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Constitutional Law-First Amendment-Newspaper Advertisement of Abortion Referral Service Entitled to First Amendment Protection

Constitutional Law—First Amendment—NEWSPAPER ADVERTISEMENT OF ABORTION REFERRAL SERVICE ENTITLED TO FIRST AMENDMENT PROTECTION—*Bigelow v. Virginia*, 95 S. Ct. 2222 (1975).

Controversies involving the first amendment[1] rights of freedom of press[2] and speech are not confined to reporters vowing to protect the identities of their sources against government prosecutors or committees attempting to identify them.[3] An area of conflict of equal import is the degree of protection, if any, afforded commercial speech by the Constitution.[4] In 1942, the Supreme Court in *Valentine v. Chrestensen*[5] enunciated[6] the commercial speech doctrine[7] which has been used,[8] despite subsequent criticism and attempts to limit the holding,[9] to remove commercial advertisement from the ambit of constitutional protection.

The *Chrestensen* holding followed a series of decisions known as the *Handbill Cases*[10] which had overturned convictions of persons prosecuted

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1. U.S. CONST. amend. I reads in part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." First amendment freedoms are protected from state infringement by the due process clause of the fourteenth amendment. Smith v. California, 361 U.S. 147, 149-50 (1959); Near v. Minnesota, 283 U.S. 697, 707 (1931); Gitlow v. New York, 268 U.S. 652 (1925). VA. CONST. art. I, §12 reads in part: "[T]he General Assembly shall not pass any law abridging the freedom of speech or of the press . . . ."

2. The rights of free speech and press are coextensive, being distinguished only by the "*form* of utterance." Francis v. Virgin Islands, 11 F.2d 860, 865 (3d Cir.), *cert. denied*, 273 U.S. 693 (1926) (emphasis added). "[T]hese [rights], though not identical, are inseparable." Thomas v. Collins, 323 U.S. 516, 530 (1945).

3. For information concerning the issue of newsmen's privilege see United States v. Caldwell, 408 U.S. 665 (1972); Comment, *Newsman's Privilege: The First Amendment Grants None*, 25 U. FLA. L. REV. 381 (1973).

4. DeVore & Nelson, *Commercial Speech and Paid Access to the Press*, 26 HAST. L.J. 745 (1975) [hereinafter cited as DeVore & Nelson].

5. 316 U.S. 52 (1942). The facts of the case appear *infra*, note 11.

6. DeVore & Nelson, *supra* note 4, at 747-48.

7. 316 U.S. at 54. The Court, after reiterating past decisions which gave constitutional protection to the exercise of freedom of speech and which allowed government regulation "appropriately" and "in the public interest," stated: "[W]e are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising." *Id.*

8. *See* note 14 *infra*.

9. *See, e.g.*, Dun & Bradstreet, Inc. v. Grove, 404 U.S. 898, 905 (1971) (Douglas, J., dissenting) (The "holding was ill-conceived and has not weathered subsequent scrutiny."); Cammarano v. United States, 358 U.S. 498, 513-14 (1959) (Douglas, J., concurring) ("The ruling was casual, almost off-hand."); 48 TUL. L. REV. 426, 431 (1974) (The "*Chrestensen* decision regulated the mode of distribution . . . not . . . content.").

10. *E.g.*, Schneider v. Town of Irvington, 308 U.S. 147 (1939); Lovell v. City of Griffin, 303 U.S. 444 (1938). For a discussion of the *Handbill Cases* see Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 448-50 (1971).

for violating ordinances prohibiting on-the-street distribution of pamphlets or handbills. *Chrestensen,* however, upheld an ordinance which prohibited the *distribution* of commercial handbills.[11] Despite the fact that the narrow holding of *Chrestensen* allowed regulation of manner of distribution, rather than content of the advertisement,[12] the commercial speech doctrine lived on. What had been a "casual, almost offhand decision" which "has not survived reflection"[13] was repeatedly cited as authority for upholding state or local regulations banning commercial speech in general.[14] For thirty-three years, until the case of *Bigelow v. Virginia,*[15] the Supreme Court refused to qualify *Chrestensen* by limiting it to its facts.

Jeffrey C. Bigelow, the managing editor of a weekly newspaper published in Charlottesville, Virginia, was convicted of violating a Virginia statute[16] which made it a misdemeanor to encourage or promote the processing of

11. The case involved the constitutionality of a provision of New York City's sanitary code forbidding street distribution of business advertising matter. Appellee Chrestensen was told that distribution of leaflets advertising the exhibition of a former Navy submarine which he now owned and from which he profited would violate the ordinance. After being told handbills solely devoted to information or public protest were not subject to the ordinance, Chrestensen prepared a second handbill with the original advertisement on one side, and a public protest on the other. Because of the presence of the advertisement on one side, Chrestensen was restrained from distributing the handbills by the police. He succeeded in his suit to enjoin interference with the distribution and, following an affirmance by the Circuit Court of Appeals, the Supreme Court granted certiorari. The Court cited the commercial nature of the advertisement and reversed.

12. Devore & Nelson, *supra* note 4, at 748; 48 TUL. L. REV. *supra* note 9, at 428.

13. Cammarano v. United States, 358 U.S. 498, 513-14 (1959) (Douglas, J., concurring).

14. *See* United States v. Bob Lawrence Realty, Inc., 474 F.2d 115, 121 (5th Cir.), *cert. denied,* 414 U.S. 826 (1973); United States v. Hunter, 459 F.2d 205, 211 (4th Cir.), *cert. denied,* 409 U.S. 934 (1972); SEC v. Texas Gulf Sulfur Co., 446 F.2d 1301, 1306 (2d Cir. 1971); Patterson Drug Co. v. Kingery, 305 F. Supp. 821, 825 (W.D. Va. 1969).

15. 95 S. Ct. 2222 (1975).

16. VA. CODE ANN. § 18.1-63 (Repl. Vol. 1960). The statute at the time of Bigelow's arrest read:

> If any person by publication, lecture, advertisement or by sale or circulation of any publication, or in any other manner, encourage or prompt the procuring of abortion or miscarriage, he shall be guilty of a misdemeanor.

The General Assembly of Virginia amended the statute, restricting its application, with respect to advertisement, to an abortion illegal in Virginia and to be performed there. The statute, as amended by Va. Acts of Assembly 1972, ch. 725 now reads in part:

> If any person . . . by advertisement . . . encourages or promotes the processing of an abortion or miscarriage to be performed in this state which is prohibited under this article, he shall be guilty of a misdemeanor.

The state in oral argument described the pre-1972 form of the statute as "effectively repealed by amendment." The Court citing Roe v. Wade, 410 U.S. 113 (1973), held the amended statute as "limited to an abortion performed by a nonphysician." Transcript of Oral Argument 38-39. "In any event there is no dispute here that the amended statute would *not* reach appellant's advertisement." 95 S. Ct. at 2228 n.3 (emphasis in original).

an abortion. Bigelow's newspaper[17] ran an advertisement giving, among other information, the name, address and telephone number of an abortion referral service in New York, where both abortions and the referral service were lawful.[18] Three months after the publication, Bigelow was charged with violating the statute.[19] He was convicted in the County Court of Albemarle County and by right of appeal obtained a de novo trial in the circuit court.[20] The court rejected his claim that the statute was unconstitutional and found him guilty. The Virginia Supreme Court affirmed the conviction.[21] Bigelow made two arguments before the court. He claimed his first amendment rights of freedom of speech and press were violated by the statute, and that the statute was overboard, in that it not only regulated non-protected speech, but that which was clearly within the ambit of the Constitution.[22]

Citing *Chrestensen*, the Supreme Court of Virginia rejected Bigelow's first amendment claim, calling the advertisement "commercial" which "may be constitutionally prohibited by the state."[23] Citing the state's goal of insuring pregnant women the choice of whether or not to have an abortion without the pressure of commercial advertisement, the court held the statute a valid exercise of state police power.[24] Turning to the "overbreadth" claim, the court held that since Bigelow's activity "was of a purely commercial nature," he had no "standing to rely upon the hypothetical rights of those in the non-commercial zone."[25] The United States

17. Jeffrey C. Bigelow was a director, managing editor, and "responsible officer" of the newspaper.

18. Subsequent to Bigelow's publication of the advertisement, the State of New York adopted Laws 1971, ch. 725, effective July 1, 1971, now codified as art. 45, § 4501 of the State's Public Health Law. The statute makes illegal and against public policy referral services which are organized as profit-making enterprises. The statute does not apply to non-profit corporations. 95 S. Ct. at 2233 n.8.

19. According to the oral argument transcript Bigelow's is perhaps the only prosecution in the then ninety-eight year history of the statute. Transcript of Oral Argument at 40, *quoted at* 95 S. Ct. at 2228.

20. VA. CODE ANN. §§ 16.1-132, -136 (Repl. Vol. 1975). These statutes give any person convicted in a court not of record the right to appeal to the circuit court of the county. The appeal shall be in the form of a trial de novo. *See, e.g.*, Harbaugh v. Commonwealth, 209 Va. 695, 167 S.E.2d 329 (1969).

21. 213 Va. 191, 191 S.E.2d 173 (1972).

22. As mentioned in note 30 *infra*, the issue of the statute's "overbreadth" was rendered moot with its amendment in such a manner as to repeal its prior application. There is no possibility now that the statute's pre-1972 form will be applied again to Bigelow or will chill the rights of others. 95 S. Ct. at 2230.

23. 213 Va. at 193-95, 191 S.E.2d at 174-76.

24. *Id.* at 196-97, 191 S.E.2d at 174-76.

25. *Id.* at 198, 191 S.E.2d at 177-78.

Supreme Court granted certiorari, but during pendency, *Roe v. Wade*[26] (which in effect overturned Virginia's and every other state's anti-abortion statute) was decided. The Court then vacated Bigelow's conviction and remanded the case for consideration in light of the new abortion ruling.[27] The Virginia Supreme Court held that *Roe v. Wade* did not involve abortion advertising and affirmed the conviction.[28] Again, the United States Supreme Court granted review.[29]

The thrust of the Court's analysis and the importance of its decision lies with the first amendment claim of the newspaper publisher in light of the commercial speech doctrine.[30] The analysis consisted of a two-tiered question. First, does the first amendment with its guarantees of freedom of speech and press reach commercial advertisement? Second, if so, are there governmental interests which in this case outweigh the need for constitutional protection?

The Court answered the first tier of the question in the affirmative. Relying on *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*[31] and *New York Times Co. v. Sullivan*,[32] the Court stated emphatically: "[S]peech is not stripped of First Amendment protection simply because it appears in [commercial] form."[33] Mr. Justice Blackmun, writing for the seven member majority, rejected the Virginia Supreme Court's reliance on *Chrestensen* (calling its holding distinctly limited) and

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26. 410 U.S. 113 (1973).

27. 413 U.S. 909 (1973).

28. 214 Va. 341, 200 S.E.2d 680 (1973).

29. 418 U.S. 909 (1974).

30. Therefore this note will not analyze the Court's rejection of the Virginia Supreme Court's holding that Mr. Bigelow lacked standing to attack the statute as being overbroad. Here the Court disposed of the issue by citing the principles of "established cases" (including a decision of the Virginia Supreme Court) which specify requirements of standing.

> The Court consistently has permitted attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with requisite narrow specificity. Dombrowski v. Pfister, 380 U.S. 479, 486 (1965), *quoted at* 95 S. Ct. at 2229 (footnotes omitted).
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> Of course, in order to have standing, an individual must present more than 'allegations of a substantive chill.' There must be a 'claim of specific present objective harm.' That requirement, however, surely is met under circumstances of this case, where the threat of prosecution already has blossomed into the reality of a conviction . . . . 95 S. Ct. at 2230.

The Virginia case noted is Owens v. Commonwealth, 211 Va. 633, 179 S.E.2d 477 (1971). Since the Virginia statute has been effectively repealed, the Court considered as moot the question of its overbreadth.

31. 413 U.S. 376 (1973).

32. 376 U.S. 254, 266 (1964).

33. 95 S. Ct. at 2231.

severely narrowed the scope of the commercial speech doctrine.[34] The second tier of the inquiry involved a balancing of the individual's interest in free speech against that of the state in exercising its police power.[35] Here the Court set definitive guidelines for future commercial speech cases by specifying particular factors to be taken into consideration and assigning a discernible weight to each. The crucial factors were the presence of matters of public interest in the advertisement, the legal status of the advertised activity, and the legitimacy of the state's interests in controlling speech in the particular controversy.[36]

Assigned great weight was the fact that the advertisement contained information of potential interest and value to the public,[37] in contrast to a strictly commercial transaction.[38] Thus, an examination of the subject of the advertisement was critical; there was no other means for the Court to determine whether it is of public interest.[39] Of equal importance was the

34. "[T]he fact that it had the effect of banning a particular handbill does not mean that *Chrestensen* is authority for the proposition that all statutes regulating commercial advertising are immune from constitutional challenge." *Id.*

35. It is significant that a seven member majority of the Burger Court agreed to decide the first amendment issue by balancing the competing interests considering the strong disdain of the late era of the Warren Court for this approach in favor of an absolute categorization of the activity involved. These categories, which have also been noted in early Burger Court decisions, are identified in Cohen v. California, 403 U.S. 15 (1971); Street v. New York, 394 U.S. 576 (1969); Tinker v. Des Moines School District, 393 U.S. 503 (1969); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949). For a discussion of the balancing versus categorization methods see Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975); Gunther, *In Search of Judicial Quality on a Changing Court: The Case of Mr. Powell*, 24 STAN. L. REV. 1001 (1972).

For one criticism of the balancing approach see Konigsberg v. State Bar of California, 366 U.S. 36, 60-80 (1961) (Black, J., dissenting); Barenblatt v. United States, 360 U.S. 109, 140-44 (1959) (Black, J., dissenting); M. SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW 86 (1966).

36. 95 S. Ct. at 2232-33.

37. The Court held the advertisement:

> [C]ontained factual material of clear 'public interest' . . . it involved the exercise of freedom of communicating information . . . which was . . . not unnewsworthy . . . [and] the activity advertised pertained to constitutional interests . . . . Thus . . . appellant's First Amendment interests coincided with the constitutional interests of the general public. *Id.*

38. "Only a few cases define the term 'commercial advertisement' for purposes of the First Amendment." Annot., 37 L. Ed. 2d 1124, 1132 (1972). *See, e.g.*, Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 384-88 (1973); New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964).

39. In his dissent, Mr. Justice Rehnquist makes the following statement concerning the majority's scrutiny of the ad's content: "If the Court's decision does indeed turn upon its conclusion that the advertisement here in question was protected by the First and Fourteenth

fact that abortions and referral services were legal in New York at the time the advertisement appeared in the newspaper.[40] The Court stated that first amendment interests are "altogether absent when the commercial activity itself is illegal."[41] Since the activity in question was legal and of public interest the first amendment protection attached. The inquiry then turned to whether Virginia's interests outweighed the need for constitutional protection. The Court reasoned that the Commonwealth of Virginia had a legitimate interest in maintaining the quality of medical care within *its own* borders,[42] but noted that the activity in question, the referral service, was not based in Virginia but in another state.[43] The Court held that in attempting to exercise its police powers under these circumstances the state was actually "asserting an interest in regulating what Virginians may *hear* or *read* about the New York services."[44] Thus interpreted, this interest was invalid and "entitled to little, if any, weight under the circumstances."[45] The Court held, therefore, that Bigelow's advertisement was protected by the Constitution and that Virginia could not apply the statute as it read in 1971 without violating his first amendment rights. With the holding came a warning: "[L]iberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper."[46]

Bigelow is an important decision for two reasons. First, the predictions of apparent immortality of Mr. Chrestensen[47] and the commercial speech doctrine have been proved unfounded. *Bigelow* clearly holds that prior

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Amendments, the subject of the advertisement ought to make no difference." 95 S. Ct. at 2237 (Rehnquist, J., dissenting). This seems to be faulting the Court for not putting the cart before the ox since the majority did not decide whether the advertisement was in fact protected until after it decided that the content was of public interest.

If by his statement Justice Rehnquist is advocating categorization of speech to be *absolutely* protected he ignores two recent cases involving first amendment claims in which he joined, stating that public expression may be subject to reasonable regulation. Pittsburgh Press Co. v. Pittsburg Comm'n on Human Relations, 413 U.S. 376, 382-83 (1973); Lehman v. City of Shaker Heights, 418 U.S. 298, 302-03 (1974).

40. 95 S. Ct. at 2232-33.

41. *Id.* at 2232. The court quoted directly from Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 389 (1973).

42. 95 S. Ct. at 2235.

43. *Id.* at 2234-35. The Court reasoned:

> No claim has been made, however, that this particular advertisement in any way affected the quality of medical services within Virginia. A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State.

44. *Id.* at 2235 (emphasis in original).

45. *Id.*

46. 2 Z. CHAFEE, JR., GOVERNMENT AND MASS COMMUNICATIONS 633 (1947) *quoted at* 95 S. Ct. at 2236.

47. Fear of Mr. Chrestensen's immortality is expressed in 51 N.C.L. REV. 581 (1973).

courts erred in their assumptions that advertisement, as such, was entitled to no first amendment protection.[48] Although it was unnecessary to overrule *Chrestensen,* the Court did forestall its citation as authority for blanket removal of advertisements from constitutional protection. Future courts will be forced to search for valid reasons behind regulations and close scrutiny of unique factual situations will likely become the rule in commercial speech cases. Second, the Court felt compelled to decide the case by direct confrontation with the first amendment issue and balancing competing interests, rather than applying the overbreadth doctrine to the statute. It is of course impossible to predict whether Mr. Justice Blackmun has adopted the balancing technique for all first amendment cases or merely those involving commercial speech.[49] In any event, his overall approach[50] was logical, yielding a just result and a standard by which to predict future first amendment commercial speech controversies.

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48. Noting the complete absence of Virginia's power to regulate the advertisement in *Bigelow,* the Court said it did not need to decide the outcome of a commercial speech case where the state *did* have such power. Notwithstanding this statement, the Court set forth guidelines which seem to indicate that it would confront that task in the same manner it disposed of *Bigelow, i.e.,* a balance of competing interests. The only difference would be a more difficult decision since the validity of the state interest might balance the scales, as opposed to *Bigelow* where all the weight came down on the side of constitutional protection. 95 S. Ct. at 2234.

49. Mr. Justice Blackmun had argued that the Court's efforts at balancing in a former "speech" case were "misplaced and unnecessary." Cohen v. California, 403 U.S. 15, 27, (1971) (Blackmun, J., dissenting).

50. Justice Blackmun's handling of the particular issues in *Bigelow* showed an ability to sort out the essential facts and reach a fair result. However, his attempt at balancing was not as masterful as that of the late Mr. Justice Harlan. He might have noted that the statute presented Mr. Bigelow with no alternative forum and that the state could have proscribed less drastic means as an alternative to criminal prosecution such as making the newspaper vouch for the referral service or hospital.