<sup>37</sup>336 U. S. 77, 69 S. Ct. 448, 93 L. ed. 513 (1949).



it. In his home or on the street he is practically helpless to escape this interference with his privacy by loud speakers except through the protection of the municipality."<sup>38</sup>

The *Kovacs* case completed the progression of statements that enabled the Court of Appeals in the *Pollak* case to give, for the first time, an express recognition to freedom of attention as a constitutionally protected right. The court adopted the *Allgeyer* proposition that the "liberty" included in the Due Process Clause encompasses the right to free enjoyment of faculties, concluding that one who is forced to listen is not free to use his faculties. Then it turned to the *Kovacs* case and reasoned that the upholding of the ordinance against "loud and raucous" sound amplifiers mounted on trucks meant that the public interest in freedom of attention was so important that it out-weighed the public interest in broadcasting a communication protected under the Free Speech Clause of the First Amendment.<sup>39</sup> By analogy it follows that public interest in freedom of attention outweighs a private commercial interest in transit broadcasting which is not protected<sup>40</sup> by the First Amendment.

Notwithstanding the fact that the Court of Appeals limited itself solely to the commercial aspect of transit radio, the reasoning of the decision would be equally valid in a situation where only occasional broadcasts of music were made. It would seem that if a passenger has the right to be free from the harrassment of the commercially operated program, he would also have the right to a totally silent radio. However, freedom of attention is not absolute. Urban life necessitates the suffering of some noise, and a passenger of modern rapid transit can-

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<sup>38</sup>*Kovacs v. Cooper*, 336 U. S. 77, 86, 69 S. Ct. 448, 453, 93 L. ed. 513, 522 (1949). See Note (1949) 6 Wash. and Lee L. Rev. 74 for discussion of the voting line-up of the Justices in this case.

<sup>39</sup>*Pollak v. Public Utilities Commission of the District of Columbia*, 191 F. (2d) 450 at 457 (C. A. D. C. 1951).

<sup>40</sup>*Valentine v. Chrestensen*, 316 U. S. 52, 62 S. Ct. 920, 86 L. ed. 1262 (1942). This case held that public streets are proper places for the exercise of the freedom of communicating information, and that while states may regulate such communications they may not unduly burden its employment in thoroughfares, but there is no such restraint placed on the states in regard to commercial advertising. *Packer Corporation v. Utah*, 285 U. S. 105, 52 S. Ct. 273, 76 L. ed. 643 (1932) indicates that advertising of the sort involved in transit broadcasting could be regulated or even prohibited, if necessary to protect the public. In that case street car placards and billboards were classified separately from other advertising media because "In the case of newspapers and magazines, there must be some seeking by the one who is to see and read the advertisement. The radio can be turned off, but not so the billboard or street car placard." 285 U. S. 105, 110, 52 S. Ct. 273, 275, 76 L. ed. 643, 647 (1932).

not complain that those noises which are the ordinary incidents of such travel infringe upon his freedom of attention. Some discomforts may perhaps be inevitable, but the forced listening to a radio even if it does send forth only occasional music is "neither incidental nor inevitable."<sup>41</sup>

WILLIAM C. BEATTY

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<sup>41</sup>See *Pollak v. Public Utilities Commission of the District of Columbia*, 191 F. (2d) 450, 457 (C. A. D. C. 1951).