CONSTITUTIONAL LAW --- FREEDOM OF SPEECH --- PUBLIC AUTHORITIES MAY REFUSE TO ACCEPT PROFFERED ADVERTISEMENTS FOR DISPLAY IN PUBLIC PLACES ONLY WHERE SUCH ADVERTISEMENTS CONSTITUTE A "CLEAR AND PRESENT" DANGER TO PUBLIC SAFETY. Kissinger v. New York City Transit Authority, 274 F. Supp. 438 (S.D.N.Y. 1967)

Imagination colors the black and white photo of the charred flesh that covers the girl's back and arms. Her eyes stare vacantly to the left, seemingly viewing without comprehension the message, which is simple and direct:

> "WHY ARE WE BURNING, TORTURING, KILLING THE PEOPLE OF VIET NAM? - TO PREVENT FREE ELECTIONS."

In smaller lettering the poster continues:

> "PROTEST this anti-democratic war. Write President Lyndon B. Johnson, The White House, Washington D. C.
>
> GET THE STRAIGHT FACTS. WRITE Students for a Democratic Society, 119 Fifth Avenue, New York, N. Y."

In small print the poster states:

> "This 10-year old girl was burned by napalm bombs."

So read the posters which plaintiffs sought to place on subway platforms of the New York City subway system. Defendant, New York Subways Advertising Co., Inc. (Advertising Company) refused to rent them space claiming that their posters were too controversial and would offend a large segment of the population. Advertising Company, a private corporation, is the exclusive advertising agency for defendant, New York City Transit Authority (Authority) which operates and controls the subway system.

Plaintiffs sued for a declaratory judgment to require defendants to accept

the posters.[1] Plaintiffs alleged that defendants, acting under the color of statutes creating the Authority as a public benefit corporation and authorizing it to rent space for advertising,[2] had violated their Federal Constitutional right of freedom of speech. Defendants denied that plaintiffs' rights had been violated. They contended first, that the posters were properly refused because they did not come within certain specified categories to which advertising, by agreement between defendants, had been limited,[3] and, second, the posters were inflammatory and might tempt members of the "captive audience"[4] of subway passengers to cause disorder in the subway system.

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1. Suit was brought under 42 U.S.C. § 1983, jurisdiction being predicated on 28 U.S.C. § 1343 (3).
2. N.Y. Public Authorities Law §§ 1201-1, 1202-13, 13a, (McKinney 1961).
3. The Advertising Company, with the approval of the Authority, had limited the advertising it would accept to:
   (a) commercial advertising for the sale of goods, etc.;
   (b) public service announcements; and
   (c) political advertising at the time of and in connection with elections.
4. The phrase "captive audience" has its origin in the opinion of Douglas, J., dissenting in Public Utilities Commission v. Pollak, 343 U.S. 451, 72 S. Ct. 813 (1952). The issue there was whether a privately owned street railway and bus company, functioning as a public utility, was constitutionally precluded from receiving and amplifying radio music programs through loud speakers in its passenger vehicles. Objection was made that the company's action infringed on its passengers' right to listen only to such points of view as the listener wishes to hear. Since the broadcasts were of music, not objectionable propaganda, the Court held that the company was not so precluded. Mr. Justice Douglas argued that the streetcar audience was a captive audience with no choice but to sit and listen to the broadcast and as such the passengers' right was being violated.

   Such a contention, however, ignores the fact that a passenger in a public conveyance does not possess the same rights of privacy as he is entitled to in his own home. In any event the Pollak case is distinguishable on its face, since the viewer of plaintiffs' posters is under no compulsion to sit and stare at them.

Plaintiffs moved for summary judgment. Held, while Authority and Advertising Company may refuse to accept all posters for display in the subway, absent a showing that plaintiffs' posters present a "clear and present" danger, defendants cannot accept some posters and refuse plaintiffs'. Plaintiffs' posters are an expression of political views, entitled to First Amendment protection, unless they present a serious and immediate threat to the safe and efficient operation of the subways. The question of whether the posters present such a threat requires trial determination; on this ground, plaintiffs' motion was denied.

In reaching its conclusion, the Court distinguished the recent decision of a California District Court of Appeal, Wirta v. Alamenda-Contra Costa Transit District.[5] On similar facts, the California Court had held that a public transportation district and a private advertising company could establish a classification of acceptable posters, similar to that in the principal case, and refuse to accept any posters that did not come within the specified categories. Defendants had argued, and the California Court agreed, that their classification was not arbitrary nor constitutionally objectionable, being based on the practical realities of public transit advertising; if one must accept all advertising on a first come, first served basis, it becomes necessary

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5. ___ Cal. App. 2d ___, 61 Cal. Rptr. 419 (Ct. App. 1967).
*Editor's note: Prior to publication, the decision of the District Court of Appeal in Wirta was vacated by the California Supreme Court and the order of the Trial court restraining defendants from refusing to accept plaintiffs' advertisements was affirmed. Wirta v. Alamenda-Contra Costa Transit District, ___ Cal. 2d___, 64 Cal. Rptr. 430, 434 P. 2d 982 (1967).

to deny space to other non-commercial users or to pre-empt commercial space with a resultant loss of good will and future income.

The Court found that the defendants in Wirta had strictly observed their advertising classifications; in Kissinger, it appeared that defendants had not done so.[6] The Court in Kissinger felt that reasonable regulations on the display of plaintiffs' posters, and others of a similar nature, in regard to number, time and place of display, would eliminate the economic difficulties foreseen in Wirta.

The basic issue in both decisions is whether a public authority may, through an advertising agent, refuse to accept proffered advertisements, under an understanding limiting the types of advertisements permissible in its facilities, without violating freedom of speech. Notwithstanding their factual distinctions, the two decisions reveal a basic conflict in Federal Constitutional jurisprudence. For Kissinger rejects Wirta's attempt to classify advertisements into acceptable or non-acceptahle categories on the basis of "practical realities of public transit advertising". It spurns the concept that fear of loss of business or fear of alienating a large segment of the population by

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6. Notwithstanding their claimed practice of accepting only those posters which came within the categories delineated in note 3 supra, defendants had previously accepted among other advertisements;
   (a) posters urging support of the U.S.O.
   (b) posters urging support of Radio Free Europe; and
   (c) posters exhorting members of the Black Muslim faith and others to read the newspaper Muhammed Speaks.

presenting controversial views, can ever, in and of themselves, constitute that compelling reason which is necessary for suppression of a First Amendment Freedom.[7]

It has long been recognized that the citizen's right under the First and Fourteenth Amendments to communicate ideas and views, however unpopular they may be, represents a bulwark of a free society.[8] The fact that dissemination of controversial and unpopular views may induce a condition of unrest, create dissatisfaction with conditions as they are, or even stir people to anger, or -- without the expression itself being unlawful -- incite them to criminal acts, is no excuse for curtailing freedom of speech.[9] The state can inhibit exercise of the right only when it is clearly demonstrable that its unfettered use will give rise to a clear and present danger of the occurrence of some substantive evil, which occurrence the state has a duty to prevent.[10]

The likelihood, however great, that a substantive evil will result, cannot alone justify a restriction upon freedom of speech. The substantive evil sought to be prevented must be extremely serious and the degree of imminence of its occurrence extremely high before regulation may be imposed.[11]

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7. See, N.A.A.C.P. v. Button, 371 U.S. 415, 438-439, 83 S. Ct. 328, 340-341 (1963).
8. Schneider v. New Jersey, 308 U.S. 147, 60 S. Ct. 146 (1939); Wolin v. Port of New York Authority, 268 F. Supp. 855 (S.D.N.Y. 1967).
9. Terminello v. City of Chicago, 337 U.S. 1, 69 S. Ct. 894 (1949); Kunz v. New York, 340 U.S. 290, 71 S. Ct. 312 (1951); East Meadow Community Concerts Assc. v. Board of Educ., 18 N.Y. 2d, 129, 219 N.E. 2d 172, (1966), on appeal after remand, 19 N.Y. 2d 605, 224 N.E. 2d 888 (1967).
10. Cantwell v. Connecticut, 310 U.S. 296, 60 S. Ct. 900 (1940); Schenck v. United States, 249 U.S. 47,39 S. Ct. 247 (1919). But see, the several opinions in Dennis v. United States, 341 U.S. 494, 71 S. Ct. 857 (1951).
11. Bridges v. California, 314 U.S. 252, 62 S. Ct. 190 (1941).

Even within this contex, the state cannot require those who wish to dissiminate ideas to present them first to some public official for his consideration and approval, since this would permit the official to act as a censor.[12]

Although the issue in Kissinger is novel, viewed within this constitutional framework, it is compelling. A contrary decision would have permitted defendants to exercise the power of censors. This they may not do. Moreover, a public authority is not in the same position as private advertising media which are so controversial that loss of revenue may result.[13] A public authority, simply because it is a public authority, cannot be allowed to pick and choose the ideas which it will allow to be presented to the public.

The difference between the positions of the public authority and the private advertising media derives solely from the limitation on the concept of state action. Private action, in the sense of infringement on protected rights by individuals, natural or juristic, not acting under the color of governmental authority, has long been held not to be a violation of the Fourteenth Amendment.[14]

The apparent inequity which arises from this limitative concept merely serves to illuminate a problem still relatively unexplored.[15] What duty, if any,

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12. Cox v. Louisiana, 379 U.S. 536, 557-558, 85 S. Ct. 453 at 466 (1965).
13. Compare the views in Wirta, supra, note 5, 61 Cal. Rptr. at 423-424.
14. Civil Rights Cases, 109, U.S. 3, 3 S. Ct. 18 (1883). But compare the Civil Rights Cases with United States v. Guest, 383 U.S. 745, 86 S. Ct. 1170 (1966), and with Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S. Ct. 856 (1961).
15. Barron, Access To The Press - A New First Amendment Right, 80 Harv. L. Rev. 1641, (1967).

do private media have to facilitate the communication of controversial ideas? Should not federally licensed radio and television be required to sell air time impartially, for advertising or other purposes, in the same manner as a public authority? And shouldn't private transportation companies, functioning as public utilities and regulated as such by the state, also be required to rent advertising space in the same manner as defendant Authority?[16] But these are the easy questions. They do not stretch the concept of state action to its breaking point. They do not involve an inherent conflict of equal rights. A more fundamental question does. Can a free press deny free speech? One may ask of what value is the right of freedom of speech in a business dominated society if it does not include the peripheral right of access to all effective means of communication? The problem, as usual, is not in the question, but in the answer. For it may not exist at all, at least not in a legal sense.

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16. Compare, Burton v. Wilmington Parking Authority, supra, note 14. See also, Harlan, J., dissent in Civil Rights Cases, supra, note 14.