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Freedom of Attention

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Freedom of Attention

To the advertising mind, the United States is one vast market; every American is a potential customer; and the highest goal is to attract and hold that citizen's attention against the cajoleries of rival "hucksters". With the growth of modern advertising methods there has begun an unprecedented assault upon the citadel of man's consciousness. For without engaging a man's attention, one cannot sell him soap, cereal, or "salvation." It is not surprising, then, that the problem has resolved itself into one of compelling that attention.

For the hapless object of these importunities, escape is well nigh impossible. True, he may forego the radio, leaf past the magazine "ads", avert his eyes from the billboards, and post on his premises "No Salesmen". But how avoid the glaring neon sign, the public address system or sound truck, the telephone canvasser, the sidewalk solicitor or puller-in, and the many aggressive salesmen and self-styled evangelists who "don't believe in signs"? With the advent of the "captive audience" technique, the conquest of the public attention seemed complete.

The situation has not escaped judicial notice. In regard to the use of sound trucks, a Pennsylvania court says:

Municipalities everywhere are seeking actively a solution to the difficult problem which will safeguard freedom of thought and at the same time not unreasonably interfere with freedom of speech.¹

In *Kovacs v. Cooper*, Justice Frankfurter was moved to observe,

. . . it is not for use to supervise the limits the legislature may impose in safeguarding the steadily narrowing opportunities for serenity and reflection. Without such opportunities, freedom of thought becomes a mocking phrase, and without freedom of thought, there can be no free society.²

In the course of the same opinion, Justice Reed dispensed with the contention that regulation of sound trucks infringes freedom of speech:

To enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself.³

In *Pollack v. Public Utilities Commission*, the Circuit Court of Appeals For District of Columbia declared:

This loss of freedom of attention is the more serious because many people have little time to read, consider, or discuss what they like, or to relax . . . The . . . loss is a serious injury to many passengers⁴.

¹ *Commonwealth v. Geuss*, 168 Pa. Super. 22, 76 A. 2d 500, 501 (1950); aff'd 368 Pa. 290, 81 A. 2d 553 (1951).

² *Kovacs v. Cooper*, 336 U. S. 77, 97 (1949).

³ *Id.* at 88.

⁴ *Pollack v. Public Utilities Commission*, 191 F. 2d 450, 457 (D. C. Cir. 1951); cert. granted 342 U. S. 848 (1951)

By and large, by the flexible application of old remedies, the courts have, thus far, been able to afford some measure of relief. As was pointed out in the *Pollack* opinion

No occasion had arisen, until now, to give effect to freedom from forced listening. 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. The law of nuisance protects him at home.⁵

The law of nuisance is well settled that persons will be protected in the quiet and peaceful enjoyment of their homes or business houses. The neon signs whose message glares into one's windows,⁶ the sound truck whose blare makes day and night hideous,⁷ the radio store that displays its wares so audibly that neighboring merchants are discomforted,⁸ must yield to the law of nuisance.

Attempts, by means of the police power, to protect householders from the intrusion of door-to-door solicitors have been only partly successful. Although, theoretically, a householder is protected, under the law of trespass, by posting a notice that solicitors are unwelcome, in practice, such a prohibition is unenforceable against the anonymous, itinerant salesman who chooses aggressively to ignore the notice.

Ordinances providing for the licensing of door-to-door solicitors, in the exercise of the police power to protect the health, comfort, and safety of the community, have been challenged on constitutional grounds, and are closely scrutinized by the courts. Where the function of the licensing agency is discretionary, such ordinances have been held invalid, for fear that the exercise of discretion will involve grave risk of discrimination against free speech, press, or religion.⁹ These latter rights have recently come to be considered "preferred rights", with the result that the courts will ignore the violation of supposedly less privileged rights, rather than risk infringement of these essential liberties. Although Justices Frankfurter and Jackson have opposed this theory, the majority of the Supreme Court support it.¹⁰

Where an ordinance provides clear standards for the licensing of house canvassers, so that the function of the licensing officer is purely ministerial,¹¹ or where there is a blanket prohibition of all uninvited solicitation,¹² it has been upheld. And where, by request of his tenants—either express or implied—a

⁵ Id. at 456.

⁶ *Green v. Garrett*, 192 Md. 52, 63 A. 2d 326 (1949); *Weber v. Mann*, 42, S. W. 2d 492 (Tex 1931).

⁷ *Biggs v. Griffith*, 231 S. W. 2d 875 (Mo. 1950).

⁸ *Stodder v. Rosen Talking Machine Co.*, 241 Mass. 245, 135 N. E. 251 (1922); *Biggs v. Griffith*, 231 S. W. 2d 875 (Mo. 1950).

⁹ *Lovell v. Griffin*, 303 U. S. 444 (1938); *Schneider v. State*, 308 U. S. 147 (1939).

¹⁰ Thornton, "Second Class Constitutional Rights," 36 ABAJ 640 (1950).

¹¹ *Gospel Army v. C. of Los Angeles*, 27 C. 2d 234, 163 P. 2d 704 (1945); *Rowe v. C. of Pocatello*, 70 Idaho 343, 218 P. 2d 695 (1950).

¹² *Bread v. C. of Alexandria*, 341 U. S. 622 (1951); *Town of Green River v. Fuller Brush Co.*, 65 F. 2d 112 (10th Cir. 1933); *Town of Green River v. Bunger*, 50 Wyo. 52, 58 P. 2d 456 (1936); *contra Martin v. Struthers*, 319 U. S. 141 (1942).

landlord has barred canvassers from a multiple dwelling, he has been upheld in so doing, under the law of trespass.¹³ On the other hand, where there had been no such request, express or implied, by the tenants, the fact that a town was privately owned,¹⁴ or Government property,¹⁵ did not justify the manager in barring canvassers.

A comparatively new advertising device, the use of the telephone for canvassing prospective customers, has not yet been tested in the courts.

Invasions of attention outside the home are subject to reasonable regulation under the police power. The use of a sound truck in public places may not be capriciously forbidden,¹⁶ but, if a clear and non-discriminatory standard is prescribed, it may be regulated,¹⁷ or (for good reason) totally prohibited.¹⁸ Sidewalk solicitors, engaged in wholly commercial enterprises, may be similarly controlled. It is said that there is no vested right to do business in the public streets.¹⁹ For the same reasons, ordinances forbidding the use of "pullers-in" to accost passersby and urge them into adjoining shops, have upheld;²⁰ although not as against a merchant who addressed pedestrians from his doorway only after they had paused to inspect his show windows.²¹

In *Pollack v. Public Utilities Commission*,²² the Circuit Court for the District of Columbia was called upon to decide, for the first time, the "captive audience" controversy. The Capital Transit Company (which operates all street-cars and buses in the District of Columbia), had arranged with a national advertising corporation and a newly created Transit Radio corporation, to deliver "canned music" and commercials to the ears of every passenger, by means of strategically located loudspeakers. Speeches on controversial matters were also occasionally by broadcast.

A determined minority of passengers, at a hearing before the Public Utilities Commission of the District of Columbia, contended that the broadcasts were inconsistent with the public convenience, comfort, and safety. But the Commission found no inconsistency, and ordered the proceedings dismissed. This order was affirmed on appeal, by the District Court for the District of Columbia.

¹³ *Watchtower v. Metro. L. Inc. Co.*, 297 N. Y. 339, 79 N. E. 2d 443 (1948); *Hall v. Commonwealth*, 188 Va. 72, 49 S. E. 2d 369 (1948).

¹⁴ *Marsh v. Alabama*, 326 U. S. 501 (1946).

¹⁵ *Tucker v. Texas*, 326 U. S. 517 (1946).

¹⁶ *Saia v. People*, 334 U. S. 558 (1948).

¹⁷ *Kovacs v. Cooper*, 336 U. S. 77 (1949).

¹⁸ *Commonwealth v. Geuss*, 168 Pa. Super. 22, 76 A. 2d 500 (1950), *aff'd* 368 Pa. 290, 81 A. 2d 553 (1951), *Brinkman v. C. of Gainesville*, 83 Ga. App. 508, 64 S. E. 2d 344 (1951).

¹⁹ *Ex parte Marles*, 171 P. 2d 762 (Calif. 1946); *Slatter v. Salt Lake City*, 206 P. 2d 153 (Utah 1949).

²⁰ *People v. Patrick*, 171 Misc. 705, 14 N. Y. S. 2d 251 (1939).

²¹ *McKay Jewelers v. Bowron*, 50 CA2d 634, 122 P. 2d 543 (1942).

²² *Pollack v. Public Utilities Commission*, 191 F. 2d 450, (D. C. Cir. 1951); *cert. granted* 342 U. S. 848 (1951).

In reversing the decision of the District Court, the Circuit Court refused to consider whether the Commission's endorsement of Transit Radio had deprived passengers of property, free speech, or free press. The Court insisted:

In our opinion, Transit's broadcasts deprive objecting passengers of liberty without due process of law . . . Freedom of attention, which forced listening destroys, is a part of liberty essential to individuals and to society, . . . the right to be free in the enjoyment of all one's faculties . . . "Service that violates Constitutional rights is not reasonable service."²³

On application of the Capital Transit Company, the United States Supreme Court granted certiorari;²⁴ and the case is now awaiting decision.

The interest which has been so aptly designated "freedom of attention" is one of that great body of imperfectly protected interests which, for want of a better name, one writer has termed "interests in personality," and another has discussed under "liability for emotional distress." Until about 80 years ago, none of these interests was recognized as a common law right. But, following publication of the now classic Brandeis paper,²⁵ many jurisdictions have adopted the so-called "Right of Privacy" as a legally enforceable interest.²⁶ It may be expected that those jurisdictions which have admitted the Right of Privacy will also be receptive to Freedom of Attention.

In a popular sense, Freedom of Attention, like freedom from unlawful search, would seem to be an interest in privacy. This idea has received support. In his articles on sound trucks, Holliday suggests that permits should be issued on the basis of "whether or not the applicant's action is likely to invade privacy . . ."²⁷ And, an article on "Constitutional Aspects of Transit Radio," reasons that "the attention of the Transit riders is of commercial value to the FM station and its advertisers," and that the appropriation of that attention is therefore an invasion of their privacy.²⁸

Those who take this view, disregard the fact that the majority of decisions have limited the Right of Privacy to tortious publications. In isolated cases, other actions, e. g., the public posting of debts, or the publication of information obtained by wiretapping, have been held to infringe privacy;²⁹ but invasions of the attention have never been brought within its scope.

This limitation of the Right of Privacy is in conformity with the doctrine as originally conceived by Brandeis and Warren, despite their initial statement that Privacy is merely "the right to be let alone."³⁰ This expression, which has led to much confusion, cannot have been intended as a definition of the right. It is said to have been taken from Cooley's work on Torts:

²³ *Pollack v. Public Utilities Commission*, 191 F. 2d 451, 458 (D. C. Cir. 1951).

²⁴ 342 U. S. 848 (1951).

²⁵ Brandeis & Warren, "The Right to Privacy," 4 Harv. L. Rev. 193 (1890).

²⁶ See Annotation: "Right of Privacy," 138 A. L. R. 22 (1942).

²⁷ Holliday, "The Problem of the Sound Truck," 2 Utah L. Rev. 65 (1950).

²⁸ Shipley, "Constitutional Aspects of Transit Radio," 11 Fed. Com. L. J. 150 (1950).

²⁹ See Annotation: "Right of Privacy," 138 A. L. R. 22, at 91, 94 (1942).

³⁰ Brandeis & Warren, *supra* note 25.

Personal Immunity: The right to one's person may be said to be a right of complete immunity, to be let alone.³¹

A recent article makes the sweeping statement that all liberties and immunities stem from "man's one fundamental right—to be let alone."³² There is enough truth in this to demonstrate the folly of so describing the Right of Privacy. The danger, suggested in the annotation cited above, is that

. . . The types of cases in which the right of privacy has been recognized vary so widely that it might be concluded that this supposed right is nothing more than a catch-all to take care of the outer fringes of tort and contractual liability, and that it is not the product of any underlying general principle.³³

No mention of privacy was made in the *Pollack* decision; and it can only be assumed that the Court purposely avoided confusing two interests which it regarded as distinct.

The *Pollack* decision, then represents, not a new application of the Privacy doctrine, but the evolution of a second incorporeal interest to fuller common-law protection under the Constitution. Common law rights do not spring full-armed from the brains of jurists, but evolve gradually in the application of "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."³⁴

The occasions when invasion of attention is accompanied by a trespass are exceptional. The effective application of the law of nuisance is hampered by Lord Eldon's now accepted dictum that "Equity acts to protect only property rights."³⁵ The police power is limited to the protection of the health, welfare and safety of the public, and is severely restricted by insistence upon "preferred" constitutional rights.

As respondents in error before the Supreme Court, *Pollack et al* have reverted to their argument that, in interfering with their conversation, radio deprives them of freedom of speech; that, in distracting them from their reading, radio deprives them of freedom of the press; and that, in depriving them of the free use of their time without compensation, radio deprives them of property.³⁶ The Supreme Court, therefore, has three alternatives: to reverse the decision of the Circuit Court; to affirm the decision in toto—thereby confirming that *Transit Radio as upheld by the Public Utilities Commission* deprives the unwilling minority of liberty without due process of law; or to adopt the respondents' rather devious reasoning.

In favor of the decision of the Circuit Court, may be employed many arguments advanced by the proponents of the Doctrine of Privacy. Louis

³¹ Cited in *Henry v. Cherry & Webb*, 30 R. I. 13, 73 Atl. 97, 99 (1909).

³² Simmons, "Man's One Fundamental Right," 36 A. B. A. J. 713 (1950).

³³ Annotation: "Right of Privacy," 138 A. L. R. 22, 25 (1942).

³⁴ *Hebert v. Louisiana*, 272 U. S. 312 (1926).

³⁵ *Gee v. Pritchard*, 36 Eng. Rep. 670 (1818).

³⁶ Respondents' Brief, *Pollack v. Public Utilities Commission*, 191 F. 2d 450 (D. C. Cir. 1951), cert. granted 342 U. S. 848 (1951).

Nizer reports that "the American courts which accepted the rights of privacy as part of their common law have acknowledged that they were motivated by an innate feeling of natural justice."³⁷ It was Thomas Paine's belief that government is a compact among individuals, under which they retain many natural rights not relinquished to the government, upon which no man may encroach.³⁸ This was the philosophy of Blackstone, who wrote that the right of personal security includes the legal and uninterrupted enjoyment of life, limbs, body, health, and reputation.³⁹ This principle was broadened in *Allgeyer v. Louisiana*:

The liberty mentioned in (the fourteenth) amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; . . .⁴⁰

In a leading case, the right of privacy was upheld on similar grounds:

The individual surrenders to society many rights and privileges which he would be free to exercise in a state of nature . . . but he is not presumed to surrender all those rights, and the public has no more right, without his consent, to invade the domain of those rights which it is necessarily to be presumed he has preserved than he has to violate the valid regulations of the government . . .⁴¹

A common scold was at common law indictable . . . the reason . . . was not the protection of any property right of her neighbors, but the fact that her conduct was a disturbance of their right to quiet and repose.⁴²

Opposed to this reasoning is the conservative philosophy manifested by the Rhode Island and New York courts in rejecting the doctrine of privacy. In their antipathy to so-called "judge-made law" they would arrest the development of the common law at its 1776 level, except as later altered by legislative enactment. The natural law philosophy is rejected in favor of the concept of State sovereignty; and it is argued that all rights not guaranteed the people by the Constitution vested in the sovereign State.⁴³ In jurisdictions where Privacy has been rejected on these grounds, it may be expected that neither Freedom of Attention, nor any other natural right will be recognized as such.

The decision of the Supreme Court is awaited with interest.

DELLA KARPELES McKNEW

³⁷ Nizer, "The Right of Privacy," 39 Mich. L. Rev. 526 (1941).

³⁸ Thomas Paine, "The Rights of Man," (1791, 2), London, J. M. Dent & Sons, Ltd. 1935, at 444.

³⁹ I Cooley's Blackstone at 119

⁴⁰ *Allgeyer v. Louisiana*, 165 U. S. 578, 589 (1896).

⁴¹ *Pavesich v. N. Eng. L. Ins. Co.*, 122 Go. 190, 50 S. E. 68, 69 (1904).

⁴² *Ibid.* at 71.

⁴³ *Henry v. Cherry & Webb*, 30 R. I. 13, 73 Atl. 97 (1909); *Roberson v. Rochester Folding Box Co.*, 64 App. Div. 30, 71 N. Y. S. 876 (1901).