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Constitutional Law—COMMERCIAL SPEECH DOCTRINE: ORDINANCE PROHIBITING NEWSPAPER FROM PRINTING SEX-DESIGNATED EMPLOYMENT ADVERTISING HELD CONSTITUTIONAL—*Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 93 S. Ct. 2553 (1973).

Newspapers generally provide sex-designated sections for help wanted advertisements, and only in recent years has the law focused its attention upon the practice.¹ Federal law² prohibits the use of these designated sections where sex is not a bona fide occupational qualification. While the courts have upheld the civil prosecution of employers under this law,³ they have found newspapers to be specifically exempt from its application,⁴ a conclusion supported by legislative history.⁵

Congressional exemption of newspapers from the operation of the statute⁶ seems to stem not from a fear of infringement upon the freedom of press, but from a desire to avoid burdening newspaper publishers with the onerous task of checking each sex-designated advertisement to assure that it is in fact based upon a bona fide occupational qualification.⁷ At least one court has held that newspapers may be prohibited from publishing discriminatory advertisements without violating the first amendment⁸ on the basis that purely commercial speech is unprotected by the first amendment.⁹

In view of this state of the law, it came as no great surprise when, in the recent decision of *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*,¹⁰ the United States Supreme Court again upheld the legislative power to oversee the content of advertising which a newspaper

1. See generally 3 MEMPHIS ST. U.L. REV. 355 (1973); 52 B.U.L. REV. 896 (1972).

2. 42 U.S.C.A. § 2000e-3(b) (Supp. 1973).

3. *Hailes v. United Air Lines*, 464 F.2d 1006 (5th Cir. 1972).

4. *Brush v. San Francisco Newspaper Printing Co.*, 315 F. Supp. 577 (N.D. Cal. 1970).

5. *Civil Rights Act of 1964*, H.R. REP. NO. 914, U.S. CODE CONG. & AD. NEWS 2403 (1964).

6. 42 U.S.C.A. § 2000e-3(b) (Supp. 1973).

7. *Civil Rights Act of 1964*, supra note 5.

8. U.S. CONST. amend. I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

9. *United States v. Hunter*, 459 F.2d 205 (4th Cir. 1972) (classified rental advertisement expressing racial preference was not protected because it was purely commercial speech). The denial of first amendment protection to advertising because it is "commercial speech" is nothing new. See, e.g., *Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968) (upholding FCC requirements that broadcasters give time for advertisements against cigarette smoking); *Bigelow v. Commonwealth*, 213 Va. 191, 191 S.E.2d 173 (1972) (upholding a statute prohibiting advertisement of abortion referral services).

10. 93 S. Ct. 2553 (1973).

may print. The Pittsburgh Commission on Human Relations had held that appellant Pittsburgh Press Company had violated a city ordinance¹¹ by providing sex-designated sections in its newspaper for help wanted advertisements.¹² The Commission's findings ultimately resulted in a cease and desist order against further use of the advertising system except when permitted by the ordinance.¹³

Pittsburgh Press Company argued that the Commission's application of the ordinance was an unconstitutional violation of its right to freedom of press. Further, the appellant asserted that even if the advertisers and their employment advertisements were not protected, the ordinance was a first amendment violation of its editorial judgment as to the location and arrangement of its classified advertisements.

The Court, rejecting these arguments, found the employment advertisements to be "commercial speech" and as such, unprotected by the first amendment. The Court further held that the use of the sex-designated headings was not severable from the unprotected commercial advertisements, nor did the fact that the first amendment challenge was launched by the newspaper publisher rather than the advertisers hinder the application of the commercial speech doctrine.¹⁴ The Court side-stepped a request that the commercial speech doctrine be abrogated by pointing to the illegal activity being furthered by these commercial advertisements—discriminatory employment practices.¹⁵

The Court acknowledged that the mere fact that language was in the form of a paid advertisement or that it was directed toward profit would not render the speech commercial.¹⁶ Realizing that there would be instan-

11. Human Relations Ordinance, Pittsburgh, Pa., Ordinance 75, Feb. 27, 1967, as amended Pittsburgh, Pa., Ordinance 375, July 8, 1969 (adding sex to its protected classes).

12. *Id.* § 8(e) makes it unlawful "[f]or any employer . . . to cause to be published . . . any . . . [employment] advertisement . . . which indicates any discrimination because of . . . sex," while § 8(j) which Pittsburgh Press Co. was found to have violated, makes it illegal "for any person . . . to aid . . . in the doing of any act declared to be an unlawful employment practice by this ordinance. . . ."

13. Initially the Commission's order prohibited all sex-designated advertising, but was modified by *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 4 Pa. Commw. 448, 287 A.2d 161 (1972) to allow use of the system for jobs exempt from the working of the ordinance, e.g., employers outside the city of Pittsburgh or those jobs where sex is a "bona fide occupational qualification (B.F.O.Q.)."

14. An amicus curiae brief suggested the order be condemned as a prior restraint in the English common law sense of the term, but the Court rejected this contention because the injunction was based upon a "continuing course of repetitive conduct." 93 S. Ct. at 2561.

15. The Court summarily dismissed a contention that the ordinance violated "due process in that there is no rational connection between sex-designated column headings and sex discrimination in employment." *Id.* n.7 at 2556.

16. As substantiation for this conclusion the Court cited *New York Times Co. v. Sullivan*,

ces where paid advertisements would be absolutely protected, the Court held that these employment advertisements were commercial¹⁷ because they "did no more than propose a commercial transaction."¹⁸

The commercial speech doctrine¹⁹ has not enjoyed widespread approval. It has been branded as an "anomaly"²⁰ by some, while others have openly referred to the doctrine as wrong.²¹ The chief objection of most observers is that the stark exclusion of all purely commercial speech from protection was announced "without any reliance on either the language or the *theory* of the first amendment" [emphasis added].²²

Is the commercial speech doctrine and its application to cases like

376 U.S. 254 (1964) (holding that a political advertisement was protected by the first amendment from giving rise to a libel action). 93 S. Ct. at 2558.

17. 93 S. Ct. at 2559.

18. *Id.* at 2558.

19. The origin of the doctrine can be traced to the two cases of *Valentine v. Chrestensen*, 316 U.S. 52 (1942) and *Breard v. Alexandria*, 341 U.S. 622 (1951). Few commentators seem to have seen a broad application of the doctrine beyond the two types of media involved in these cases: *Valentine* dealt with the distribution of handbills, while *Breard* dealt with door to door solicitation. See, e.g., Resnik, *Freedom of Speech and Commercial Solicitation*, 30 CALIF. L. REV. 655 (1942); 2 BILL OF RIGHTS REV. 222 (1942); 26 MINN. L. REV. 895 (1942). Even in *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 93 S. Ct. 2553, 2562, 2566 (1973) (Burger, C.J. & Stewart, J., dissenting in separate opinions) it is argued that *Valentine* applies only to its subject media (handbills). Even today *Valentine* is seen by some commentators as significant only within its limited factual area. B. SCHWARTZ, *CONSTITUTIONAL LAW* § 139 (1973). In some areas of commercial regulation the commercial speech doctrine has not been generally applied, rather the courts have traditionally spoken only in terms of due process standards. This tendency seems to have resulted in the relegation of the doctrine to a certain degree of obscurity. See generally Note, *Freedom of Expression In A Commercial Context*, 78 HARV. L. REV. 1191 (1965).

20. Kaufman, *The Medium, the Message and the First Amendment*, 45 N.Y.U.L. REV. 761, 769 (1970).

21. See, e.g., *Cammarano v. United States*, 358 U.S. 498, 513 (1959) (Douglas, J., concurring); See 1 C. ANTIEAU, *MODERN CONSTITUTIONAL LAW* § 1:3 (1969); Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429 (1971); *Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005 (1967); Comment, *The First Amendment and Consumer Protection: Commercial Advertising as Protected Speech*, 50 ORE. L. REV. 177 (1971); 5 U. CHI. L. REV. 675 (1938) (arguing against a commercial distinction before *Valentine*).

22. Redish, *supra* note 21, at 429. Some of the theories which have presented themselves over this past half-century include: "clear and present danger test" enunciated in *Schenck v. United States*, 249 U.S. 47 (1919); two levels of language theory (protected and not protected) stated in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); the balancing of interests formula seemingly announced in the *American Communications Ass'n v. Douds*, 339 U.S. 382 (1950); in the realm of obscenity the social value test announced in *Roth v. United States*, 354 U.S. 476 (1957) and seemingly exploded in the recent decision of *Miller v. California*, 93 S. Ct. 2607 (1973) leaving the definition of obscenity to the individual localities. See generally Kalvern, *The New York Times Case: A Note on "the Central Meaning of the First Amendment,"* 1964 S. CT. REV. 191.

Pittsburgh Press completely devoid of any theoretical foundation? An analysis of the majority's opinion suggests that it is not. The Court in *Pittsburgh Press* put down its first and essential premise to the opinion: the purpose of the first amendment and its protection of the press is to preserve our system of self-government.²³ This premise was not merely accident of introduction, nor was it uttered in a hushed tone. This statement of the first amendment as an exponential function of "democracy" and "self-government" demonstrates the culmination of a half-century of judicial thought²⁴ which has found firmament in the more recent first amendment decisions.²⁵

This new first amendment philosophy is essentially the statement of a theory long espoused by the late Professor Alexander Meiklejohn.²⁶ As the premise laid by the Court in *Pittsburgh Press* suggests, this theory might best be called the self-government principle. Briefly stated, the principle holds that wherever there is language which either has direct relevance to self-governing decisions a citizen must make or which in some way adds to his education and enlightenment so as to better prepare him to make these decisions, then this language is "free speech" *absolutely* protected by the first amendment.²⁷ Any other speech would presumably be protected only by due process standards.²⁸

When one views the fact that in *Pittsburgh Press* one of the dissenting judges himself cited Professor Meiklejohn,²⁹ it becomes apparent that the real question in this case was whether "purely commercial speech" as a classification should be excluded in a blanket fashion as not of self-governing significance or should such language receive consideration under the self-government principle on a case to case basis. Apparently the majority felt that it had no such significance, but this result must be tempered

23. In the words of the Court itself:

As Mr. Justice Black put it, "In the First Amendment the Founding Forefathers gave the free press the protection it must have to fulfill its essential role in our *democracy*." . . . [O]ur system of *self-government* hinges upon the preservation of these freedoms. . . . The *repeated emphasis* accorded this theme in the decisions of this Court serves to underline the narrowness of the recognized exceptions to the principle that the press may not be regulated by the Government. [emphasis added]. 93 S. Ct. at 2557.

24. See note 23 *supra*.

25. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *Curtis Publishing Co. v. Butts*, 388 U.S.130 (1967); Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965); Kalvern, *supra* note 22.

26. See Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245.

27. *Id.*

28. Redish, *supra* note 21, at 429.

29. 93 S. Ct. at 2564 (Douglas, J., dissenting).

by the fact that the Court was dealing with illegal discriminatory employment practices.³⁰ Had it confronted the self-government principle in more neutral territory the commercial speech doctrine might not have gone unscathed as it did in *Pittsburgh Press*.

For those who feel that the best, if not the only way to protect our fundamental rights to freedom of speech and press is to provide total protection to all language, the continuation of the commercial speech doctrine will be greeted as an anathema. *Pittsburgh Press* offers no support for the absolutist philosophy. For those who believe the theory that first amendment protection is a function of the particular media involved³¹ and that newspaper and their kindred are particularly sacred media, *Pittsburgh Press* will represent yet another encroachment upon editorial freedom by government.

Should newspapers be protected by the first amendment in their indiscriminate publishing of improperly sex-designated employment advertisements? Is purely commercial speech unprotected by the first amendment? Looking at the degree of regulation over commercial speech which is now exercised by federal agencies alone,³² one wonders if it is even feasible to speak of purely commercial language as being absolutely protected by the Constitution. It would seem that the right to "propose commercial transactions" is something more akin to a property right³³ protected by due process standards rather than "free speech" in the first amendment sense of the term. The sheer realities of our present form of government would seem to suggest that the self-government principle never has nor ever will include purely commercial speech.³⁴

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30. It seems that the case could have been decided based upon this matter of illegality alone. While there have been few audacious enough to argue the point, it is clear that language used to actually carry out an illegal activity is unprotected by the first amendment. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949); *Gitlow v. New York*, 268 U.S. 652 (1925); *Gompers v. Bucks Stove and Range Co.*, 221 U.S. 418 (1911).

31. See generally Kaufman, *supra* note 20; 51 N.C.L. REV. 581 (1973).

32. Consider, e.g., the regulation of commercial language by agencies such as the FTC, SEC, and FDA.

33. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 948 n.93 (1963).

34. The reasons for this conclusion were best expressed in the dissenting opinion of Judge Frank in *Chrestensen v. Valentine*, 122 F.2d 511 (2d Cir. 1941), *rev'd* 316 U.S. 52 (1942):

[s]uch men as Thomas Paine, John Milton, and Thomas Jefferson were not fighting for the right to peddle commercial advertising. . . . [N]o business man need apologize for seeking personal gain. . . . But the constitutional limitations on legislation affecting such pursuits are not as specific and exacting as those imposed on legislation interfering with free speech. *Id.* at 524.

Judge Frank's words were ultimately vindicated by the Supreme Court when the commercial speech doctrine was first announced in *Valentine v. Chrestensen*, 316 U.S. 52 (1942).