

The Plight of the Captive Auditor

Excerpt from a classic essay by Charles L. Black, Jr., from *Columbia Law Review*, 166 (1953)

Science fiction has been called the literature of extrapolation. Last year one of the leading magazines ran a serial, *Gravy Planet*, in which the title role is played by an Earth that has come to be dominated by the philosophy of advertising. Common names for food and drink are heard no more. Functions of government are performed under trade names, to whose owners the great advertising agencies serve as ministries of propaganda; food inspectors wear armbands of a well-known supermarket chain, and there is a senator, complete with phony Southern accent, from a soft drink. Advertising itself is ubiquitous; attending to its message is both a necessity and a felt duty of citizenship; objection is dangerous unorthodoxy.

The claim to freedom from unwanted speech rests on grounds of high policy and on convictions of human dignity closely similar to if not identical with those classically brought forward in support of freedom of speech

I especially remember one sequence. On a plane in flight, the cabin windows are opaqued from time to time, and sound movies appear upon them, to extol the merits of the vaunted (though, as it turns out, shoddy and worse) products of Gravy Planet Material culture. In climax, an "olfactory" hammers home the urgency of purchasing a named deodorant by filling the cabin with a life-like counterfeit of the consequences of its omission. A passenger unthinkingly expresses distaste, but hastens to explain he didn't mean any harm . . .

I stopped laughing just before the last installment came out. About that time, the Supreme Court uttered its judgement in the case of the Washington, D.C. "captive audience." [*Public Utilities Comm'n v. Pollak*, 343 U.S. 451 (1952)] The captives at bar had become such by being trapped in buses and by being forced to listen to news, music, commercials, and other matter.

The Court rejected the contention, which had been sustained 3—0 in the District of Columbia Court of Appeals, that so to use objecting riders was to deprive them of liberty without due process.

The facts of the case were in no way unique. Despite occasional checks, the captive audience pattern threatens to spread through the so-dedicated nation. In the application to public transit, it works this way: the bus company is paid by entrepreneurs for allowing them to install FM receivers in (and loudspeakers inescapably throughout) its vehicles. The entrepreneurs line up an FM station which broadcasts special programs to which the bus radios are fixed-tuned. The passengers listen to what the people at the station want them to hear, whether they like it or not. Some like it. Some do not. Some exceedingly do not.

Advertisers support the scheme. They have been assured, in one trade journal ad, "If they can hear—they can hear your commercial!" The Washington station has described itself (again to the trade) as "delivering a guaranteed audience!"

If your flesh crawls as did mine on reading this phrase as applied to American citizens going about their lawful occasions, then you will see why I think it only fair to throw up at this time any pretense of neutrality on the forced listening question. I am revolted by the whole business. I see only one side of it. And I tremble for the sanity of a society that talks of the precious integrity of the individual mind while forcing it to spend a good part of every day under bombardment with whatever some crowd of promoters want to throw at it.

Forced feeding on trivial fare is not itself a trivial matter but rather a sinister symbol of the relative weighting of the independence of the mind and the lust to make a buck

I think this practice raises issues of high principle. I say this at the start because the toughest obstacle in dealing with the subject in a vein of earnestness is the often-encountered feeling that the whole matter is rather trivial—a bit of a fuss about nothing. I suggest that this feeling, where present, may be in its origin associative rather than logical—that it fallaciously evaluates the interests invaded by forced listening in terms of the incontrovertible triviality and trashiness of much of the stuff the captive audience has to listen to. To drag this association into the open is to rob it of its force. Subjecting a man, willy-nilly and day after day, to intellectual forced-feeding on trivial fare is not itself a trivial matter; to insist, by the effective gesture of coercion, that a man's right to dispose of his own faculties stops short of the interest of another in forcing him to endure paid-up banality, is not itself banal, but rather a sinister symbol of relative weighting of the independence of the mind and the lust to make a buck.

A few months ago *The New Yorker*, long a front-line fighter against audience captivity, ran a lead paragraph in Talk of the Town, protesting the institution of forced listening on buses in Yonkers. In obvious allusion to the Washington case, the writer conceded that the would-be audience captor "has the Supreme Court behind him." This just ain't necessarily so. The Court held only that the objecting captives could not find their deliverance in constitutional rights. One may disagree with that holding and still recognize that it does not amount to general approval of coerced listening, or to establishment of the right of the captor against all assailing.

Still, the constitutional case posed issues within the framework of which may neatly be set. The most substantial question came down to this: "Does this sort of thing infringe the guarantee against deprivation of liberty, and if it does, is government so implicated as to bring into play a guarantee good only against governmental action?" Or, to break this down: "What is liberty?" "What is it to deprive a man of liberty?" "What sort and degree of governmental involvement bring an encroachment on liberty under the ban?"

Although these are problems in legal doctrine, no intelligent layman and no responsible lawyer will stand for their being at that. First, as to "liberty," the root-symbol of the Republic: "What are the freedoms, franchises, autonomies, integrities, the diminishment of which cheapens the worth of our citizenship and our humanity?" Secondly, since the forbidding of deprivation must really forbid that which really deprives: "What actions make unavailable our enjoyment of freedom?" And thirdly, given the multiform, complex, and novel interventions of government in affairs: "What relations of sponsorship between government and the 'private' encroacher on freedom, ought to be looked on as amounting to a wrongful incidence on individual man, of the power of the Entirety?"

Of this last question, little need be said. The relations between private transit companies and public authority follow a set pattern; the Washington case was typical. The transit company holds a virtual monopoly, granted by the legislative body. A man has to ride the buses of the one company because governmental authority says they are the only buses to run. Monopoly is the same thing as absence of alternatives. Furthermore, where audience captivity prevails, the governmental organ has acquiesced to compel listening to the bus radio.

But is coercion present? Can a man be said to be deprived of his freedom not to listen, when he only has to listen because he "chose" to get on a bus? Bus companies would of course have us look on their relations with passengers as purely voluntary on both sides, no more coercive than any private offer. But when the Supreme Court finished that Monday, what choice was really open to the clerks of the court, to the government attorneys, to the reference librarians across the way? Or to such people in any city large enough to attract the ministrations of the transit radio entrepreneurs? A taxi? Twice a day? (Have you read any good budgets lately?) Keeping a car and parking it downtown? Buying a nice house within walking distance of work, or moving into a close-by apartment, big enough for the family? Well, all those things may be possible "in contemplation of law." Abandoning that contemplation and looking about, we know they are virtually impossible for most people working in a great city. Once the loudspeakers have blossomed on the bus wall, the only way most of us can avoid the daily taking of whatever they dish out is to throw up the job and leave town. Horse-sense as well as etymology is outraged by the suggestion that we have satisfactorily protected the integrities of our citizenship when people have to get out of the city to enjoy them. On the horse-sense level, the substantial coerciveness of the captive audience scheme is not a debatable matter. Admen know this and speak of guaranteed delivery.

If what we want is a society in which respect for individual integrity effectively prevails, it is undoubtedly invaded by making people listen daily to what somebody else thinks it well for them to hear; such an invasion is right now being accomplished by coercion, and under the sanction of the State as representative of the social whole.

A society which treats its members' listening to words as a thing, to be reduced to possession and sold in carload lots at a dollar a thousand, cannot long hold fast to a contradictory respect for their utterance of words as something inviolably close to the center of man as man.

Which brings us to the crux. In court or out, the crucial question has to be that of the worth and dignity of the interest the captive auditors bring to judgement. Many, at first glance, look on the pleas of the objecting captive as somehow *infra dignitatem* in a constitutional context. I ask again: Why on earth should anyone committed to the central assumptions of our ethical life see anything picayune or petty in the claim of a man to dispose of his attention and of the faculties it marshals, as against the claim of a group to take this autonomy away from him for their own profit? The objecting captive is in fact defending one corner of a piece of ground that ought to be holy to all of us if we truly mean what we say when we speak seriously about the moral significance of our life as a nation. He is fighting in a novel quarter, for the means of general attack on the sector he defends came only lately into the hands of the aggressors. But he is fighting, after all, for a very old freedom, a freedom to which, in some sense, all the others are dedicated handmaidens—the freedom of the mind. And the millennia rise up and cry out that he is forever right in going to war to defend that freedom the moment a new attack is mounted.

I don't think it much matters what use any given rider might have made of his faculties during the time (for many people quite substantial) of their forced expropriation. Richard Burton used to memorize Old Persian vocabularies. I would guess that some young men are dreaming of zootsuits and hot rods. Lots of people read books and magazines; some close their eyes and rest, or think about whatever they choose. A few seem to be shuffling and examining papers. Certain uses of the time may be a good deal more frivolous than these. Others may be more serious; man remains a mystery. But the essential thing is that to be free in any regard is to be able to choose what use one will make of that freedom, whatever someone else might think of the value of the chosen activity. Miscellaneity of action, comprising inevitably some aimlessness and inanity, is the only visible body freedom possesses.

Forced listening attacks the mind's integrity with a new directness, pushing more deeply, though no more painfully, into the minds of the unwilling than was possible with our ancestors' homely ways of censorship and suppression. A man can no longer fall back to the last wall of keeping his mouth shut and calling his mind his own. The sound, too loud and insistent to be ignored, now exacts, as a price of living a normal life in society, submission to the daily entry of whatever slick operators think he requires.

There is more, though closely connected. Man, we are told, is a rational animal. But we only know this because he is an animal that uses and understands language. Talk, like sex and death, is laughed at a lot, but if man has serious worth, then speech is a serious matter, for it is speech that maketh him manifest. Few shafts could strike with more on-target insult to humanity than its degradation into a collectivized object of speech, powerless to escape and powerless to answer. Much has been said and written, throughout the captive-audience controversy, on the relations between "freedom of speech" and "freedom from unwanted speech." Whether the former includes the latter, as a matter of sound construction, is a technical one of great difficulty. What is perfectly clear is that the claim to freedom from unwanted speech rests on grounds of high policy and on convictions of human dignity closely similar to if not identical with those classically brought forward in support of freedom of speech in the usual sense. Forced listening destroys and denies, practically and symbolically, that unfettered interplay and competition among ideas which is the assumed ambient of the communication freedoms. It contradicts, moreover, what some people would regard as a deeper ground for letting people say freely what they choose to say—respect, namely, for each person, in his uniquely human and finally mysterious function as a user of language. For respect, like liberty, is indivisible, and most obviously so when fine divisions are sought to be made in the same life-context. A society which treats its members' listening to words as a thing, to be reduced to possession and sold in carload lots at a dollar a thousand, cannot long hold fast to a contradictory respect for their utterance of words as something inviolably close to the center of man as man.

Forced listening rigs the market in ideas, for it heavily and arbitrarily favors those communication agreeable to its managers. But the market rigging function of forced listening suggests attention to another side of advertising. It has, its exponents tell us, a Philosophy, a Way, and even (for an adman stops at nothing) a Gospel. One Article of Faith in this Gospel: Prices were never so reasonable, products never so fine, and a lot of you folks out there never so roseate in hue. We know another Article well: Material possessions produce happiness. (Symmetry is thereby served, for another Gospel has much to say about the same proposition.)

**I tremble for the sanity of a society
that talks of the precious integrity of
the individual mind while
forcing it to spend a good part of
every day under bombardment
with whatever some crowd of
promoters want to throw at it**

The adman has every right to preach his Gospel. But is it consonant with any notion of free competition among ideas, or, indeed, of freedom of any kind, that all of us should be forced to hear him or become hermits?

A few defenses have been offered. One of them, to which I shall assign the number "zero," runs to the effect that riders don't really have to pay attention, but may withdraw their minds at will, the whole thing being "psychological." I don't think it worthwhile to discuss such a defense when it is put forward by those who have marshaled every resource of societal pressure, technology, and applied psychology to the precise end of making the withdrawal of attention as difficult as possible—who even have installed, as one trade ad brags, a special device to boost volume when the commercial comes on. Under the same number, let's throw in the attempt at equating the loudspeakers with the car posters or highway signs; that argument might convince a being from Mars, but most of us Terrans are aware that you can close or avert your eyes, but cannot close your ears.

The other defenses may be at least worth numbering. It is said, first, that most riders like the stuff. Tame surveys have been taken, and produced their unsurprising results. Other surveys have seemed to contradict these results. Surveys are not, after all, the last word in the matter, for if our nation is committed to anything it is to the ranking of some interests as beyond the reach of majority preference. But no survey has taken into account, in the framing of its questions, the difference (one which precisely marks civilized man) between merely liking something and insisting on what you like at whatever cost to others. For no survey has solicited or tabulated the answer to this question: Even if you enjoy these broadcasts, as far as your own tastes go, do you want to continue to be amused if a good many of your fellow passengers are deeply outraged by them? I have faith that a great majority of our people would not wish to purchase relief from tedium with the coin of another's anguish and felt insult.

Secondly, we are reminded that liberty is never absolute, but always "qualified." Yes, but how? In this, the sound gloss on "qualified" is "subject to abridgement for good public cause." This is where the audience captors get in trouble. Of course, we would all acquiesce in the enforced assembly of the population to listen to air-raided instructions. But what has that to do with the delicious T-bone steak at the Fat Boy Restaurant?

Thirdly (and with climactic speciousness), it is pointed out that noise is inescapably incidental in city life. However, the bus-radio scheme is not inescapably incidental but rather a contrivance precisely aimed at the coercion of listening. What would we think of a man who turned a hose on passers-by, and defended his action on the ground that people in those parts were often caught in rain? Privacy and freedom from distraction are indeed rare in modern life; the spoliation of what remains of them is hence the more injurious.

We hire halls in which to tell one another how much we respect the Mind of Man. But as Man rides the bus home from the lecture, what is the bus radio saying? Something like this, I'm afraid: That the mental and spiritual integrity of the citizen will not be insisted on if it gets in the way of the fast buck; that a human being, if he happens to be in a crowd, is properly to be treated as a means rather than as an end, as a commodity rather than as a person, not as a unique subject but as a fungible object, promised for daily delivery guaranteed; that intellectual insult is after all *de minimis*, and to resent it is to make a tempest in a teapot; and that our culture can accommodate a new normative system the aim and effect of which is to make of our people a herd handily corralled for whatever purpose certain resourceful gentlemen may think proper for profit.