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SUBLIMINAL MESSAGES IN MUSIC: FREE SPEECH OR INVASION OF PRIVACY?

MATTHEW W. DAUS*

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I. INTRODUCTION

The use of subliminal messages in music poses perplexing legal questions. Should legal protection be afforded such communication? If so, what is the extent to which these subconscious messages can be nestled in the panoply of the First Amendment? This comment will attempt to answer these queries within the framework of Constitutional analysis.

The focus of the subliminal message inquiry involves the case of *Vance v. Judas Priest*.¹ This is the only case which has dealt directly with the issue of subliminal messages. The litigation was highly controversial and accompanied by extensive media coverage.²

The law suit in *Vance* was commenced by the estate of Raymond Belknap and James Vance against the heavy metal rock band Judas Priest, CBS Records, and other related organizations and individuals.³ The primary allegation was that subliminal messages are present on the Judas Priest album entitled "Stained Class," and that those communications caused the deaths of James

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1. Nos. 86-5844, 86-3939, 1990 WL 130920 (Nev. Dist. Ct.) [hereinafter *Vance*].

2. See, e.g., Seager, *Did a record lead to youths' suicide pact? The 'Judas Priest' case*, 103 L.A. DAILY J. 1 (August 3, 1990); *Blaming a family's failure on rock 'n' roll*, 103 L.A. DAILY J. 6 (September 26, 1990).

3. *Vance* at 1.

and Raymond.⁴ Both teens attempted suicide after listening to the Judas Priest album by firing a sawed-off shotgun under their chins in a church playground.⁵ Raymond successfully completed this attempt, however, James did not immediately end his life. James Vance was grossly disfigured and died after commencement of the suit.⁶

Nevada State District Judge Jerry Carr Whitehead, decided, as a preliminary matter, that subliminal messages on record albums are not protected speech.⁷ This solitary legal opinion will be closely scrutinized, and its reasoning frequently evaluated in this comment where appropriate.

II. THE HISTORY OF AND PUBLIC REACTION TO SUBLIMINALS

First, a brief history of the evolution of subliminal messages in music and other media is essential to an understanding of the holding in *Vance*. Subliminal messages are projections of "light or sound so quickly and faintly that they are received below the level of consciousness."⁸ The basic premise behind "this technique is that sensory data which may be too dim, too silent, or too distorted to be registered consciously will nevertheless be perceived subconsciously."⁹

The concept of subliminal communication was first introduced to the public at a press conference held on September 12, 1957 by James Vicary, a marketing and motivational research specialist.¹⁰ The results of subliminal experiments conducted in a New Jersey movie theater were disclosed.¹¹ The messages "Drink Coca-Cola"

4. See *id.*

5. See *id.* at 16-17.

6. An explanation of the subsequent surgical procedures performed upon James Vance prior to his death adequately conveys the extent of pain and suffering resulting from his injuries: One of the procedures endured by Mr. Vance was the creation of a new nose by the doctors and the implantation of this nose upside down upon his forehead for a time. This nose was later removed and implanted on the front of what remained of his face. James underwent two different procedures to implant a bone segment to serve as a make-shift chin. Also, having lost much of his mouth James was unable to keep liquids and saliva contained in his mouth and was forced to wear a bib most of the time and slept in his bed with a towel underneath him.

Id. at 17.

7. See *Vance* at 5.

8. ALAN F. WESTIN, *PRIVACY AND FREEDOM* 279 (1967) [hereinafter WESTIN].

9. Comment, *Judicial Recognition And Control Of New Media Techniques: In Search Of The "Subliminal Tort,"* 14 J. MARSHALL L. REV. 733, 737-738 (1981) [hereinafter Comment, *In Search Of The "Subliminal Tort"*].

10. See Westin, *supra* note 8, at 279.

11. See *id.*

and "Hungry? Eat Popcorn" were superimposed on the theater's screen so quickly that it was not consciously visible to the audiences.¹² Apparently, there was a dramatic increase in soda and popcorn sales when the subliminals were flashed.¹³

Following Vicary's press conference, a public outcry resulted. Subliminal messages were condemned by the three major television networks (CBS, NBC, and ABC), the National Association of Radio and Television Broadcasters, and national and state civic organizations.¹⁴ Public hostility resulted in the introduction of Congressional and state anti-subliminal bills.¹⁵

III. SUBLIMINAL TECHNIQUES

Subliminal messages are currently capable of being transmitted through visual and audio means.¹⁶ The visual media which have been utilized include television,¹⁷ film, and still photographs. In television, two methods are available: (1) a tachistoscope device that "mixes the message with the regular video signal and periodically flashes the message for a fraction of a second,"¹⁸ and (2) a more modern and inexpensive method accomplished through "varying light intensities of a projector."¹⁹ In film, editing involving the insertion of single-frame shots transmits the message²⁰ as well as superimposing "low contrast images onto main features, essentially showing two films simultaneously."²¹

Subliminals are transmitted through still photographs by hidden "embeds."²² Embeds are words or images of high emotional

12. See *id.*

13. See *id.*

14. See WESTIN, *supra* note 8, at 282-284.

15. See *id.* at 282-283. Statutes involving subliminal communication were proposed in New York, New Jersey, and California, but were never enacted. See Olivia Goodkin and Maureen Ann Phillips, Note, *The Subconscious Taken Captive: A Social, Ethical, and Legal Analysis of Subliminal Communication Technology*, 54 S. CAL. L. REV. 1077, 1133 (1981) [hereinafter, *The Subconscious Taken Captive*].

16. See Note, *The Subconscious Taken Captive*, *supra* note 15, at 1081.

17. See generally *Zamora v. State*, 361 So.2d 776, 779 (Fla. Dist. Ct. App.), *reh'g denied*, (1978) (Evidence pertaining to "involuntary subliminal television intoxication" was rejected upon proffer by defendant Zamora, who contended that expert testimony on this subject would establish his insanity defense to a charge of first degree murder).

18. Goodkin, *The Subconscious Taken Captive*, *supra* note 15, at 1080-1081.

19. *Id.* at 1081.

20. *Id.*

21. Wolk, *You Won't Know It When You See It: An Essay on Subliminal Communication and First Amendment Theory*, 23 COLUM. J.L. & SOC. PROBS. 523, 525 (1990) [hereinafter Wolk].

22. See Comment, *In Search Of The "Subliminal Tort," supra* note 9, at 739.

value - the content of which is usually sexual - that are detectible only through careful scrutiny or special equipment.²³

Subliminal messages are communicated in music through a process entitled "multi-tracking."²⁴ This technique involves conveying messages "as part of a background murmur."²⁵ Hence, a message would be mixed into a sound recording on one or several tracks of a multi-track tape, mostly at subdued and slurred levels.

A device which resembles a multi-track recording, and which has been utilized by department stores to subconsciously deter shoplifting, is designated and marketed as a "subliminal sound conditioning system."²⁶ This product is a small box (akin to a mixing board) which "combines music with a verbal message repeated 9000 times per hour at a decibel level not consciously heard by the listener."²⁷ Such audio subliminals are easily detectible in comparison to visual subliminals, due to devices which can amplify and slow down the projected signals.²⁸

IV. AN EXPLANATION OF THE HOLDING IN *VANCE v. JUDAS PRIEST*

A. *The Intentional Tort For Subliminal Messages*

Now that a foundation for understanding has been established, it seems prudent to explain the findings of fact in *Vance v. Judas Priest*.²⁹ After reviewing the pertinent evidence, Judge Whitehead made four major findings of fact relieving Judas Priest of liability:

- (1) The 24 track tape of the song "Better By You: Better Than Me" admitted into evidence is the unaltered original
- (2) The words "Do It" are present several times on the song

23. *See id.*

24. The use of the term "multi-tracking" is probably derived from modern recording techniques. Basically, a mixing board is utilized to place different sounds (usually by different instruments) on separate tracks. Each track records on only a small portion of a sizeable tape (usually ½ or 1 inch in diameter and containing space for 16 or 24 tracks). The mixing board is employed to adjust the volume and tonal quality of each track in relation to the others. Then, the multi-track tape is re-recorded onto a master (one or two track) tape, from which phonorecords, cassettes, and compact discs are pressed for distribution and sale. *See also, Vance v. Judas Priest*, Nos. 86-5844, 86-3939, 1990 WL 130920 (Nev. Dist. Ct.).

25. Wolk, *supra* note 21, at 525.

26. *See Note, The Subconscious Taken Captive, supra* note 15, at 1081.

27. *Id.*

28. *See Note, First Amendment Dialogue And Subliminal Messages*, 11 N.Y.U. REV. L. & SOC. CHANGE 331, 337 (1983) [hereinafter *Note, First Amendment Dialogue*].

29. Nos. 86-5844, 86-3939, 1990 WL 130920 (Nev. Dist. Ct.).

"Better By You, Better Than Me"

(3) The "Do Its" on the record are subliminal

(4) The words "Do It" are the result of a chance combination of sounds: the words were not intentionally formed.³⁰

Apparently, the cause of action derives from a tortious invasion of privacy theory.³¹ The only reason Judas Priest was not found to be liable for the deaths of James Vance and Raymond Belknap, is due to the insufficiency of the plaintiffs' evidence in proving the element of "intent".³²

Although the court did find that the words "Do It" amount to a subliminal message present on the "Stained Class" album,³³ the process by which those words were formed convinced Judge Whitehead that Judas Priest did not intentionally place the verbal command on the recording. The words "Do It" were a result of "the singer's exhalation of breath on one track and a 'leslie guitar' on another track."³⁴ Hence, it is unlikely that one would undertake the extremely complex process of "sound spreading" (across different tracks) to place a subliminal message on an album.³⁵

B. The Quasi-Creation Of An Intentional Tort For Backmasking

It was a major step for a court to announce that one could recover under intentional tort theory for the placement of subliminals on recordings.³⁶ The amount of available evidence con-

30. See *id.* at 8-9.

31. See *id.* at 10; see also, *infra* notes 157-163 and accompanying text. A similar tort for subliminal messages was formulated and derived from various aspects of privacy law, the F.C.C. fairness doctrine, and misleading advertising cases, and was expounded in a relatively recent article. See also Comment, *In Search Of The "Subliminal Tort," supra* note 9, at 756. (The proposed tort contained three elements: "(1) that a subliminal invasion has occurred; (2) that the subliminal invasion was intentional; and (3) that the invasion was wrongful".

32. See Vance at 10.

33. See *id.* at 9.

34. *Id.*

35. See *id.* ("It is inconceivable to the Court that in 1978 the defendants had reason to believe that this level of deception was necessary[.]").

36. A somewhat more radical approach sounding in strict liability was adopted by the California legislature. This body passed a bill conferring standing to sue on an invasion of privacy theory, where records and tapes with backward messages are distributed without public notice. See Vokey and Read, *Subliminal Messages: Between the Devil and the Media*, *American Psychologist* 1231 (Nov. 1985) [hereinafter Vokey and Read]. Similarly, Arkansas passed a bill "requiring that the following message be placed on records and tapes sold in the state: 'Warning: This record contains backward masking which may be perceptible at a subliminal level when the record is played forward.'" *Id.* Texas also contemplated the passage of such legislation, but did not ultimately do so. See *id.*

cerning the effectiveness of subliminals on human behavior is tenuous support to justify judicial notice of a subconscious cause of action. Nevertheless, despite this bold common law theory, and aside from the subliminal message issue set for trial,³⁷ the court in *Vance* appears to have created a tort for "backmasking" words onto a record.

First, the court drew a distinction between backward messages and backmasking. Second, Judge Whitehead rendered findings of fact pertaining to backmasking which are logically unrelated to the subliminal message issue.

The court in *Vance* defined "backmasking [as] the process of singing or stating words on a recording in such a way that when the recording is played backwards, the forward words create intelligible words or phrases in the reverse."³⁸ In Judge Whitehead's opinion, backmasking differs from backward vocals because the latter involves "a vocal played backward on a song, [even though] generally unintelligible."³⁹ Backward messages were referred to as "pointless,"⁴⁰ but the influence of "backmasking" manifests itself in a dicta-created tort:

In conclusion, the Court believes that the plaintiffs have submitted a forceful argument that the backmasked messages are present and have succeeded in raising grave suspicions in the mind of the Court. However, this is an area where anyone including the Court could be easily led by the power of suggestion. Just as in the area of forward subliminals, the Court would require as an element of the tort a showing by the plaintiffs that the backmasked messages were created consciously and intentionally by the defendants.⁴¹

A court may have the capacity to draw a distinction between "backmasking" and backward vocals by drawing upon the arguments of experienced counsel and the leading experts in the field to make a finding of fact. Instead, the Court in *Vance* drew the distinction *sua sponte*, without any sufficient evidence for doing so.⁴²

Finding of Fact Number 11

37. See *Vance* at 3. The case proceeded forward solely on the theory that subliminal messages were a cause of the deaths.

38. *Id.* at 18.

39. *Id.* at 19.

40. *Id.*

41. *Id.* at 20-21.

42. Or even if there was some sort of evidence proffered at or before trial, this possibility was not disclosed by the published opinion whatsoever.

THERE WAS NO CREDIBLE SCIENTIFIC EVIDENCE PRESENTED TO SHOW THAT A PERSON CAN PERCEIVE A BACKMASKED MESSAGE EITHER SUBLIMINALLY OR SUPRALIMINALLY.

Basis for Finding

If there is any scientific evidence concerning the ability of the human mind either conscious or unconscious to interpret backward messages, that information was not presented to the Court. The human mind may be much more powerful than it is given credit for. However, no tests or scientific evidence was presented to substantiate this contention.⁴³

Therefore, it was left for another day to determine whether evidence can establish that backmasking has the same effect upon one's subconscious that subliminals purportedly possess.⁴⁴

Approaching the distinction from a syllogistic point of view tends to vitiate its existence. Backmasking and backward vocals are functional equivalents because both require the listener to play a recording backwards in order to make out an intelligible message. The only difference between backmasking and backward vocals is the manner in which the message is placed on the recording.⁴⁵

Once the distinctions between backmasking and backward vocals are eroded, the Court's reasoning for constructing this quasi-

43. Vance at 21.

44. *But see*, Vokey and Read, *supra* note 36, at 1234-1236.

The more generic label of "backward messages" was analyzed by Vokey and Read, and no distinction was drawn between "backmasking" and "backward vocals." Further, this article exposed the results of an experiment pertaining to a listener's ability to consciously detect a backward message. "[A]lthough the subject may [have been] able to detect (or, more likely, to reconstruct) the occasional word of a backwardly recorded message, very little of the forward meaning is consciously available."

Practically speaking, the likelihood that a listener will sit down and play a record in search of backward messages is slim at best. Logically speaking, it does not seem probable that such a listener will be able to perceive backward messages consciously or subconsciously by listening to forward music. For instance, if humans possess that ability, then whenever a person converses with another person, each would be able to inform the other of the backward words that they inadvertently formulated. It appears doubtful that any human being is capable of such mental activity, unless he or she can be classified as an intellectual genius.

For a related view, compare Note, *First Amendment Dialogue*, *supra* note 28, at 331, 337, which states that a primary common sense distinction between backward messages and subliminal messages is that the former can only be detected by listening to the recording backwards. The latter can be uncovered by various methods while analyzing the music played forwardly, namely through slowing down or amplifying the recording. Therefore, it appears more probable that one could subconsciously perceive a subliminal message due to its presence upon forward playback, than a backward message, which cannot be disclosed to the court by experts unless the recording is actually played backwards.

45. Backmasking involves forwardly slurred lyrics, while backward vocals are classified as messages recorded backwards. *See supra* text accompanying notes 38-39.

subliminal tort fails. If backward vocals are "pointless,"⁴⁶ and backmasking has the same exact effect upon the listener, then it too must be pointless. The obvious counter-argument is that both methods should give rise to recovery if the effect on one's subconscious could be established at trial. This approach would be logically consistent, and Judge Whitehead would have delivered a more persuasive opinion if the distinction was drawn while also leaving open the possibility for recovery in both instances.

Nevertheless, suffice it to say that the logically inconsistent treatment of the backmasking/backward vocal distinction by the *Vance* Court indicates it is embarking upon uncharted waters with a raft containing quite a few holes in it. Basically, the clear acknowledgement that future suits could establish a backmasking cause of action if sufficient evidence is shown, but a similar opportunity not being afforded backward vocals, demonstrates that Judge Whitehead has not properly repaired the intellectual raft. If a plaintiff can prove that backward vocals have been subconsciously perceived, as a result of some future technological developments or successful experiments, he too should be permitted to recover for any injuries caused by such messages.

V. THE REGULATION OF SUBLIMINALS

A. State Action

A primary concern regarding subliminals and the First Amendment is the doctrine of "state action." This requirement was not explicitly addressed in *Vance*, yet, the Court held that subliminals are not free speech.⁴⁷ An appendix was attached to the Court's findings of fact, dealing with the First Amendment issue through an extensive memorandum of law on the topic.⁴⁸

The search for a rationale justifying the Court's appendix is crucial to its treatment as valid precedent. Otherwise, the First Amendment holding in *Vance* may be considered either completely erroneous, or mere dicta (and possibly persuasive authority for a proper case where state action exists).

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech."⁴⁹ "[T]he First Amendment is implicated only when a 'law' abridges freedom of

46. See *Vance* at 19.

47. See *id.* at 5.

48. See *id.* at 22-28.

49. U.S. CONST. amend. I.

speech.”⁵⁰ Hence, a literal interpretation would apply this Constitutional guarantee only to acts of Congress. However, the United States Supreme Court has liberally construed freedom of speech so that the Constitutional rights conferred under the First Amendment are made applicable to abridgements by state law.⁵¹ This end was accomplished by virtue of the Fourteenth Amendment’s “due process” clause.⁵² The only plausible purpose for the court’s discussion of the First Amendment implies that the common law creation of a right to privacy tort for placement of subliminal messages on record albums, would itself amount to state action prohibiting free speech.⁵³

The notion that judicial action is attributable to the state within the context of the Fourteenth Amendment, is not a modern development. As early as 1879, the United States Supreme Court approved of the judicial state action concept in *Virginia v. Rives*,⁵⁴ with regard to the equal protection clause.⁵⁵ Justice Strong, delivering the opinion of the Court, propounded that:

It is doubtless true that a State may act through different agencies,—either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another.⁵⁶

Although the standards applicable to equal protection state action

50. MELVILLE NIMMER, *NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT* §4.01[A], at 4-3 (1984) [hereinafter Nimmer].

51. See *id.* at §4.01[B], 4-6. See also, *Gitlow v. New York*, 268 U.S. 652 (1925); *Stromberg v. California*, 283 U.S. 359 (1931); *Near v. Minnesota*, 283 U.S. 697 (1931).

52. See *Near v. Minnesota*, 283 U.S. 697, 707 (1931)

“It is no longer open to doubt that the liberty of the press and of speech is within the liberty safeguarded by the due process clause of the 14th Amendment from invasion by state action.”)

The facts in *Vance* do not involve the Constitutionality of a statute or an agency regulation prohibiting subliminal messages. Instead, the defendants raised free speech as a defense to maintenance of the suit in their motion for summary judgment.

According to Professor Melville Nimmer and Justice Douglas’s concurrence in *Lehman v. Shaker Heights*, 418 U.S. 298, 305, n. 1 (1974), the 14th Amendment state action theory as applied to freedom of speech is universally accepted: Because the meaning of the due process clause in the freedom of speech context is no longer a subject of active dispute, the Court increasingly simply cites the First and Fourteenth Amendments as the underlying authority for guaranteeing freedom of speech and press as against state laws, without bothering to cite a particular clause of the Fourteenth Amendment. Nimmer, *supra* note 50, at sect. 4.01[C], 4-8.

53. See *Vance* at 19-23.

54. 100 U.S. 313 (1879).

55. See *id.* at 314.

56. *Id.* at 318.

analysis may differ from that of the First Amendment, in *Press-Enterprise Co. v. Superior Court of California*⁵⁷, a discrete footnote in Justice Stevens' concurrence states that "[i]t is, of course, well settled that the Fourteenth Amendment makes [the First Amendment] applicable to the abridgement of speech by the States, including state judges."⁵⁸

The Court's holding in *Vance* might fulfill the state action requirement for the abridgement of free speech. However, the validity of the view espoused by Justice Stevens in *Press-Enterprise*⁵⁹ is called into question by the timeliness of the purported state action in *Vance*.

One could conceivably contend that at the time the Court in *Vance* entertained the defense of free subliminal speech, no state action had yet been taken. Subliminal communication was not, presently being regulated by any instrumentality of the state.⁶⁰

In light of the foregoing, if one were to adopt such a rigid view of judicial state action, the concept itself would cease to exist. Every time a Constitutional violation is alleged in a lower Court, the defendant would contend that there has not been state action until a Court ruling is rendered. Since this scenario would result in an abandonment of *Press-Enterprise*, the holding of *Vance* should be permitted to amount to state action, despite any timeliness defect. In the future, however, it would be wise to state the grounds upon which a Court is competent to decide a novel Constitutional law issue, especially where its own judicial opinion is a manifestation of state action.

B. Subliminal Advertising

No direct regulations or statutory prohibitions against the placement of subliminal messages on record albums have been enacted, nor against their use in general.⁶¹ However, the same does not hold true for subliminal advertising, which is indirectly regulated through existing statutes. It is not surprising that certain statutes are designed to protect consumers from subliminals. This

57. See *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501 (1984).

58. *Id.* at 516, n. 1 (citing *Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976)).

59. See *Id.*

60. However, an argument on appeal to a higher court that the lower court's actions constituted an abridgement of speech seems more plausible. Yet, one runs into a procedural quagmire because a party must object on First Amendment grounds in the lower court in order to preserve the issue for appeal.

61. See Comment, *In Search Of The "Subliminal Tort," supra* note 9, at 747.

form of communication was first introduced to the public and prof-
ferred as a marketing device by James Vicary and others to astute
capitalists within an advertising context.⁶²

1. Lanham Act Civil Actions

Subliminals in advertising do not require the passage of new
legislation. Instead, the problem posed by such messages fits nicely
into the categories for unfair trade practices contained in the Lan-
ham Trademark Act. In addition, where interstate commerce is not
involved, state common law unfair competition theories may pro-
vide the vehicle for maintaining a civil cause of action for the use
of subliminal messages in an advertising context. The pertinent
provision of the statute creates a civil cause of action for "False
designation of origin":

Any person who, on or in connection with any goods or services,
or any container for goods, uses in commerce any word, term,
name, symbol, or device, or any combination thereof, or any
false designation of origin, false or misleading description of
fact, or false or misleading representation of fact, which —

(1) is likely to cause confusion, or to cause mistake, or to deceive
as to the affiliation, connection, or association of such person
with another person, or as to the origin, sponsorship, or approval
of his or her goods, services, or commercial activities by another
person, or

(2) in commercial advertising or promotion, misrepresents the
nature, characteristics, qualities, or geographic origin of his or
her or another person's goods, services, or commercial activities,
shall be liable in a civil action by any person who believes that
he or she is likely to be damaged by such act.⁶³

Where a product is purchased by a consumer due to an augmented
expectation created by subliminal advertising messages, and the
product does not rise to the level of those subconsciously created
expectations, a misleading representation has occurred⁶⁴ within the
meaning of 15 U.S.C. 1125(a).⁶⁵

It would be consistent with the general legislative intent be-
hind the Trademark Act to allow recovery for damages incurred as

62. See Westin, *supra*, notes 10-15 and accompanying text.

63. 15 U.S.C. §1125(a) (1988).

64. See David Gurnick, *Subliminal Advertising: Threat To Consumer Autonomy?* 21
Beverly Hills Bar Association Journal 56, 66 (Winter 1986-87) [hereinafter Gurnick].

65. Cf. Note, *First Amendment Dialogue*, *supra* note 28, at 340-341. ("Briefly, Lan-
ham Act infringement subliminals involve the conversion of psychological associations pro-
duced by one advertiser to another advertiser's use.").

a result of the false hopes created by subliminal advertising techniques. "One [of the basic purposes underlying any trademark statute] is to protect the public so that it may be confident that, in purchasing a product bearing a particular trademark which it favorably knows, it will get the product which it asks for and wants to get."⁶⁶ Most products are incapable of living up to consumer expectations created by subliminal messages in advertisements. Since subliminals must be highly emotive, and often sexual in their content to purportedly achieve maximum effectiveness,⁶⁷ these instinctual feelings will probably never be re-created by most products.

For example, assume that sexual embeds are effectively disguised in a still photograph, encouraging one to purchase a certain brand of cigarettes. It is not likely that a normal purchaser will receive sexual gratification by smoking the particular brand of cigarettes in question. The consumer merely associates the cigarettes with unfulfilled sexual feelings present in his or her mind as a result of the subliminal advertisement. The only effect upon the potential consumer, if any, would be an urge to purchase the product due to subconscious mental association.

Practical problems in establishing a *prima facie* case under Section 1125(a) arise because a plaintiff must prove some type of misrepresentation caused by the subliminals. The effects of subliminals upon behavior are more easily measurable in the commercial advertising area because one may monitor the monetary expenditures by consumers in response to such messages.⁶⁸ But it may be difficult to locate evidence demonstrating exactly what comprises the average consumer's expectations after exposure to a subliminal advertisement.⁶⁹

One might argue that in-court or out-of-court psychological experiments and accompanying expert testimony would suffice. However, this approach would be a difficult and arduous task indeed since the subjective and subconscious feelings of various consumers are incapable of direct proof.

66. Senate Comm. On Patents, S. Rep. No. 1333, 79th Cong., 2d Sess., *reprinted in* 1946 U.S. Code Cong. Serv., at 1274.

67. See *supra*, note 23 and accompanying text.

68. See Gurnick, *supra* note 64, at 60.

69. This matter is further complicated by the possible ambiguities which may result from a particular subliminal, and the mixed messages which different consumers may receive therefrom. One must remember that although there are certain similarities in measuring behavioral responses to external stimuli, no two people are the same, and the subconscious activity and reactions of each might differ substantially — thus diluting the proof of a 15 U.S.C. §1125(a) case.

2. Federal Trade Commission Regulations

Despite the availability of a civil cause of action, subliminals in advertising may be prohibited entirely by the Federal Trade Commission (F.T.C.). Regardless of consumer reliance upon misleading representations created by subliminals and the subsequent purchase of products below their expectations, the F.T.C., as a quasi-judicial body, "has wide discretion to determine whether any practice is unfair."⁷⁰ This broad enforcement power, including pertinent remedies and fact finding resources, could potentially facilitate the detection and elimination of offensive subliminal advertising.⁷¹

"[T]he F.T.C. [presently] has no specific regulations or policy concerning subliminals."⁷² It appears that such regulations do not seem forthcoming any time in the near future, unless another subliminal scare places political pressure upon the F.T.C. If the public outcry against subliminals that accompanied its introduction in 1957⁷³ did not elicit F.T.C. response, it would take a tremendous uprising to provoke regulatory action.

3. Non-Commercial Subliminal Messages On Record Albums

The situation addressed in *Vance* dealt specifically with the presence of subliminal messages on record albums. One might posit the notion that the intrusive aspects of subliminals in general, including music, should be regulated regardless of whether advertising is involved.

This comment supports the regulation of subliminals in advertising because the deceptive use of this phenomenon influences consumer purchase of misrepresented products. The fraud underlying such tactics of wealth acquisition conflicts with the virtues of a free-market economy. However, the rationale that supports this position does not apply to subliminals utilized in a non-advertising context. Therefore, any attempt to analogize the separate and distinct domains of music and advertising must fail.

First, one must recognize the difference between the point in time that the subliminal message is perceived by a listener, and the alleged effect it has upon him or her. Subliminals utilized in advertisements are ordinarily intended to influence a consumer to buy a

70. See Gurnick, *supra* note 64, at 70.

71. See *id.*

72. Note, *First Amendment Dialogue*, *supra* note 28, at 359.

73. See Westin, *supra* notes 10-15 and accompanying text.

product, thus compelling a commercial transaction.⁷⁴ The effect of this communication occurs before sale.

The facts in *Vance*, however, involve a distinct situation. A subliminal message placed on an album is not perceived by a listener until after the record is purchased. Thus, unless a subliminally laced song was heard prior to sale (thereby influencing purchase), there is no deception with regard to the commercial transaction. Therefore, direct regulation of the advertising field cannot be justified in the record industry. Moreover, the effect upon the listener's behavior, if any, would ordinarily occur after the product is purchased, and is further distinguishable from advertising in this way.

It may be convenient to justify the regulation of subliminals where advertising or commercial communication is involved, but, the rationale for this result does not necessarily apply to non-commercial communication or artistic expression.⁷⁵ Before discussion can proceed as to the merits of such a conclusion, these categories must be defined. There are two significant terms which necessitate definition: (1) "Commercial speech" constitutes any speech which is intended to and/or does produce economic gain for the communicator;⁷⁶ and (2) "Non-commercial speech" conveys a message which is not intended to and/or does not accrue economic benefits to the speaker.

Commercial speech undoubtedly includes advertising, but may be unduly overbroad since a message intended to promote economic gain could have the peripheral effect of conveying information and/or having artistic appeal. For example, one may enjoy watching a commercial because he or she finds it humorous or exciting, but may have no desire to purchase the product whatsoever. Subliminal messages may be subsidiary to, or a part of, artistic elements associated with advertisements. Although the commercial speech definition may be sweeping, the governmental interest in

74. See Gurnick, *supra* note 64, at 60.

75. See *id.* at 70. When discussing a 1984 California bill imposing various restrictions upon subliminals without regard to the commercial/non-commercial distinction, it was noted that "[t]o the extent that the proposal dealt with realms of communication [other than advertising,] it might or might not be appropriate."

76. See, e.g., *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). The Supreme Court has defined purely commercial speech as speech that "does no more than propose a commercial transaction . . . [and] is so removed from any exposition of ideas." *Id.* at 762. Commercial speech is protected, however it is protected less than non-commercial speech, and its protection depends on the nature of the speech and the government's interest in regulating it. *Metromedia v. City of Sand Diego*, 453 U.S. 490, 506 (1981).

protecting consumers would outweigh any aesthetic enjoyment a listener or viewer receives.

If the sole intent or unambiguous content of the subliminal message accompanying speech is to promote economic gain, it is commercial communication subject to regulation by the Federal Trade Commission or relevant State counterparts.⁷⁷ The governmental interest in guarding against intentional subliminal communication for economic gain would apply to some messages placed on record albums, based on their content as well.

For example, if a record album contains a subliminal message that states — “BUY MORE JUDAS PRIEST ALBUMS” — even though the consumer perceives the command after purchasing the album, one can view this communication as a prolonged advertisement, commercial enough in nature to warrant regulation. This content based limitation applies with greater force where the particular song containing the subliminal message is aired on the radio or through other media accessible to the general public.

According to the aforementioned prolonged-advertisement hypothetical, the intent and content of the message go hand in hand because the subliminal command is clear and unambiguous. However, evidentiary difficulties arise where the content of such a message is ambiguous.

For instance, an album message stating “JUDAS PRIEST IS GOOD” is ambiguous with regard to influencing a listener to buy more Judas Priest albums. There can be two separate intentions and effects of such a message: (1) To buy more Judas Priest albums, or (2) To instill the notion into a consumer’s mind that listening to the music of Judas Priest is a beneficial activity, and merely promotes or effectuates increased auditory enjoyment. Where this dual meaning and intention exists, it is difficult to classify such messages as commercial speech under the definition provided in this comment. Further, what prevents such unclear communication from being branded as non-commercial speech?

Branding ambiguous subliminal communication as commercial or non-commercial requires a judgment call or some type of balancing test. The analysis regarding this decision could become highly abstract, complicated, and unnecessary considering the scope of this article.

Artistic expression is the scope of this comment. This form of expression through the use of subliminal messages clearly fits

77. See Gurnick, *supra* note 64, at 67.

within the expansive definition of non-commercial communication. Assuming that subliminals are free speech and the particular message conveyed is clear and unambiguous, there should be no regulation of such communication. The intent and effect of such artistic messages are distinguishable from the purposes for regulating subliminals in an advertising context. Subliminals that create emotive responses and enhance the feelings normally evoked by certain forms of artistic expression should not be regulated because to do so would hinder creativity. Where art and music are involved, the ultimate effect of entertainment may be intensified through the use of subliminal messages. An entirely new realm of creative tools lay at the fingertips of musicians and artists, who can utilize technology to further audience enjoyment and ultimately benefit society.

Since the artistic expression subcategory of non-commercial subliminal communication involves copyrighted works, the intent of the copyright clause of the United States Constitution is pertinent to the regulation of such speech. This clause states that Congress has the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."⁷⁸

Subliminals can comprise a portion of a copyrighted work, increasing its appeal to the perceiving audience. Hence any Congressional, or even state regulation of this type of subliminal message, would hinder originality and preclude the incentive to achieve a superior work; a result which belies the primary purpose of the United States Constitution's Copyright Clause. Moreover, one might not even go so far as to treat subliminal messages as a separate and distinct mode of art. Instead, such messages could easily be considered a component part of the copyrightable expression, thus warranting Constitutional protection.

One must also remember that the First Amendment does not exist in a vacuum, and must be read in conjunction with other Constitutional provisions and objectives. This includes the interplay between the Copyright Clause and the First Amendment. "The First Amendment was designed to enlarge, not to limit, freedom in literature and in the arts as well as in politics, economics, law, and other fields."⁷⁹ The framers of the First Amendment are presumed to be aware of the intention of promoting creativity evi-

78. U.S. CONST. art. I, s. 8, cl. 8.

79. Bosmajian, *Justice Douglas and Freedom of Speech*, 26-27 (1980)(citing *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 151-159).

dent from the pre-existing Copyright Clause. Therefore, allowing the use of subliminals to enhance artistic expression serves the dual ends of both Constitutional provisions.

The basis for regulation of advertising subliminals and not expressive subliminal messages, is the former's ability to deceive the viewer or listener. The latter type strengthens the overall effect of a presently purchased album in terms of greater consumer satisfaction with the product and the entertainment provided therefrom.

The objective for regulating the use of subliminals in advertising is the prevention of fraud upon consumers. A subliminal that augments the effect of expression after the album or other work is purchased does not encompass fraud. It would be extremely difficult for one to contend that a listener should not receive the most effective, entertaining, and aesthetically pleasing product that he or she pays for. Getting more for one's money does not involve consumer fraud and does not warrant regulation.

VI. FIRST AMENDMENT PROTECTION OF SUBLIMINALS IN MUSIC

A. *Are Subliminals Free Speech?*

1. Recognized Free Speech Theories

The court in *Vance* based its conclusion that subliminal messages are not speech upon its purported failure to advance any of the underlying theories of free speech.⁸⁰ These theories are: "(1) the marketplace of ideas; (2) representative democracy and self-government; and (3) individual self-fulfillment and self-realization."⁸¹ Judge Whitehead declared that:

Audio subliminal communications are the antithesis of these theories. They do not convey ideas or information to be processed by the listener so that he or she can make an individual determination about its value. They do not enable an individual to further his personal autonomy. Instead, they are intended to influence and manipulate the behavior of the listener without his knowledge.⁸²

Analysis of the three accepted theories of free speech were grouped together in the preceding statement rather than discussed separately. Here, each theory will receive distinct and thorough

80. See *Vance* at 23.

81. *Id.*

82. *Id.* at 59.

treatment.

a. The Marketplace Of Ideas (Promoting Knowledge and Truth)

The marketplace theory first received judicial recognition when Justice Holmes, dissenting in *Abrams v. United States*,⁸³ stated:

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.⁸⁴

This precept was formally accepted by the Supreme Court in *Red Lion Broadcasting Co. v. FCC*,⁸⁵ where Justice White declared:

It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.⁸⁶

The evolution of the marketplace theory derives its foundations from the writings of John Milton in 1644⁸⁷ and John Stuart Mill in 1859,⁸⁸ and has survived within American jurisprudence up to the present.

Crucial to an analysis of whether subliminals further the marketplace theory is the definition of the word "idea." If subliminal messages somehow promote ideas or are themselves ideas which as-

83. 250 U.S. 616, 624-631 (1919) (Holmes, J., dissenting).

84. *Id.* at 630.

85. 395 U.S. 367 (1969).

86. *Id.* at 390.

87. In AREOPAGITICA — A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING (1644), John Milton argued: "And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worst, in a free and open encounter?" Quoted in Brest and Levinson, PROCESSES OF CONSTITUTIONAL DECISIONMAKING, 2 Ed., 1093 (1983) [hereinafter Brest and Levinson].

88. In *On Liberty* (1859), John Stuart Mill stated: "First, if any opinion is compelled to silence, that opinion may, for aught we can certainly know, be true. To deny this is to assume our own infallibility. Secondly, though the silenced opinion be an error, it may, and very commonly does, contain a portion of the truth; and since the general or prevailing opinion on any subject is rarely or never the whole truth, it is only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied." *Id.*

sist the goals of the free flow of information and truth, then it should be considered speech.

The American Heritage Dictionary Of The English Language defines the word "idea" as "[t]hat which exists in the mind, potentially or actually, as a product of mental activity, such as thought or knowledge."⁸⁹ If one were to base the meaning of the word "idea" in the marketplace theory upon this standard definition, it appears to encompass subliminal messages.

The phraseology concerning potential or actual existence in the mind⁹⁰ could easily be construed to include subconscious and conscious brain activity, respectively. The potential existence of knowledge seems to involve the subconscious or emotive level of thought processes; that through which subliminal messages are apparently received. The actual existence of knowledge connotes a conscious awareness; that which subliminals seem to evade when first perceived by the senses. There appears to be no other rational explanation for the distinction drawn between potential and actual existence of truth or knowledge in the mind. Hence, any type of subliminal message when received by the subconscious realm of the mind is potential knowledge, and thus speech.

The subconscious message may also linger about and become enmeshed with one's conscious beliefs, ultimately leading to the actual existence of conscious knowledge. However, the line between the conscious and the subconscious is abstract, amorphous and incapable of being precisely delineated either by the Courts or science within the foreseeable future.

If the previously discussed definition of the term "idea" does not appeal to those whom have contemplated the marketplace theory, or for whatever other reason this meaning should not apply, a more stringent interpretation would preclude subliminals from being considered speech. The Court in *Vance* implicitly subscribed to a narrower meaning of the word "idea" when it reasoned:

Even in its most basic form, the use of speech presumes that views will be exchanged or that information will be conveyed and understood. However, subliminal messages are not intended to convey information to be consciously understood, they are intended to surreptitiously influence the thought processes of an individual, and ultimately, his behavior.⁹¹

It seems that Judge Whitehead is restricting the meaning of the

89. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 653 (1982).

90. *Id.*

91. *Vance* at 25.

word "idea" to the actual conscious existence of knowledge in one's mind.

Judge Whitehead's view is very much akin to the philosophical conception of ideas espoused by Kant and Hegel. Kant considered an idea to be a product "of reason that is transcendent but non-empirical."⁹² Hegel classified ideas as "absolute truth [which] is the ultimate product of reason."⁹³

Although Judge Whitehead's strict view of what constitutes an idea and hence speech under the marketplace theory may be valid, his subsequent focus upon the intent of subliminals to evade conscious thought and influence behavior⁹⁴ is fallacious. When determining whether subliminals are speech, the entire focus should be the actual effect of such messages upon human thought processes and behavior, not the intentions of the speaker.

One could conceivably convey a message without intending or being aware of its existence or meaning. In this author's opinion, such an unintentional message is speech if the person receiving the message can extract value or meaning therefrom. The intention of the speaker may be relevant to whether or not communication is afforded First Amendment protection against governmental regulation; however, intent shall not be pertinent to the issue of whether a message amounts to speech.⁹⁵

Regardless of the conceptions of Justice Holmes, John Milton, or John Stuart Mill as to what constituted an idea when the marketplace theory was first contemplated, rationales underlying free speech doctrine should be flexible to allow for changes in medium and advances in technology. Obviously, Milton and Mill could not have conceived of the significance or future existence of subliminal messages. However, this potential form of communication has been discovered, is with us now, and must be addressed.

One example of the malleability of free speech notions to accommodate new media and technology became manifest in *Red Lion*.⁹⁶ There, the Court endorsed the "fairness doctrine" by holding that "Congress and the [Federal Communications] Commission

92. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 653 (1982).

93. *Id.*

94. *See* Vance at 25.

95. According to the United States Supreme Court, the intent of a speaker to convey a particular message is relevant to determining whether "conduct" is speech. *See* *Texas v. Johnson*, 491 U.S. 397 (1989); *Spence v. Washington*, 418 U.S. 405 (1974). However, there is no such doctrine in relation to modes of perception that would cover the transmission of subliminal messages.

96. 395 U.S. 367 (1969).

do not violate the First Amendment when they require a radio or television station to give reply time to answer personal attacks and political editorials.”⁹⁷ In doing so, the marketplace of ideas theory was a primary consideration.⁹⁸ Also, the Court realized that “differences in the characteristics of new media justify differences in the First Amendment standards applied to them.”⁹⁹

Red Lion based its holding regarding the “fairness doctrine” upon its similarity to the notions protected by the marketplace theory and the new broadcast media’s effect upon this free speech precept. Consistent with the spirit of *Red Lion*, subliminal messages should be considered a new medium of expression warranting a liberal interpretation of the marketplace theory. This result could be directly justified by expanding the definition of the word “idea” to include potential knowledge received through subconscious perception.

The modern phenomenon of subliminal messages breaks away from the status quo and is analogous to recognizing and allowing dissent: a fundamental consideration underlying the uniqueness of the United States of America. “A major purpose of the first amendment . . . is to protect the romantics — those who would break out of classical forms: the dissenters, the unorthodox, the outcasts.”¹⁰⁰ The unorthodox within the confines of subliminal communication are those artists, performers, or musicians which seek to utilize such measures to enhance their respective creative work product.

“The spirit of nonconformity within us all”¹⁰¹ is being denied access to subconscious mental growth via the conduit of subliminal communication. This method of communication breaks with the norm of conscious interaction. Mental and intellectual progress, including the opportunity for the human race to expand its mental faculties, is being repudiated by a failure to classify subliminal messages as free speech.

97. *Id.* at 396.

98. *See id.* at 390.

99. *Id.* at 386.

100. Shiffrin, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* 5 (1990) [hereinafter Shiffrin]. *See also*, *Martin v. City of Struthers*, 319 U.S. 141, 149 (1943) (Murphy, J. concurring) (“The lesson of experience is that - with the passage of time and the interchange of ideas - organizations, once turbulent, perfervid and intolerant in their origin, mellow into tolerance and acceptance by the community, or else sink into oblivion.”) Likewise, even though subliminals might not be immediately accepted, they should be permitted because the passage of time provides an opportunity for development and future acceptance by the community; or else, such communication will fall into oblivion.

101. *Id.*

One must remember that the "general [marketplace of ideas] theory or principle does not resolve 'hard cases.'"¹⁰² Whether subliminal messages are speech is undoubtedly a "hard case" since this concept is amorphous in nature and was not foreseeable by those who formulated the marketplace theory. Hence, it would be wise not to apply or not to rely heavily upon the marketplace theory in determining whether subliminals are free speech under the First Amendment.

b. Representative Democracy and Self-Government

The representative government theory underlying the First Amendment centers exclusively around political discussion, arguably other than the abolition of a democratic form of government. "It has not been seriously disputed that freedom of expression about political matters is essential both to assure effective representation and to check the abuses of those in power."¹⁰³

It was clearly the intention of the Framers of the First Amendment that political discussion be unrestricted,¹⁰⁴ unlike the Pre-Revolutionary War setting where England dominated the American colonies.¹⁰⁵ In *Mills v. Alabama*,¹⁰⁶ Justice Black described this objective:

Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.¹⁰⁷

102. CHAMBERLIN AND BROWN, *THE FIRST AMENDMENT RECONSIDERED: NEW PERSPECTIVES ON THE MEANING OF FREEDOM OF SPEECH AND PRESS* 93 (1982).

103. Brest and Levinson, *supra* note 87, at 1092.

104. According to Justice Brandeis' concurrence in *Whitney v. California*, 274 U.S. 357, 375 (1927), "[t]hose who won our independence believed that . . . freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government."

105. See *infra* at note 127 and accompanying text.

106. 384 U.S. 214 (1966).

107. *Id.* It should be noted that some scholars have adopted an absolutist approach to interpreting the First Amendment. Not only does this philosophy encompass a literal and narrow construction of the Amendment's language, but also the theory behind its adoption.

One such commentator is Alexander Meiklejohn, who goes so far as to label the promotion of political values and processes to further a democratic form of government as the sole purpose contemplated by the framers of the First Amendment. See generally, Shiffrin, *supra* note 100, at 47-53. Meiklejohn's theory appears radical since he considers affording

It is evident that the First Amendment framers contemplated free and robust debate concerning the political process. The subsequent judicial and extra-judicial elucidation of the representative democracy and self-government theory can be utilized to ascertain new forms of speech.¹⁰⁸ However, this theory clearly does not apply to subliminal messages within any medium.

Political debate is essential to the direction of this Nation and the actions taken by its elected officials. One's astute reasoning abilities are necessary in order to effectively partake in and comprehend politically related concepts. The discussion of political matters is the antithesis of subliminal messages, and any attempt to reconcile both notions will prove fruitless.

Conveying political beliefs through subliminal messages in any medium is inherently surreptitious. One's thought processes are corrupted without giving conscious faculties a chance to logically confront the intellectual intruder. Further, such subconscious tactics cannot be justified by the argument that a subliminal message consistent with a person's political ideology can do no harm. To the contrary, in the political arena those ideologically consistent subliminals can do much harm since a person is compelled to retain a particular belief. This individual would find it difficult to change his predisposition through free and unadulterated thought; an objective which forms the crux of First Amendment representative government theory.

The representative democracy and self-government justification is merely one of the theories underlying the First Amendment. This comment argues that artistic expression, and in particular musical recordings that contain subliminal messages, constitute speech. But where the content of the message is political and inconsistent with the unambiguous frontward lyrics of an album, there should be restrictions upon such communication.

Promoting representative democracy is a factor which one may utilize to determine whether a particular type of communication amounts to speech. The impossibility, under any circumstances,

artistic expression First Amendment protection only where it relates to political purposes or influences a voter's decision at the polls. *Id.* at 54. In his later works, Meiklejohn stated "that philosophy, science, art, and literature were areas from which the voter derived 'knowledge, intelligence, sensitivity to human values: the capacity for sane and objective judgment which, so far as possible, a ballot should express.'" *Id.*

108. See *Texas v. Johnson*, 491 U.S. 397 (1989); *Cohen v. California*, 403 U.S. 15 (1971). These Supreme Court rulings classifying flag burning and "Fuck the Draft" as protected speech were not recognized as such by express reliance upon a democratic self-government theory. However, the foundations of this theory must have been a tacit consideration.

that subliminal messages could positively influence a voter's rational decision at the polls or contribute to fair and open political debate leads to a conclusion that such activity does not qualify as speech under this democratically oriented theory. However, if other First Amendment theories can justify subliminal messages in other contexts, it may be defined as speech for such purposes.

c. Individual Self-Fulfillment and Self-Realization

Thomas Emerson, an eminent First Amendment scholar, eloquently described the broad self-fulfillment theory as follows:

The Right To Freedom of expression is justified first of all as the right of an individual purely in his capacity as an individual. It derives from the widely accepted premise of Western thought that the proper end of man is the realization of his character and potentialities as a human being. . . He has the capacity to think in abstract terms, to use language, to communicate his thoughts and emotions, to build as a culture. He has powers of imagination, insight and feeling. It is through development of these powers that man finds his meaning and his place in the world.¹⁰⁹

This theory is a fundamental precept to an orderly and prosperous society. One cannot meaningfully or satisfactorily contribute to the development of others at his or her full potential unless there is freedom to grow. The freedom to grow not only intellectually, but also emotionally and artistically, is the concept that the self-fulfillment and realization theory addresses.

Freedom of speech allows one to expand his or her horizons in the way most desirable to that particular individual, so that society may ultimately benefit from such personal growth.¹¹⁰ If humans are assured they can speak their minds or listen to the speech of others without unreasonable governmental interference, then there exists true freedom and the utmost capacity for self-fulfillment.¹¹¹ "Those who won our independence believed. . . that the greatest menace to freedom is an inert people. . . [and they recognized] that it is hazardous to discourage thought, hope and

109. THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 4 (1966) [hereinafter EMERSON].

110. *Id.* at 5. ("[T]he purpose of society and of its more formal aspect, the state, is to promote the welfare of the individual. Society and the state are not ends in themselves; they exist to serve the individual.").

111. *Id.* ("Every man is influenced by his fellows, dead and living, but his mind is his own and its functioning is necessarily an individual affair.").

imagination."¹¹²

David A. J. Richards explained the individual self-fulfillment theory and its functions by stating:

[T]he significance of free expression rests on the central human capacity to create and express symbolic systems, such as speech, writing, pictures, and music, intended to communicate in determinate, complex and subtle ways. Freedom of expression permits and encourages the exercise of these capacities: it supports a mature individual's sovereign autonomy in deciding how to communicate with others; it disfavors restrictions on communication imposed for the sake of the distorting rigidities of the orthodox and the established. In so doing, it nurtures and sustains the self-respect of the mature person.¹¹³

The "complex and subtle ways" of communication¹¹⁴ contemplated by Richards' First Amendment theory embrace the very nature of subliminal messages. The methods through which subliminals are created and the mysterious manner in which they are allegedly received by one's subconscious involves complexities that have rarely been confronted in the past. Further, since even subtle communication can be considered speech under the individual self-fulfillment theory, subliminals conform to this description.

Freedom for those who desire to utilize subliminal communication entails the expansion of the mind and individual self-fulfillment can be reached through this mode of growth.¹¹⁵ "The achievement of self-realization commences with development of the mind."¹¹⁶ Subliminals may enhance the perception of art forms such as music by amplifying and stretching the range of human emotion. Development of such capabilities may have a positive evolutionary impact, ultimately resulting in advanced levels of mental understanding that could change the structure of society. "The power to realize [one's] potentiality as a human being begins at [the point of mental exploration] and must extend at least this

112. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J. concurring).

113. David A. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 62 (1974).

114. *Id.*

115. Levy, *Freedom of Speech and Press in Early American History* 284-285 (1963) (quoting Tunis Wortman's 1880 work entitled, *A TREATISE CONCERNING POLITICAL ENQUIRY, AND THE LIBERTY OF THE PRESS*, an individual is entitled to pursue every justifiable method of increasing our perceptions and invigorating our faculties.).

116. Emerson, *supra* note 109, at 4-5. Although Emerson addresses the belief that "the process of conscious thought by its very nature can have no limits," *id.* at 5, the importance which is placed upon the expansion of one's mind would apply to subconscious as well as conscious thought if subliminal messages were contemplated at the time.

far if the whole nature of man is not to be thwarted."¹¹⁷

Subliminal communication is adequately supported by the broad individual self-fulfillment and self-realization theory.¹¹⁸ Although compelling arguments could be formulated that subliminal messages are not covered by the marketplace of ideas and representative democracy theories, the significance of this proposition may be inconsequential. The marketplace and democracy concepts are extremely narrow and inferior to the all-inclusive self-realization model of First Amendment theory.

The First Amendment value of self-fulfillment is key.¹¹⁹ This is one of the values that "is and has been our historically developed commitment and has been urged by numerous theorists who have discussed freedom of speech."¹²⁰ Therefore, the fundamental importance of the self-realization theory alone justifies the classification of subliminal messages as speech within the meaning of the First Amendment. One must remember that "thought and communication are the fountainhead of all expression of the individual personality. To cut off the flow at the source is to dry up the whole stream. Freedom at this point is essential to all other freedoms."¹²¹

2. The Creation of Novel Free Speech Theories and Rationales

The problem with applying subliminal messages to the recognized rationales underlying the First Amendment is that this form of communication does not fit into nicely structured categories. Professor Franklyn S. Haiman came to grips with this reality by

117. *Id.*

118. *But cf.* Comment, *In Search Of The "Subliminal Tort,"* *supra* note 9, at 735-736 ("Subliminal communication is *prima facie* offensive because it violates the fundamental principle of personal autonomy. This principle states that an individual's identity and sense of self worth are threatened when his behavior is manipulated or controlled by others. When subliminal communication is used to affect an individual's behavior without his awareness, the principle of personal autonomy is violated."); Note, *First Amendment Dialogue*, *supra* note 28, at 346, ("Subliminals interfere with autonomy, a traditional bastion of first amendment protection. Our autonomy is invaded as subliminals replace our norms and subjectivity of meaning with a mechanical substitute for the associative process. Similarly, subliminals are antithetical to the first amendment policy of promoting knowledge, truth, and self-fulfillment.").

119. See C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 47 (1989).

120. *Id.* at 48. Besides the value of self-fulfillment, the other ideal which Edwin Baker considers of at least equal importance is "participation in decision making by all members of the society." This view is 'particularly significant for political decisions' but 'embraces the right to participate in the building of the whole culture.' See *id.* at 47. This value could arguably include or peripherally relate to the representative democracy theory. But clearly, the promotion of change in society is broader than the scope of self-government First Amendment underpinnings.

121. EMERSON, *supra* note 109, at 6-7.

noticing that "[w]here in . . . [the] particular scheme of things one would place influence through . . . subliminal stimuli is a difficult question to answer."¹²² Determining whether subliminals are speech, and whether they are protected, is an amorphous and abstract task.¹²³ However, such difficulties can be reconciled by the creation of a modern rationale for the First Amendment.

Assuming that subliminal messages do not qualify for acceptance by either of the three recognized theories of free speech, there is no sound reason to deny its existence as speech on this basis. These three theories surfaced after the enactment of the First Amendment and there is no evidence that these notions were contemplated by its Framers.

"The history concerning the adoption of the First Amendment is sparse and vague."¹²⁴ Instead, the recognized theories are after the fact justifications and rationales created by the Courts and various legal scholars. The only exception might be the representative democracy theory, since "the framers' focus was on political speech, which had been suppressed in a variety of ways in England

122. FRANKLYN S. HAIMAN, *SPEECH AND LAW IN A FREE SOCIETY* 214 (1981). Professor Haiman also observed that:

"[d]irect physical contact is obviously absent, so in that sense the interaction might be considered only symbolic. On the other hand, without the mediation of the target's consciousness between stimulus and response, there is no generation of meaning in the usual sense of that word. Further compounding the problem, at least as concerns subliminal stimuli, is that it is not at all demonstrable that behavior can actually be controlled by that method. In any event, our decision with [this] particular phenomenon [on] will not be aided by attempting to distinguish symbolic from nonsymbolic elements.

Id. Haiman went on to conclude that subliminal stimuli should not be protected by the First Amendment because "to the extent that [it] may be effective in controlling the behavior of unconsenting others they constitute forms of coercive communication which, although not physically intrusive upon the target person, are nevertheless impossible to resist." *Id.* at 233.

123. For example, one commentator went so far as to combine philosophy and psychology concepts in his "internal dialogue" model:

The best argument that subliminals are speech is the internal dialogue argument, which is an epistemological argument. The infant first imperfectly perceives all external objects and, perhaps, all internal feelings. These external or internal sense impressions are embodied as concepts and refined by comparison with other concepts and sense impressions. Gradually, the sense impression becomes meaningful as it is continually mentally re-evaluated. This is the internal dialogue. Subliminals arguably become part of the interior dialogue as they interplay with our previous associations.

Note, *First Amendment Dialogue*, *supra* note 28, at 348. However, besides being difficult to prove, the internal dialogue theory is flawed because it is overbroad. The interplay of previous associations based upon the perception of external stimuli renders all such stimuli speech since all could conceivably have an impact on one's mental processes.

124. Brest and Levinson, *supra* note 87, at 1097.

and the Colonies.”¹²⁵

This comment does not argue that the recognized theories of free speech are invalid because they were not explicitly within the intentions of the Framers of the First Amendment. It is herein contended that the creation of new theories to accommodate the changing times and technology that was not foreseeable when the First Amendment sprung into existence, should be a goal and policy of the legislatures, the Courts, and the executive branch of government.¹²⁶ If the Courts and legal scholars were permitted to create or formulate concepts which are, *soi disant*, “recognized” as the core of free speech, then novel and modern theories should be scrutinized and formally acknowledged if reasonable.

An example of one such innovative theory was proposed by Thomas Emerson and labeled “the achievement of a more adaptable and hence more stable society.”¹²⁷ This concept apparently never became widely accepted by First Amendment scholars. One might debate whether this goal is presently being furthered by the representative government and self-fulfillment models of free speech. Despite such disagreement, Emerson is entitled to have his purportedly new theory considered by other scholars in the field, and by the government. “When . . . alternative theories are openly discussed and debated, we have a better chance of arriving at a clearer understanding of what kind of society we wish to achieve and of what rights and liberties it is most crucial to protect.”¹²⁸ Various modern First Amendment theories might support treatment of subliminal messages as free speech. One such theory could be based on the expansion of technology. The industrial revolution and the development of computers, space technology, and a plethora of other technological advances were largely unforeseeable by the Framers of the First Amendment. A reasonable draftsman of a

125. *Id.*

126. The view that the Framers provided for unforeseeable change by drafting vague and expansive Constitutional provisions, such as the First Amendment, has been vigorously adhered to by Justice Frankfurter, as he wrote, “From generation to generation, fresh vindication is given to the prophetic wisdom of the framers of the Constitution in casting it in terms so broad that it has adaptable vitality for the drastic changes in our society which they knew to be inevitable, even though they could not foresee them.” *Martin v. City of Struthers*, 319 U.S. 141, 152 (1943) (Frankfurter, J. dissenting); see also, *Kovacs v. Cooper*, 336 U.S. 77, 96 (1949) (Frankfurter, J. concurring) (“The various forms of modern so-called ‘mass communications’ raise issues that were not implied in the means of communication known or contemplated by Franklin and Jefferson and Madison.”).

127. CHAMBERLIN & BROWN, *supra* note 102, at 149 (quoting HODGE, *DEMOCRACY AND FREE SPEECH: A NORMATIVE THEORY OF SOCIETY AND GOVERNMENT*).

128. *Id.* at 172.

Constitutional provision in modern times would need to address the interplay between such developments and free speech to design an appropriate foundation for the language contained therein.

The controlled functional use and development of subliminal communication is intertwined with the advancement of technology. The methods through which such messages are created and detected involve highly specialized and complex audio and visual equipment. Further, besides being considered a product of technology, subliminal messages themselves might be considered a form of technology.

Another possible modern theory could attribute protection to the impact of communication upon an individual's emotions. In *Cohen v. California*,¹²⁹ Justice Harlan pontificated upon the importance of emotion to the very existence of speech:

[M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.¹³⁰

The context of subliminal messages in music or other art forms would be consistent with an emotion based theory of free speech. Subliminal images which enhance the ordinarily perceived artistic expression could be considered part of the permissible supraliminal communication with one's consciousness and emotions directly.¹³¹

The artistic enhancement subliminal would be protected by an emotion based theory whether or not the content of the message conveyed is consistent or conflicts with the supraliminal expression. For instance, the ideal example of a consistent subliminal is portrayed by the situation in *Vance*. The frontward lyrics of the album "Stained Class" concern the subject of suicide. Hence, the subliminal message "DO IT," or even a more specific message

129. 403 U.S. 15 (1971).

130. *Id.* at 24.

131. *Cf. Wolk, supra* note 21, at 528 ("At present, most subliminal communication induces fairly raw emotional effects that influence the perception of accompanying supraliminal stimuli . . . People who argue in favor of restricting subliminal communication of this type often go too far, implying that any emotional appeal, especially a subliminal one, obfuscates rational faculties that are the 'appropriate' basis for a decision.").

about suicide, would merely accentuate the concededly permissible message conveyed through the frontward lyrics. Likewise, placing a visual image of snakes upon characters that portray evil in a particular film would be a consistent subliminal message. This message increases enjoyment of the film by a viewer whose emotions are able to relate to the characters and the plot more effectively.

Subliminal messages which conflict with supraliminal artistic expression should also be permissible according to an emotion oriented First Amendment theory. An often employed device in artistic works is the creation of conflicting emotions, sometimes to attain originality and deviation from entertainment norms. For example, a moviemaker could allow a pure, innocent looking child to commit the most heinous acts to create an emotional clash between a viewer's expectations and the subsequent activity. Similarly, a corresponding effect could be achieved if an evil image, such as a snake, is imposed upon that same innocent looking child.

Instead of the conflict commencing in one's conscious mind, the viewer is unable to locate the stimuli which is causing his or her emotional discord. If this creative device could be employed supraliminally to achieve an almost exact effect upon the audience if done subliminally, then all such conflicting messages should be allowed under the proposed emotion-based theory of free speech.¹³²

B. Are Subliminals Protected Speech?

Now that the first part of the Constitutional inquiry is complete, namely whether subliminal messages are speech, it is time to proceed to the second question: whether such messages are protected under the First Amendment. Analogous standards which have been developed from case law and other sources will be analyzed in order to ascertain whether subliminals should receive partial, complete, or no protection. Conflicting rights will be pitted against one another to examine the extent and feasibility of regulating subliminals.

For purposes of this portion of the comment, the reader must assume *arguendo* that subliminal messages are speech to consider

132. But cf. Note, *First Amendment Dialogue*, *supra* note 28, at 343 ("Even in healthy individuals, the receipt of competing or contradictory messages both below and above the threshold of consciousness may result in cognitive dissonance, a state of psychological discord caused by simultaneously entertaining contradictory beliefs. Heightened cognitive dissonance disrupts an individual's tranquility and peace of mind. It is thought to lead to a plethora of future health problems, both physical and mental. Tranquility and peace of mind are themselves legitimate health concerns, even when their disruption has no physical manifestations.").

the issue of First Amendment protection. To affront the notions which follow, an open and liberal approach would be wise since subliminals are a novel form of communication. In the words of Justice Stewart, "[t]he scope of constitutional protection of communicative expression is not universally inelastic."¹³³

1. The Incitement Standard

In addressing arguments regarding the "incitement standard" enunciated in *Brandenburg v. Ohio*,¹³⁴ the court in *Vance* summarily dismissed the application of the doctrine to subliminal messages. It stated "that doctrines or standards developed in one context [supraliminal music lyrics] should not be applied in another context [subliminal communication]."¹³⁵ However, Nevada District Judge Jerry Carr Whitehead also stated that "the Court has no direct precedent to rely upon in deciding whether subliminal communication is protected by the First Amendment."¹³⁶ Hence, since this is a "case of first impression,"¹³⁷ analogies to relatively similar cases and the reasoning behind those decisions should be analyzed as persuasive authority. Yet, despite this common law axiom, *Brandenburg* was not even explored by the Court in *Vance*.

Here, the *-Brandenburg* analysis which should have been applied to the *Vance* case will be flushed out. But for the purposes of doing so, one must assume that subliminal communication is free speech, since the "incitement standard" is relevant only to determine whether or not speech is protected.

In *Brandenburg*, a Ku Klux Klan leader was convicted under an Ohio statute prohibiting one from "voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism."¹³⁸ By legislative definition, the term "criminal syndicalism" includes "advocat[ing]. . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplish-

133. *Virginia State Board Of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 778 (1976) (Stewart, J., concurring).

134. 395 U.S. 444 (1969).

135. *Vance* at 23 (citing *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 76 (1976) (Powell, J., concurring)); see also *Kovacs v. Cooper*, 336 U.S. 77, 96 (1949) (Frankfurter, J., concurring).

136. *Vance* at 23.

137. *Id.* at 3.

138. *Brandenburg v. Ohio*, 395 U.S. 444, 444-445 (1969).

ing industrial or political reform."¹³⁹

At a Ku Klux Klan rally held on a farm, which was later broadcast on local and national television,¹⁴⁰ the defendant delivered a speech containing the following statements: "We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken;"¹⁴¹ and "Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel."¹⁴² The speaker did not carry a weapon, although members of the audience did possess various implements.¹⁴³

Although the trial court convicted the defendant for violating the Ohio criminal syndicalism statute, the U.S. Supreme Court declared the law unconstitutional. The Court elucidated for the first time what is now known as the incitement test: "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."¹⁴⁴ The majority's opinion draws a necessary distinction between "abstract teaching" and "preparing a group for violent action."¹⁴⁵ The Ohio statute's punishment for mere advocacy or abstract teaching rendered it unconstitutional on its face and in its application.¹⁴⁶

The facts of *Brandenburg* are overwhelmingly distinguishable from those found in the *Vance* case. The advocacy of "revengeance" against the government or black and Jewish citizens, spoken with blatant specificity and clarity differs from a purported subliminal message placed on a record telling the listener to "DO IT." It was apparent from the circumstances surrounding the Ku Klux Klan rally that vague or general statements would acquire meaning when analyzed in context. Further, the various listening contexts and consumer personalities are largely unforeseeable or unascertainable by the speaker, namely Judas Priest.

If the Supreme Court allowed the specific abstract teaching or

139. *Id.*

140. *See id.* at 445.

141. *Id.* at 446.

142. *Id.* at 447.

143. *Id.*

144. *Id.*

145. *See id.* at 448.

146. *See id.* at 449.

advocacy of the hatred of blacks and Jews in *Brandenburg*, then there appears no reason to restrict vague or even specific subliminal messages appearing on record albums. The forum of the speech and the surrounding circumstances in which words are spoken are highly pertinent to determining whether a speaker is inciting imminent lawless action under *Brandenburg*.¹⁴⁷ Since there is no ultimate forum created when a record is played, or because each listener has his own separate and distinct forum, the unlawful incitement contemplated by the *Brandenburg* decision is not present.

When attempting to apply the two part "incitement test" to subliminals, the following questions arise: (1) Does the presence of subliminal messages on record albums incite "imminent lawless action?"¹⁴⁸ and (2) Are subliminal messages on record albums "likely to incite or produce [imminent lawless] action?"¹⁴⁹

To commence analysis, in the *Vance* case, the lawless action would be the act of committing suicide. An issue with regard to the first inquiry is whether subliminal messages on the Judas Priest album entitled "Stained Class" create an imminent threat of suicide to all those who listen to it.

Obviously, the word "imminent" encompasses an element of time. The distinction which the Supreme Court drew in *Brandenburg* between "abstract teaching" and "preparing a group for violent action,"¹⁵⁰ is based largely upon the amount of time between the message conveyed and the occurrence of the lawless activity. In *Brandenburg*, the defendant's reference to possible revengeance in the future was deemed abstract advocacy and therefore protected speech, while an immediate suggestion to resort to revengeance by violence then and there would probably not be protected.

a. Time — "Imminency"

The element of time is relevant to the placement of subliminal messages on records in two ways: (1) The amount of time it takes for the message to be received by the listener; and (2) Once the message is received, the amount of time it would take for the lis-

147. See *Brandenburg v. Ohio*, 395 U.S. 444, 445-447 (1969). Although forum analysis was not expressly declared an important factor, it appears implicit from the Court's close scrutiny of the circumstances surrounding the Ku Klux Klan meeting at the Ohio farm. For example, whether or not the speaker or others were carrying weapons, the burning of a large wooden cross, and the presence of only the participants and newsmen at the rally.

148. *Id.* at 447.

149. *Id.*

150. *Id.* at 448.

tener to act in response to the message.

(1) Receipt of the Message

Where record distribution is concerned, there may be an extended period of time between the placement of the message on the album and the consumer's purchase of the product. A subliminal message calling upon all listeners "to rise immediately against the government" at a particular point in time may be received piecemeal by different individuals over a ten year period; rendering the element of imminent incitement moot. Of course, this hypothetical illustrates that the nexus between speech and imminent action in furtherance thereof will vary, depending upon the content of the message conveyed.

In *Vance*, assuming the messages placed on the album were specific commands to commit suicide, the element of record distribution time would not be problematic. The content of the suicidal subliminals on the "Stained Class" album are of an individualized nature. The imminent lawless action of suicide is carried out by each listener on his own, and the amount of time between the conveyance of and the receipt of the message is inconsequential. This case is distinguishable from the previous hypothetical calling upon masses of listeners to revolt against the government by use of force.

(2) Action Resulting from the Message

The second issue which should be addressed as to the time element is the proximity between the listener's receipt of the message and the actions resulting therefrom. The imminency contemplated by the Court in *Brandenburg* undoubtedly concerned a near immediate response to the speech delivered at the Ku Klux Klan rally. The incitement to riot and unlawful action commencing at the farm would appear to be the type of speech which the government may prohibit.

Analogizing the situation in *Brandenburg* to subliminals is a difficult task indeed. The subconscious nature of subliminals and direct public speech are substantially dissimilar. The problem arises due to uncertainty surrounding the amount of time it takes each individual to react to the subconscious message received.

A perfect illustration is the reaction of James Vance and Raymond Belknap to the subliminals on "Stained Class." The two young men listened to and were exposed to the subliminal "DO IT" numerous times before they actually acted upon the message.

James Vance described the day of the attempted suicides: "We got a message. It told us just do it."¹⁵¹ The question is: How much time did it take for either person to act after receiving the message? The answer to this query will undoubtedly depend upon when the message was received; a point in time which is highly unascertainable in most circumstances.¹⁵²

Whether Vance and Belknap received the message years before or minutes before the suicidal impulse will never be known. One might persuasively argue that it should be presumed that the message was received right before acted upon, otherwise suicide would have resulted long ago. However, the plausibility of subconscious conditioning due to years of album play and subsequent events in each person's life (including drug use) may increase the tendency to commit suicide, even though the message was first received at some distant time in the past.

The amount of album playback and the predisposition of a given individual necessary for the subconscious message to cause a behavioral response will vary substantially with each person. Therefore, the circumstances contemplated by *Brandenburg*, where each individual would receive and act upon the speech conveyed within a similar period of time, do not apply to subliminal messages.

b. Likelihood of Incitement

The likelihood that a subliminal message could ever incite an individual to commit an act is itself debatable. At the trial in *Vance*, the testimony of the plaintiff's expert, Dr. Shevrin, revealed that "subliminal stimuli may affect behavior [only if a person is] predisposed to do a particular act."¹⁵³ Dr. Pratkanis, the defendants' expert, testified that "a subliminal message can have no impact on behavior."¹⁵⁴ After considering the preceding expert opinions, the Court stated that "[t]his subject is simply not a

151. *Vance* at 14.

152. In some cases it would be easy to determine when a subliminal message has been received. For example, if an individual watched a television program with the subliminal "DRINK COKE" superimposed upon it, and one minute later ran out to the store to buy ten cases of Coca Cola, it would be easy to determine how long this particular viewer took to react to the subliminal. Also, if this was the only time the individual viewed the program and the subliminal, the time at which it was subconsciously perceived may be readily calculated. However, unlike the Vance case, where both individuals repeatedly listened to the album "Stained Class" over an extended period of time, it is extremely difficult (if not impossible) to determine when the message was subconsciously perceived.

153. *Vance* at 11.

154. *Id.* at 29.

closed issue.”¹⁵⁵ Since the present stage of scientific knowledge concerning the effect of subliminals upon behavior is not absolutely clear, it is difficult to arrive at a conclusion that subliminals are “likely to incite or produce [imminent lawless] action.”¹⁵⁶ At an absolute minimum, even those who advocate that subliminals have an effect on behavior (such as Dr. Shevrin) seem to agree that a predisposition to act is required.¹⁵⁷

It is possible that one might send a subliminal message which urges those who receive it to “forcibly overthrow the United States government.” However, even assuming that 50 percent of the individuals who receive the message have a violent predisposition to partake in such activity, the likelihood that each person would decide to act upon the subliminal at the same time that another recipient would is speculative. Of course, the content of the message itself controls the likelihood of imminent lawless action. But, the “overthrow the U.S. government” illustration demonstrates the impossibility of prohibiting such speech until the advocated unlawful action occurs.

In sum, the type of imminent action contemplated by the speech in *Brandenburg* simply does not apply to subliminal messages because the likelihood of each person’s predisposition to act is unascertainable. Therefore, if subliminal messages are speech, regulation may not be justified under the *Brandenburg* standard.

2. The Right To Privacy

State common law recognizes various rights of privacy largely due to the influential writings of Samuel D. Warren and Louis D. Brandeis in a famous 1890 Harvard Law Review article.¹⁵⁸ However, not all jurisdictions recognize enforceable rights of privacy.¹⁵⁹ Of the various types of protectible privacy interests, the only theory which appears to be applicable to subliminal messages is that based upon an ‘unreasonable intrusion.’ An unreasonable intrusion includes the “intentional interference with another’s interest in solicitude or seclusion, either as to his person or to his private affairs

155. *Id.* at 30.

156. *Brandenburg*, 395 U.S. 444, 447 (1969).

157. *See* Vance at 11-12.

158. PROSSER AND KEETON, TORTS 849 §117 (5th Ed. 1984) [hereinafter PROSSER AND KEETON].

159. 77 C.J.S. *Right Of Privacy* section 1-b, at 397.

or concerns.”¹⁶⁰ Also, in order to recover under this cause of action, “the intrusion must be something which would be offensive to a reasonable person,”¹⁶¹ and “the thing into which there is intrusion or prying must be, and be entitled to be, private.”¹⁶²

Besides such state protections, in *Griswold v. State of Connecticut*,¹⁶³ the United States Supreme Court recognized a Constitutional right to privacy.¹⁶⁴ In *Griswold*, a zone of “privacy surrounding the marriage relationship”¹⁶⁵ justified the overthrow of a state statute prohibiting the use and disclosure of information concerning contraceptives.¹⁶⁶ The “zone of privacy” has subsequently been enlarged to include a “personal autonomy interest . . . generally relat[ing] to [individual decisions concerning] matters of marriage, procreation, contraception, family relationships, childrearing, and education.”¹⁶⁷

At common law, consent is a defense to an invasion of privacy.¹⁶⁸ Such consent “may be given expressly or by conduct.”¹⁶⁹ This defense also logically applies as a waiver of the constitutional right to privacy. In factual situations such as *Vance*, where subliminal messages are placed on record albums, certain circumstances may indicate that the listener impliedly consents to an invasion of privacy based on both tort and constitutional theories.

First, whether the right to privacy can ever outweigh another’s right to free speech will be encountered. Second, the concept of

160. PROSSER AND KEETON, *supra* note 158, at 854.

161. *Id.* at 855. See also, 77 C.J.S. *Right Of Privacy* §2, at 399 (“The right of privacy is not an absolute right and is subject to limitations. It protects only the ordinary sensibilities of an individual and not supersensitiveness.”).

Since one must have a predisposition to commit a certain act before a subliminal message can affect behavior, *supra* notes 153-157 and accompanying text, this fact alone may preclude recovery

under most state privacy theories. A person with a predisposition to act in a way harmful to himself, i.e. suicide, evinces the existence of a “thin skull,” and such a supersensitive or unreasonable plaintiff cannot attribute his deficiencies to a defendant’s liability if unforeseeable. In a recording context, proof is extremely difficult because a plaintiff would need to show that a particular market (composed of relatively differing individuals) is predisposed to commit suicide, and also that it was foreseeable to the defendant recording artist that this class of persons was predisposed to commit such an act.

162. PROSSER AND KEETON, *supra* note 158, at 855.

163. 381 U.S. 479 (1965).

164. See *id.* at 484. (A zone of privacy is created by emanations of the penumbras of specific guarantees in the Bill of Rights, including the First, Third, Fourth, Fifth, and Ninth Amendments).

165. *Id.* at 486.

166. *Id.* at 480, 485-486.

167. PROSSER AND KEETON, *supra* note 158, at 866-867 (footnote omitted).

168. *Id.* at 867.

169. *Id.*

implied consent will be applied to the underpinnings of various Constitutional decisions — including those relied upon by the Court in *Vance*. Third, as an illustration of the thesis of this paper, the facts of the *Vance* case will be analyzed to show that it was wrongfully decided on tort grounds. Fourth, record label warnings will be explored as an alternative which can universalize express consent to the receipt of subliminals.

a. Constitutional Right To Privacy v. Freedom Of Speech

*Griswold v. State of Connecticut*¹⁷⁰ discovered a right to privacy implicit in the Bill of Rights.¹⁷¹ However, *Griswold* did not concern free speech. The line of reasoning which the *Griswold* court utilized to find a Constitutional right to privacy is too infirm to permit this attenuated right to even outweigh the First Amendment right to free speech.

In *Griswold*, the First Amendment right of association was considered, *inter alia*, to be one of the specific guarantees of the Bill of Rights giving rise to a right of privacy.¹⁷² Justice Douglas, delivering the opinion of the Court, stated that:

the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means . . . is a form of expression of opinion; and while it is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful.¹⁷³

This implicit right of association was considered by the Court to be an example of the privacy recognized by the First Amendment.¹⁷⁴

The Supreme Court regarded the right of privacy as an emanation of the penumbra of the First Amendment right of association.¹⁷⁵ However, this privacy right really is a penumbra of a penumbra. The right of association is not expressed anywhere within

170. 381 U.S. 479 (1965).

171. See *id.* at 484.

172. *Id.* Other specific guarantees which were facets of the Constitutional right of privacy include: (1) the Third Amendment's "prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner;" (2) the Fourth Amendment "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures;" (3) the Fifth Amendment's Self-Incrimination Clause, which "enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment;" and (4) the Ninth Amendment's guarantee that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." *Id.*

173. *Id.* at 483.

174. See *id.* at 484.

175. *Id.*

the text of the First Amendment.¹⁷⁶ Instead, one may view it as a penumbra of this amendment. Therefore, the Court's conclusion that the right of privacy exists within the penumbras of the Bill of Rights, one of which is the implicit First Amendment right of association, seems tenuous. This type of reasoning could stretch the Constitution far beyond its permissible limits. Theoretically, every implicit right could give rise to another implicit right, and such an expansive and broad method of construction could extend the reach of this valued governmental document *ad infinitum*.

For argument's sake, assuming there does exist a Constitutional right of privacy, to allow this implicit right to ever override the First Amendment's express guarantee of free speech¹⁷⁷ vitiates the need for a written Constitution. Therefore, if subliminals are free speech, the right to transmit them cannot be abrogated by some abstract right of privacy exercised by a listener who desires to be free from such messages.

One may counter this quasi-stringent Constitutional construction argument by relying on the Ninth Amendment's plain language. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."¹⁷⁸

The Ninth Amendment, by its express terms, can be viewed as giving the judicial branch of government the power to declare the retained right of privacy as paramount to the guarantee of free speech clearly enumerated in the First Amendment. Hence, one might contend that privacy is a right "retained by the people,"¹⁷⁹ and is an express Constitutional guarantee by virtue of the Ninth Amendment. As a result, the determination of which conflicting express right (the First or the Ninth Amendment) is to ultimately prevail, would be relegated to the courts.

Reliance upon Justice Goldberg's concurrence in *Griswold*¹⁸⁰ bestows credence upon the Ninth Amendment argument: "[T]he right of privacy in the marital relation is fundamental and basic — a personal right 'retained by the people' within the meaning of the Ninth Amendment . . . [and] which is protected by the Fourteenth Amendment from infringement by the States."¹⁸¹ However, this

176. *Id.* at 483.

177. U.S. CONST. amend. I. ("Congress shall make no law . . . abridging the freedom of speech.").

178. U.S. CONST. amend. IX.

179. *Id.*

180. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (Goldberg, J., concurring).

181. *Id.* at 499.

amendment was clearly not intended to permit the construction of such rights. "[T]he Ninth Amendment [was] enacted to protect state powers against federal invasion."¹⁸² Similarly, as Justice Stewart observed in his dissent in *Griswold*:¹⁸³

The Ninth Amendment . . . was framed by James Madison and adopted by the States simply to make clear that the adoption of the Bill of Rights did not alter the plan that the Federal Government was to be a government of express and limited powers, and that all rights and powers not delegated to it were retained by the people and the individual States.¹⁸⁴

To interpret the Ninth Amendment as being a legal tool for the creation of Constitutional rights directly contradicts the intent of its framers. Even one who adopts a liberal view that a Constitution should be flexible and change with the times would have difficulty justifying the absence of an express right of privacy in this cherished document. After all, even though subliminal messages may have been unforeseeable by the Founding Fathers, a right to privacy was foreseeable. Instead, the drafters only deemed certain specific rights of privacy as important enough to be covered by the clothing of the Constitution. For example, the Third Amendment's prohibition against the quartering of soldiers in time of peace in any person's house without his or her consent,¹⁸⁵ and the Fourth Amendment's protection of unreasonable searches and seizures.¹⁸⁶

b. The Captive Audience Cases

Assuming that the bare existence of a Constitutional right to privacy is validly established and possesses equal value to the free-

182. *Griswold v. Connecticut*, 381 U.S. 479, 507, 520 (1965) (Black, J., dissenting).

183. *Griswold v. Connecticut*, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting).

184. *Id.* at 529-30. In *Griswold*, Justice Goldberg, in his concurrence, *id.* at 486, elaborated upon the history of the passage and purpose of the Ninth Amendment:

The [Ninth] Amendment is almost entirely the work of James Madison. It was introduced in Congress by him and passed the House and Senate with little or no change in language. It was proffered to quiet expressed fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected.

Id. at 488-489.

185. "No soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." U.S. CONST. amend. III.

186. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

dom of speech, some governmental body must then decide which of these two conflicting rights must prevail. In *Vance*, this Constitutional prerogative was considered to be in the hands of the judicial branch of government.¹⁸⁷ Judge Whitehead believes that the answer depends upon "a balancing test,"¹⁸⁸ and he looked to various "captive audience" cases to formulate this rule.¹⁸⁹

In this context, it is helpful to state Judge Whitehead's conclusion before the commencement of analytical scrutiny:

[T]he [captivity] cases firmly establish that the privacy rights of an unwilling listener will prevail over the free speech rights of a speaker if the listener is subjected to a speaker's message under circumstances which make it impossible or impractical for the listener to avoid being exposed to the unwanted message. Conversely, if the listener or viewer can avoid exposure after the initial impact, then the First Amendment rights of the speaker should prevail . . . [Hence,] the very nature of subliminal messages make it impossible for the unknowing listener to avoid exposure.¹⁹⁰

Here, the court's analysis is its conclusion. Judge Whitehead did not carefully compare the reasoning and facts of the captivity cases to those in the case before him, even though he stated that the "balancing test . . . often depends upon the circumstances under which the [privacy / free speech] conflict occurs."¹⁹¹ Each captivity case is completely distinguishable from the situation in *Vance*, and generally, whenever subliminal messages are placed on musical recordings.

(1) *Rowan v. U.S. Post Office Dep't*

In *Rowan v. U.S. Post Office Dep't*,¹⁹² the United States Supreme Court held that a statute allowing a person to "require that a mailer remove [the addressee's] name from its mailing lists and [to] stop all future mailings to the householder,"¹⁹³ did not violate the First Amendment.¹⁹⁴ Chief Justice Burger, writing for the

187. See *Vance* at 29.

188. *Id.*

189. See *id.* (citing *FCC v. Pacifica Found.*, 438 U.S. 726, 748 n. 27 (1978); *Rowan v. Post Office Dep't*, 397 U.S. 728, 736-37 (1970); *Erznoznik v. Jacksonville*, 422 U.S. 205, 208-09 (1975)).

190. *Vance* at 31.

191. *Id.* at 29.

192. 397 U.S. 728 (1970).

193. *Id.* at 729.

194. *Id.* at 736-737.

Court, rejected the argument that "[t]he freedom to communicate orally and by the written word and, indeed, in every manner whatsoever is imperative to a free and sane society."¹⁹⁵ Instead, "a mailer's right to communicate [was deemed to] stop at the mailbox of an unreceptive addressee."¹⁹⁶

The crux of the Court's analysis in *Rowan* is that one cannot be a "captive" inside his own home to the receipt of objectionable speech through the mail.¹⁹⁷ Instead of explicitly discussing the right to privacy by relying on *Griswold*, an ancient maxim was utilized: "A man's home is his castle" into which "not even the king may enter."¹⁹⁸ Although the Court may have been implicitly referring to a Constitutional right of privacy, its language indicates otherwise. The stated premise that "[n]othing in the Constitution compels us to listen to or view any unwanted communication,"¹⁹⁹ is not very persuasive when one observes that there is "something" in our Constitution expressly guaranteeing freedom of speech and communication.

Even if one accepts the reasoning in *Rowan* as sound and correct (namely that proper Constitutional case law was cited to reach the same result), the factual circumstances therein differ from those in *Vance*. The statute in *Rowan* was premised on the speech contained within the mail as being unwanted or offensive to the addressee. But, subliminal speech, although it may be offensive to some, is certainly not unwanted by one who voluntarily purchases a record album. When compared to the objectives sought to be achieved by *Rowan*, subliminals willingly received within one's home through an entertainment medium can be easily reconciled by virtue of the universal defense of consent, or waiver of the right to privacy.

There is a vital difference between mail which is forced upon one at her doorstep and speech that accompanies a product brought into the home for listening pleasure by the homeowner. The position that the facts portrayed in *Vance* and *Rowan* are substantially distinguishable, is strengthened by the placement of a warning label on record albums. This remedy is a form of express consent which cannot be legally contested.

Debate could focus on an anti-subliminal listener's disappoint-

195. *Id.* at 735 (citing Brief for appellants at 15).

196. *Id.* at 736-737.

197. *Rowan v. U.S. Post Office Department*, 397 U.S. 728, 738 (1970).

198. *Id.* at 737.

199. *Id.*

ment when learning that a warning is branded upon a record which she would have otherwise purchased. The fruits of creativity would be shared only by those persons capable of tolerating subliminal messages. However, the enjoyment of music created by private individuals and manufactured by private entities is a privilege belonging to them, and cannot be seriously contested. A record company's decision concerning the market it intends to target is solely within its discretion. However, wise businessmen would make the product available to both pro and anti-subliminal listeners by selling albums with and without the subconscious messages.

The Court in *Rowan* failed to define the term "unwanted communication"²⁰⁰ as it pertains to a homeowner's right of privacy. It is not clear from the Court's language whether "unwanted communication" refers to the content or the medium of the speech. Apparently, however, the statute in *Rowan* did not deem the medium of communication, namely unsolicited mail, offensive or unwanted speech *per se*. Rather, since "the addressee[,] in his sole discretion [may insulate himself from advertisements he] believes to be erotically arousing or sexually provocative,"²⁰¹ the content of such speech seems to be the focus of the statute and a limitation of the Court's holding in *Rowan*.

In *Vance*, when applying the *Rowan* test, the Court emphasized "[subjection] to a speaker's message under circumstances which make it impossible or impractical for the listener to avoid being exposed to the unwanted message."²⁰² Further, it is "the very nature of subliminal messages [which] make it impossible for the unknowing listener to avoid exposure."²⁰³ This exclusive analytical reliance upon "avoiding exposure,"²⁰⁴ and the "very nature of subliminal[s],"²⁰⁵ indicates that the medium of expression, not its content, controls one's privacy rights.

Instead of focusing on the unlawful, unwanted, or offensive nature of the suicidal message, the court in *Vance* rests its decision entirely upon the medium of expression, namely the intrusive characteristics of subliminals in general. *Rowan*, however, being one of the authorities from which the *Vance* court derives the applicable legal standard, is limited to the content of speech. There-

200. See *id.* at 737.

201. *Rowan v. U.S. Postal Department*, 397 U.S. 728, 730 (1970). (citing 39 U.S.C. §4009(9)(1964 ed., Supp. IV)(footnote omitted)).

202. *Vance* at 31.

203. *Id.*

204. See *id.*

205. See *id.*

fore, *Rowan* was either improperly construed or applied by Judge Whitehead.

(2) *Erznoznik v. City Of Jacksonville*

In *Erznoznik v. City of Jacksonville*,²⁰⁶ the main issue involved a First Amendment challenge to the constitutionality of a Jacksonville, Florida ordinance prohibiting the exhibition of "films containing nudity by . . . drive-in movie theater[s] when its screen is visible from a public street or place."²⁰⁷ The City of Jacksonville argued that the ordinance "protect[s] its citizens against unwilling exposure to materials that may be offensive."²⁰⁸ In rejecting this contention, the United States Supreme Court held "that the limited privacy interest of persons on the public streets cannot justify . . . censorship of otherwise protected speech on the basis of its content."²⁰⁹ The captive audience analysis which the Court applied in *Erznoznik*²¹⁰ could not sustain the suspect statute because it was not "so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it."²¹¹ The core of the *Erznoznik*'s decision radiated disdain for the content-based restriction of speech, and the lack of a compelling reason by the government for doing so. The Court emphasized that "[a]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."²¹²

In *Vance*, Judge Whitehead grouped both *Erznoznik* and *Rowan* together as standing for the same broad proposition that impossible or impractical avoidance of exposure of unwanted speech always overrides free speech rights.²¹³ However, this generically portrayed similarity does not exist between those cases. *Rowan* implicitly approves the content regulation of speech,²¹⁴ while *Erznoznik* explicitly disapproves of such regulation.²¹⁵

Judge Whitehead could have strengthened his position by relying upon the emphasis accorded the medium of expression in

206. 422 U.S. 205 (1975).

207. *Id.* at 206.

208. *Id.* at 208.

209. *Id.* at 212. (footnote omitted).

210. *See id.* at 209.

211. *Id.* at 212 (citing *Redrup v. New York*, 386 U.S. 767, 769 (1967)).

212. *Id.* at 215 (citing *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)).

213. *See Vance* at 74.

214. *Rowan v. U.S. Post Office Department*, 397 U.S. 728, 730 (1970).

215. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 215 (1975).

Erznoznik, namely the drive-in movie screen.²¹⁶ But this path would have been futile since a large picture screen perceivable by the public is simply not analogous to the existence of subliminal messages on record albums perceived within the privacy of one's home. The general teachings of *Erznoznik* leave the impression that "in our pluralistic society, constantly proliferating new and ingenious forms of expression"²¹⁷ should constrain, and not expand, captive audience limitations on speech.

(3) *FCC v. Pacifica*

In *FCC v. Pacifica*,²¹⁸ the issue before the Supreme Court of the United States was "whether the Federal Communications Commission has any power to regulate a radio broadcast that is indecent but not obscene."²¹⁹ The FCC issued a declaratory order to be placed in the license file of Pacifica Foundation (the owner of a New York radio station) concerning possible future sanctions if further complaints were received similar to those resulting from a 2:00 PM broadcast of George Carlin's "Filthy Words" monologue.²²⁰

The Court held that the FCC has the power to regulate the content of radio programs as well as the time of day during which such content is broadcast.²²¹ This conclusion was based upon the premise that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection."²²² According to one critic, "[m]ost people with any first amendment bones in their bodies are troubled by the *Pacifica* case. . . [because it] is an affront to a notion of content neutrality."²²³

Pacifica is distinguishable from *Vance* because the latter case did not concern the broadcast of subliminals over public radio. Moreover, the indecent subject matter of George Carlin's monologue appeared to play a role in its result while the subliminals in

216. *Id.* at 212.

217. *Id.* at 210.

218. 438 U.S. 726 (1978).

219. *Id.* at 729.

220. *See id.* at 729-730.

221. *Id.* at 750.

222. *Id.* at 748.

223. Shiffrin, *supra* note 100, at 80. ("The *Pacifica* case produces heat precisely because Carlin's speech is considered by many to be precisely what the first amendment is supposed to protect. Carlin is attacking conventions; assaulting the prescribed orthodoxy; mocking the stuffed shirts; Carlin is the prototypical dissenter.").

Vance were not sexually explicit. Justice Stevens, writing for the Court in *Pacifica*, stated that "[p]atently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."²²⁴

The Court in *Pacifica* emphasized the uniqueness of the public airwaves, especially when one is listening in his own home. Undoubtedly, if record albums containing subliminals were found to be indecent or actually dangerous to certain listeners, there would be a right under *Pacifica* for the F.C.C. to regulate the broadcast time, or a complete prohibition of such subliminal music. However, in factual situations akin to *Vance*, where a consumer buys a record album produced by a private company for her listening pleasure at home, the peculiar concerns of *Pacifica* simply do not apply. This proposition applies even if the subliminals are indecent; and the language of *Pacifica* supports private consumption as an alternative: "Adults who feel the need [to listen to George Carlin's indecent monologue] may purchase tapes and records or go to theaters and nightclubs to hear these words."²²⁵

The *Pacifica* Court also alluded to a listener's alternative of merely tuning out an unwanted or offensive program.²²⁶ Nevertheless, due to the unique nature of broadcasting, this remedy did not suffice.²²⁷ "Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content."²²⁸ However, the situation is different in *Vance*, because one can choose not to buy a record with subliminal messages on it if a warning appears on the album cover.²²⁹

224. *Pacifica*, 438 U.S. at 748.

225. *Id.* at 750, n.28.

226. *Id.* at 748-749.

227. *But see id.* at 764-765 (Brennan, J., dissenting) ("I believe that an individual's actions in switching and listening to communications transmitted over the public airways and directed to the public at large do not implicate fundamental privacy interests, even when engaged in within the home. Instead, because the radio is undeniably a public medium, these actions are more properly viewed as a decision to take part, if only as a listener, in an ongoing public discourse.").

228. *Id.* at 748.

229. "[B]roadcasting appears to differ from books and records, which may carry warnings on their face, and from motion pictures and live performances, which may carry warnings on their marquees." *FCC v. Pacifica*, 438 U.S. 726, 760 n. 2 (Powell, J., concurring).

3. The First Amendment Right To Receive Information

The right to perceive subliminal messages present on records constitutes reception of information protected by the First Amendment. The right to receive information first appeared in *Martin v. City of Struthers*,²³⁰ where the United States Supreme Court declared unconstitutional a statute prohibiting the door-to-door distribution of leaflets, circulars, or advertisements.²³¹ The Court declared:

Freedom to distribute information to every citizen, wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved. The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas.²³²

Martin and *Vance* are slightly analogous, primarily in principle rather than factual orientation.

One might not have the right to force another to perceive subliminal messages in her homestead. However, if a citizen desires to be subliminally influenced by listening to a record on his own property (without interfering with the rights of neighbors), then the right to do so exists free from governmental prohibition. This proposition reflects the teachings of *Martin* as applied to the *Vance* case, if state action is involved.

The next major case addressing one's First Amendment right to receive information is *Kovacs v. Cooper*.²³³ The United States Supreme Court held that "It is a [constitutionally] permissible exercise of legislative discretion to bar sound trucks with broadcasts of public interest, amplified to a loud and raucous volume, from the public ways of municipalities."²³⁴ *Kovacs* qualified the First Amendment right to receive information by finding it to be outweighed by the interests of those who choose not to be dis-

230. 319 U.S. 141 (1943).

231. See *id.* at 142, 149.

232. *Id.* at 146-147. See also, *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) ("Freedom of speech presupposes a willing speaker. But where a speaker exists . . . the protection afforded is to the communication, to its source and to its recipients both.").

233. 336 U.S. 77 (1949).

234. *Id.* at 87.

turbed.²³⁵ Thereafter, the *Vance* Court construed *Kovacs* as implying "[a] First Amendment right to be free from unwanted speech."²³⁶

The *Vance* court reasoned that "if an individual has the right to receive information and ideas expressed by others with whom he may philosophically, socially, religiously, or politically agree or disagree, he must also have the reciprocal right to refuse to receive such information and ideas."²³⁷ While this logic may be valid on its face, further inquiry into the ultimate purpose of the First Amendment indicates otherwise.

The First Amendment entails the spread of information, truth, the attainment of individual self-fulfillment and other ends.²³⁸ This Constitutional provision's *raison d'être* contemplates an attempted change in one's mental status quo. The right to speak and to receive or listen to speech is protected by the First Amendment. A right to refuse the reception of information does not involve an alteration of the status quo. An individual's wealth of knowledge, self-esteem, and views do not undergo metamorphosis or growth by a refusal to listen to speech.

The positive objectives underlying the First Amendment are not advanced by allowing a right to refuse the reception of speech. Instead, these free speech goals are quite inconsistent with a right of refusal. Therefore, *Vance's* reasoning is invalid to the extent it infers this right from the First Amendment itself. Yet, this supposition does not suggest that a right to refuse receipt of information, or to be left alone, does not exist. Rather, only the origin of this right is disputed. The rights to refuse the receipt of information and to be left alone inhere in the constitutional right to privacy that emanates from the penumbras of the Bill of Rights.²³⁹

235. The regulation in *Kovacs* appears to be justified under nuisance law principles. See *Kovacs v. Cooper*, 336 U.S. 77, 89 (1949). (Preventing nuisance is well within the confines of State police power, and subject to a mere rational relationship test of Constitutionality.).

236. *Vance* at 28. It appears that this implicit right to be free from unwanted speech or to be let alone is very similar to the right of privacy recognized in *Griswold*, *supra* notes 168-171 and accompanying text, and may be the same exact concept with a different label. Suffice it to say that this is inevitable because the right of privacy itself stems from the First Amendment right of association according to *Griswold's* reasoning. *Supra* notes 176-180 and accompanying text.

237. *Id.*

238. See *supra* notes 80-119 and accompanying text.

239. See *supra* notes 168-171 and accompanying text; see also, *Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 467 (1952) ((Douglas, J., dissenting) Although the right to privacy, which is "a repository of [and the beginning of all] freedom" was construed to exist from the "liberty" language of the due process clause, an interpretation which differs from

One may argue that it is of no significance where the right to refuse the receipt of information originates, as long as its existence is acknowledged from some Constitutional source. However, it is difficult to lend credence to a tenuous right of privacy that is inferred from certain explicit Constitutional provisions. It is even more troubling to allow this implicit right of privacy to override an explicit Constitutional provision, namely the First Amendment; especially where the former right's existence is derived in part from the latter right through liberal and temporal judicial interpretation.²⁴⁰

The distinction which *Vance* fails to recognize turns out to be more than subtle semantics after further inquiry concerning Constitutional interpretation. There are no conflicting First Amendment rights involved where one's right to convey information clashes with another's right to refuse reception of such communication. Instead, the right to privacy and the First Amendment conflict, and, in this author's view, the court in *Vance* should have utilized a balancing test.

The balancing test proposed herein would give great deference to First Amendment considerations, the analysis commencing with the scales tilted in favor of free speech. This tremendous burden can be overcome only by a showing that the method or mode of communication is so intrusive as to destroy completely one's privacy or other fundamental rights.²⁴¹ The remedy of averting one's

that of the *Griswold* majority, it clearly includes "[t]he right to be let alone.").

240. See *supra* notes 174-180 and accompanying text.

241. Cf. *Roth v. United States*, 354 U.S. 476, 484 (1957) ("All ideas having even the slightest redeeming social importance - unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion - have the full protection of the guaranties [of the First Amendment].")

The results reached in the captive audience cases are an excellent illustration because they encroach upon the limited area of more important interests. See, *Virginia State Board Of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 755 (1976) ("The First Amendment interest in the free flow of [drug] price information could be found to outweigh the countervailing interests of the State."); See also, *id.* at 789 (Rehnquist, J., dissenting) ("This case presents a fairly typical First Amendment problem - that of balancing interests in individual free speech against public welfare determinations embodied in a legislative enactment.").

The forum for the speech in question is a major factor in determining the extent of one's privacy rights for balancing purposes. In *Public Utilities Comm'n v. Pollak*, 343 U.S. 451 (1952) a street railway company's broadcast of radio programs through loudspeakers on its passenger vehicles, a First Amendment right, does not violate the privacy rights of the passengers. See generally, at *id.* Justice Burton, writing for the Court, reasoned that "each passenger on a public vehicle . . . [does not possess] a right of privacy substantially equal to the privacy to which he is entitled in his own home." *Id.* at 464.

But the degree of privacy depends not only on the forum, but may also be constricted by the First Amendment rights of others to receive information. This concept was validated

eyes from offensive speech adequately preserves the much valued deference which should be accorded free speech.²⁴²

Justice Douglas' concurring opinion in *Lehman v. City of Shaker Heights*,²⁴³ somewhat mirrors this captive audience/privacy approach previously discussed. The issue in *Lehman* was "whether a city which operates a public rapid transit system and sells advertising space for car cards on its vehicles is required by the First and Fourteenth Amendments to accept paid political advertising on behalf of a candidate for public office."²⁴⁴ A plurality of the Court held that there was no First Amendment forum based in part on the premise that public transit system passengers are a captive audience.²⁴⁵

Despite the plurality view's analysis, Justice Douglas adequately elaborated on the correct theories which should have decided the case:

While petitioner clearly has a right to express his views to those who wish to listen, he has no right to force his message upon an audience incapable of declining to receive it. In my view the right of the commuters to be free from forced intrusions on their privacy precludes the city from transforming its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience.²⁴⁶

A simplified inference from Justice Douglas' opinion is that where the First Amendment conflicts with the right to privacy, these rights must be balanced.

Captive audience cases merely involve a certain type of factual situation where the rights of privacy and the First Amendment clash. Another way to approach this issue is to ask whether restrictions on First Amendment rights are reasonable with regard to the time, place, and manner through which speech is conveyed.²⁴⁷ This analysis is broader than the speech/privacy balancing test, yet ab-

in Pollak: "However complete [a passenger's] right of privacy may be at home, it is substantially limited by the rights of others when its possessor travels on a public thoroughfare or rides in a public conveyance." *Id.* Hence, an individual's privacy rights are malleable, and are shaped and defined depending upon where he or she carries them.

242. See generally, *Cohen v. California*, 403 U.S. 15 (1971), where Justice Harlan, writing for the majority, posited that "[t]hose in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes [from the back of defendant Paul Cohen's jacket, bearing the words 'Fuck the Draft']." *Id.* at 21.

243. 418 U.S. 298, 305 (1973) (Douglas, J. concurring).

244. *Id.* at 299.

245. See *id.* at 304.

246. *Id.* at 307.

247. See *Lehman*, 418 U.S. 298, 311 (1973) (Brennan, J. dissenting).

sorbs the latter.

Time, place, and manner restrictions apply to any legitimate governmental interests which conflict with First Amendment interests.²⁴⁸ Such restrictions, if reasonable, may be imposed, and the right to privacy is one of those interests. Further, captive audience cases are merely an amalgam of place and manner regulations on speech. For example, the place and manner of restriction on the speech in *Lehman* concerns transit system vehicles and advertisement displays, respectively.

The absolute ban which the *Vance* Court imposed on intentional subliminal messages warrants discussion from a First Amendment standpoint. The Court stated its First Amendment conclusion as follows:

Subliminal speech is intended to influence the listener's behavior by having the message surface in the listener's conscious mind as his own thoughts and beliefs. When an individual is exposed to subliminal messages without his knowledge and consent, he is deprived of his constitutional right to choose the speech to which he would either listen or decline to listen and his First Amendment right of freedom of thought is violated.²⁴⁹

This reasoning is invalid for two reasons. First, whether or not subliminal messages can influence a listener's behavior is still an open question. The dual testimony of both plaintiff's and defendants' expert witnesses, conceding that a predisposition to act is a prerequisite for subliminals to influence behavior,²⁵⁰ vitiates Judge Whitehead's basis for decision.²⁵¹

If an individual is already predisposed to act, any external stimuli may have an effect on behavior. This observation belies the notion that subliminal messages wrongfully surface in a listener's conscious mind, thus becoming his own thoughts and beliefs. If there is a predisposition necessary to effect behavior, then those thoughts which are related to the scope of that propensity belong

248. Cf., e.g., *Lehman*, 418 U.S. at 302-303 ("[T]he nature of the forum and the conflicting interests involved . . . [are] important in determining the degree of protection afforded by the [First] Amendment to the speech in question.").

249. *Vance* at 28.

250. See *supra* notes 157-159 and accompanying text.

251. In any event, the ability of a court to create a common law cause of action (in *prime facie* tort or otherwise) is questionable due to its limited fact finding resources. The creation of an intentional subliminal message tort is more appropriate for a legislative enactment because more experts and scientific data can be relied on than in a court of law, where the inquiry is limited to issues of fact.

to the listener prior to receipt of the subliminal message.²⁵²

There is no absolute proof at this point in time as to whether subliminals actually surface in one's conscious mind. It is highly probable that subliminals enter one's subconscious and remain there until this sphere of the mind itself causes the individual to spontaneously act. Besides, the line separating the conscious from the subconscious mind is blurry and incapable of precise delineation; the point being that the *Vance* court's analysis is founded on unwarranted assumptions, and is therefore flawed.

Second, exposure to subliminal messages without a listener's knowledge and consent does not implicate a First Amendment violation. Rather, a listener's privacy rights are violated where there is no knowledge or consent to subliminal mental seduction. Hence, for reasons previously stated, the First Amendment/privacy balancing test should be utilized.²⁵³

The balancing test which was previously enunciated²⁵⁴ will now be applied to subliminal messages placed on record albums. Since subliminal messages are contended to be speech in this comment,²⁵⁵ it qualifies for First Amendment protection from the outset. However, the right for musicians, record companies or producers to speak through subliminals on record albums, generally conflicts with a listener's right to privacy if the person does not consent to this subtle form of speech.

Whether or not a listener explicitly consents by purchasing a record with a warning appearing somewhere upon the product, or implicitly by purchasing an album with knowledge of the content of the forward lyrics (which are consistent with the content of specific and clear subliminal messages), is a collateral matter which must be scrutinized on a case-by-case basis. Absent such consent, there is a free speech/privacy conflict which must be resolved through a careful balancing of related interests.

A substantial factor in the balancing test is that listeners have a related First Amendment interest in receiving the information conveyed through subliminal messages. The rights of these receptive listeners tip the scales in favor of free speech where an absolute ban on subliminals is involved. Absolute illegality would completely violate the First Amendment rights of those who wish to

252. Cf. Westin, *supra* note 8, at 296 ("[W]hether people can be forced to do things 'against their will' by subliminals is not the real issue. It is whether stimuli could release or strengthen urges that are already in viewers or listeners.").

253. See *supra* note 77 and accompanying text.

254. *Id.*

255. See *supra* notes 26-47 and accompanying text.

benefit from this phenomenal and modern form of communication.

Functional subliminal messages are an excellent example of the benefits which would be denied as a result of an absolute ban.²⁵⁶ Functional subliminals assist listeners with weight loss, prevent shoplifting or theft through Muzak²⁵⁷ in department and other stores, and could be utilized to benefit society. For instance, subliminals could be employed as an educational tool for children or adults who desire improvement of memory retention or to simply expand their mental perspective. A variety of societal goals which could be advanced through the use of functional subliminals would be denied development, exploration, and experimentation if an absolute ban is imposed.

Just as subliminal advertising is subject to reasonable regulation by the Federal Trade Commission,²⁵⁸ there may be reasonable regulation of subliminal messages in music where an unsuspecting listener of radio or other media could perceive such communication. The Federal Communications Commission (FCC) could enact regulations pertaining to the media broadcast of music or other forms of communication containing subliminal messages. Where rights are being infringed through the media, broad jurisdiction to

256. *But see*, Note, *In Search Of The "Subliminal Tort," supra* note 9, at 759 ("The invasion of privacy occurs whether or not the objective behavior modification has social utility. Even the seemingly beneficial effects may be ultimately destructive. A society that must function by the use of subliminal stimuli rather than the conscious willingness of its people is bound to become unstable.").

257. Muzak is a term that is widely known as identifying functional music and is named after its largest producer, Muzak Corporation. *See* Note, *In Search Of The "Subliminal Tort," supra* note 9, at 740. This form of music is described as follows:

It is designed by psychologists to achieve specific psychological and physiological changes in listeners. Depending on the intentions of the designers of a particular program, the music may increase sales in supermarkets, increase the vigilance of military personnel, or reduce the error rate in a factory. To accomplish these goals, functional music programmers control and regulate such variables as pitch, tempo, and the complexity of orchestration. Functional music programs are frequently designed to reach periodic peaks, followed by periods of silence. The precise patterns vary with the day of the week, the hour of the day, and the particular result the music is designed to accomplish. While the music is patent, it 'is arranged and recorded for its effectiveness on a secondary or subconscious level.'

Id. at 740-741.

Functional music is similar in nature to subliminal messages in that both attempt to influence the behavior or mood of the listener. However, the latter is distinguishable due to the presence of an actual verbal message. Nevertheless, subliminal messages could be utilized within the framework of Muzak, or functional music, to increase or enhance the effect upon the listener.

258. *See supra* notes 72-74 and accompanying text.

regulate is granted to the F.C.C.²⁵⁹

Just as captive audience cases involve place restrictions on speech subject to reasonableness, an analogous situation arises where subliminal messages are broadcast on the radio waves. The *Vance* Court stated that "the individual has no knowledge that he is being bombarded by these messages, and therefore, has no means of making a conscious decision to either hear them or avoid them."²⁶⁰ In this author's view, the F.C.C. would have a legitimate governmental interest in protecting the privacy rights of an unsuspecting listener to radio or other media by imposing a complete ban on forms of expression that contain subliminal messages. This absolute ban constitutes a manner restriction on free speech, which is a component of the balancing test theory proposed in this comment, and should be constitutionally permissible if reasonable.

A warning issued prior to the broadcast of a song on the radio, for instance, would not be a rational regulation. Although a listener could turn the dial if the warning is heard, the possibility that one could turn on the radio midway through a song containing subliminal messages plagues the effectiveness of a warning system. The classic captive audience exception where one could avert his eyes or turn the radio dial if offensive speech is identified, does not apply to subliminal messages. Listeners who would be offended by subliminal messages are unable to recognize their existence if the radio is tuned in during the middle of a song.

VII. CONCLUSION

To reduce a relatively complex issue to simplicity, the use of subliminal messages in music creates a conflict between the First Amendment right to free speech and the right to privacy. The First Amendment right belongs to the musician who desires to enhance the effect of her music upon the emotions of the listener through the use of subliminals.

In order to classify subliminals as speech, a liberal interpretation must be accorded the policies underlying the First Amendment. Further, a generous treatment of case law regarding the protection afforded such purported speech is warranted because, prior to *Vance*, subliminals were not encountered by the Courts, and, as a general axiom, "every medium of communication 'is a law unto itself.'"²⁶¹

259. See *supra* note 225 and accompanying text.

260. *Vance* at 28.

261. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 220 (1975) (Burger, C.J., dissent-

The *Vance* decision destroyed the subliminal flower before it had the opportunity to blossom. The repercussions that will result from this decree place an undue burden on the recording industry to search for these obscure and often unintentional messages. Moreover, the *Vance* precedent could cause the courts to become flooded with frivolous or tenuous claims. Basically, if one looks hard enough for something, he or she will eventually find it, or at least something that closely resembles the item sought. This proposition holds true for subliminal communication since scientific research concerning this phenomenon has not yet been fully developed and will, in all likelihood, become stifled or brought to a standstill due to the fear of liability.

Not only is the reasoning in *Vance* fallacious at times, but Judge Whitehead has accorded undue import to the right of privacy in the context of the case before him. It is no small problem when the judicial branch of government restricts an entirely modern and novel mode of communication without the fact finding resources available to the legislative and executive branches.

The solution should be not to ostracize subliminals from music, but to leave this decision to the proper branches of government. Legislative committees and executive agencies may conduct extensive scientific and social research into the matter. Thereafter, these governmental bodies would possess the competence to render a fully informed decision regarding a total ban, or the extent and logistics of the regulation of subliminal messages in music or elsewhere.

Not only are the doors to mental development and new forms of entertainment being closed by the court in *Vance*, but the First Amendment is being placed on the backburner. In sum, the classification of subliminal messages as protected speech and not as an absolute invasion of privacy is the proper conclusion. It is possible that this classification may backfire, but, in the words of Circuit Judge Lumbard, "[i]n areas of doubt and conflicting considerations, it is thought better to err on the side of free speech."²⁶²

ing) (quoting *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring)).

262. *Hotchner v. Castillo-Puche*, 551 F.2d 910, 913 (2d Cir. 1977); see also, *Carto v. Buckley*, 649 F. Supp. 502, 506 (S.D.N.Y. 1986).