Recent Development

Constitutional Law—FIRST AMENDMENT—United States Supreme Court held that the first amendment protected an abortion advertisement which conveyed information of potential interest to an audience, despite its appearance in the form of a paid commercial advertisement.—*Bigelow v. Virginia*, 95 S. Ct. 2222 (1975).

An attack on the constitutionality of a Virginia statute,[1] which prohibited publication of items which would encourage the procurement of an abortion, afforded the United States Supreme Court an opportunity to limit the scope of "commercialism." Prior cases held that commercial advertisements were not covered under the guarantees of the first amendment.[2] In *Bigelow v. Virginia*,[3] the Court expanded the scope of the protected rights of the first amendment by redefining "commercialism" to exclude advertisements which contain "factual material of clear 'public interest.'"[4]

On February 8, 1971, the *Virginia Weekly*[5] contained an advertisement for Women's Pavilion, a New York City abortion referral and placement center. The advertisement included an opening statement that abortions "are now legal in New York" with "no residency requirements."[6] This was followed by an

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[1]Act of March 30, 1960, ch. 358, § 18.1-63, [1960] Va. Acts 428 (repealed by amendment 1972). See text of present statute at note 23 *infra*.

[2]*See, e.g.*, Head v. New Mexico Bd., 374 U.S. 424 (1963); Breard v. Alexandria, 341 U.S. 622 (1951); Packer Corp. v. Utah, 285 U.S. 105 (1932).

[3]95 S. Ct. 2222 (1975).

[4]*Id.* at 2232, *quoting from* Valentine v. Chrestensen, 316 U.S. 52, 54 (1942).

[5]The *Virginia Weekly*, published by Virginia Weekly Associates of Charlottesville, has its major focus on the University of Virginia campus. Appellant Bigelow described the publication as an "underground newspaper." Brief for Appellant at 3, Bigelow v. Virginia, 95 S. Ct. 2222 (1975).

[6]The entire advertisement appeared as follows:

UNWANTED PREGNANCY
LET US HELP YOU
Abortions are now legal in New York.
There are no residency requirements.
FOR IMMEDIATE PLACEMENT IN ACCREDITED
HOSPITALS AND CLINICS AT LOW COST
Contact
WOMEN'S PAVILION

offer of immediate placement in accredited hospitals and clinics upon contacting the given New York address or phone numbers. Jeffrey Bigelow, the managing editor of this publication, was charged with violating the Virginia statute by publishing material which would encourage procurement of an abortion.[7]

Bigelow's contest of this misdemeanor in the County Court of Albemarle County was to no avail. In a de novo trial, the circuit court reached the same decision as the county court.[8] This was affirmed by the Virginia Supreme Court which held that the advertisement was not within the scope of protected rights under the first amendment.[9] The Court excluded this case from the blanket protection of "freedom of speech and press" due to the doctrine often referred to as "commercialism."[10] When an activity is of a purely commercial nature, there is no standing to claim a legitimate first amendment interest.[11] Since this advertisement "constituted an active offer to perform a service, rather than a passive statement of fact,"[12] it exceeded the permissible informational status. The court further held Virginia's statute valid as an exercise of the State's police power by finding a reasonable state interest "to ensure that pregnant women in Virginia who decided to have abortions come to their decisions without the commercial advertising pressure usually incidental to the sale of a box of soap powder."[13]

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515 Madison Avenue
New York, N.Y. 10022
or call any time
(212) 371-6670 or (212) 371-6650
AVAILABLE 7 DAYS A WEEK
STRICTLY CONFIDENTIAL. We will make
all arrangements for you and help you
with information and counseling.

Virginia Weekly, Feb. 8, 1971, at 2 *quoted in* 95 S. Ct. at 2227.

[7] [I]f any person, by publication, lecture, advertisement, or by the 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.

Act of March 30, 1960, ch. 358, § 18.1-63, [1960] Va. Acts 428 (repealed by amendment 1972). See text of present statute at note 23 *infra*.

[8] A Virginia statute allows de novo review on appeal to the circuit court from the county court. Va. Code Ann. §§ 16.1-132,-136 (1960).

[9] Bigelow v. Commonwealth, 213 Va. 191, 191 S.E.2d 173 (1972) (4-2 decision).

[10] *See* 60 Va. L. Rev. 154 (1974).

[11] *See* 78 Harv. L. Rev. 1191 (1965).

[12] Bigelow v. Commonwealth, 213 Va. 191, 193, 191 S.E.2d 173, 174 (1972).

[13] *Id.* at 196, 191 S.E.2d at 176.

On appeal to the United States Supreme Court,[14] the judgment was vacated and the case remanded for further consideration in light of the Court's decisions in *Roe v. Wade*[15] and *Doe v. Bolton.*[16] The Virginia Supreme Court again affirmed Bigelow's conviction.[17] Appealing a second time to the Supreme Court, the appellant was granted a reversal of his conviction in a 5-2 decision.[18]

Justice Blackmun, writing for the majority, first criticized the Virginia Supreme Court for not examining the appellant's argument that the statute was overbroad.[19] Reaffirming the position taken in *Dombrowski v. Pfister*[20] and other recent cases,[21] he stated that overbreadth is a facial attack upon the statute itself and therefore does not depend upon a showing of a constitutionally privileged activity.[22] However, the Court did not rest its decision on the possible overbreadth of the Virginia statute. Since the stated that overbreadth is a facial attack upon the statute itself in a manner which would effectively repeal its prior application, the question of overbreadth was in essence moot.[23]

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[14]Bigelow v. Virginia, 413 U.S. 909 (1973).

[15]410 U.S. 113 (1973).

[16]410 U.S. 179 (1973).

[17]Bigelow v. Commonwealth, 214 Va. 341, 200 S.E.2d 680 (1973). In a per curiam opinion, the Virginia court stated that the *Roe* and *Doe* decisions were not in conflict with its holding in the *Bigelow* case on the ground that *Roe* and *Doe* dealt strictly with abortion while *Bigelow* involved the question of whether the first amendment permits commercial advertising on the part of a commercial abortion agency.

[18]Justice Blackmun delivered the opinion of the Court, in which Chief Justice Burger and Justices Douglas, Brennan, Stewart, Marshall, and Powell joined. Justice Rehnquist, joined by Justice White, filed a dissenting opinion.

[19]95 S. Ct. at 2230.

[20]380 U.S. 479, 486 (1965).

[21]*See* Grayned v. City of Rockford, 408 U.S. 104, 114 (1972); Gooding v. Wilson, 405 U.S. 518, 520-21 (1972); Coates v. City of Cincinnati, 402 U.S. 611, 616 (1971); NAACP v. Button, 371 U.S. 415, 432 (1963); Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940); Owens v. Commonwealth, 211 Va. 633, 638-39, 179 S.E.2d 477, 481 (1971).

[22]The only limitation the Court placed on this general statement that overbreadth is a sufficient ground to afford standing was the exception ennunciated in Laird v. Tatum, 408 U.S. 1 (1972). The *Laird* Court stated that in order to obtain standing there must be a "claim of specific present objective harm or a threat of specific future harm." *Id.* at 13-14.

[23]The amended statute reads:

> [I]f any person by publication, lecture, advertisement, or by the sale or circulation of any publication, or through the use of a referral agency for profit, or in any other manner, encourage or promote 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.

VA. CODE ANN. § 18.1-63 (Cum. Supp. 1974). It is interesting to note that

Proceeding to the central issue of the case, whether this advertisement was within the scope of the first amendment, the Court held invalid the Virginia Supreme Court's assumption that first amendment guarantees of free speech and press are per se inapplicable to paid commercial advertisements.[24] Using the reasoning expressed in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*[25] and *New York Times Co. v. Sullivan*,[26] the Court claimed that merely because an item appeared in the form of an advertisement or had commercial interests did not negate all first amendment guarantees.[27] The test to be employed to determine whether an item is covered by the first amendment is that from *Valentine v. Chrestensen*.[28] Does the advertisement contain "factual material of clear 'public interest.' "[29] In the *Chrestensen* case, the owner of a United States Navy submarine prepared and printed a handbill advertising the boat and soliciting visitors for a stated admission fee. On the opposite side of the handbill was a protest message against action by the City Dock Department in refusing the respondent wharfage facilities at a city pier. New York City had a municipal ordinance which forbade distribution in the streets of commercial and business advertising matter.[30] In deciding this case, the Court found that the protest message was attached to the handbill advertising the exhibition of the submarine solely for the purpose of evading the ordinance. As such it failed to be within the realm of a protected right under the first amendment.

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the Court did not rest its opinion on overbreadth because the amendment rendered the issue moot. Yet, the first amendment issue, upon which the Court did rest its conclusion, would also have been moot in light of the same amendment.

[24] 95 S. Ct. at 2230-31.

[25] 413 U.S. 376, 384 (1973).

[26] 376 U.S. 254, 266 (1964).

[27] 95 S. Ct. at 2231.

[28] 316 U.S. 52 (1942).

[29] 95 S. Ct. at 2232.

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> [N]o person shall throw, cast or distribute, or cause or permit to be thrown, cast or distributed, any handbill, circular, card, booklet, placard or other advertising matter whatsoever in or upon any street or public place, or in a front yard or court yard, or on any stoop, or in the vestibule or any hall of any building, or in a letterbox therein; provided that nothing herein contained shall be deemed to prohibit or otherwise regulate the delivery of any such matter by the United States postal service, or prohibit the distribution of sample copies of newspapers regularly sold by the copy or by annual subscription. This section is not intended to prevent the lawful distribution of anything other than commercial and business advertising matter.

NEW YORK CITY, N.Y., SANITARY CODE § 318.

The *Chrestensen* case was distinguished in *New York Times Co. v. Sullivan*,[31] a case in which an elected official in Montgomery, Alabama claimed that an advertisement appearing in the newspaper libeled him. In examining this case, the Supreme Court noted that the advertisement was not "commercial" in the sense in which the word was used in *Chrestensen*. The distinguishing factor was that the advertisement in the *New York Times* case "communicated information, expressed opinion, recited grievances, protested claimed abuses and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern."[32]

Applying these standards to the present case, the Court claimed that the Women's Pavilion advertisement "did more than simply propose a commercial transaction."[33] The Court noted that the advertisement conveyed information of interest not only to readers in need of the services offered, but also to those interested in the law of another state, and those with a general curiosity about abortion reform in Virginia.[34] The fact that the advertisement stated that abortions were now legal in New York, and that there was no residency requirement for obtaining one, supported the Court's view.

The last aspect of the Court's examination of the scope of first amendment protection dealt with whether the State had an interest in its regulation of advertising. The majority concluded that Virginia could in no way supervise the internal affairs of New York.[35] Although Virginia could, through regulations, promote the dissemination of information which enables its citizens to make better informed decisions when they travel to another state, it could not, "under the guise of exercising internal police powers, bar a citizen of another state from disseminating information about an activity that is legal in that [other] State."[36] Finding no legitimate state interest for Virginia to prohibit this particular advertisement, the decision rested with the appellant.[37]

Justice Rehnquist, joined by Justice White, dissented from the opinion of the majority. Their major objections were the Court's finding of "public interest" from a mere two-line blurb and the majority's failure to note Virginia's state interest. The dissenters supported their view that the advertisement was strictly

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[31]376 U.S. 254 (1964).

[32]*Id.* at 266.

[33]95 S. Ct. at 2232.

[34]*Id.* at 2233.

[35]The Court noted the case of Huntington v. Attrill, 146 U.S. 657, 669 (1892), in support of this premise.

[36]95 S. Ct. at 2234.

[37]*Id.* at 2236.

"commercial" by noting that other groups provided the same service as Women's Pavilion without charging a referral fee.[38] Further, they found a legitimate state interest in the fact that this advertisement dealt with the health field.[39] It is considered within the power of a state to "maintain high ethical standards in the medical profession and to protect the public from unscrupulous practices."[40] Thus, finding a reasonable regulation which served a legitimate public interest, Justices Rehnquist and White opposed the holding of the court.[41]

The effect of this case[42] is to limit the "doctrine of commercialism."[43] By stating that any advertisement which contains "factual material of clear 'public interest' "[44] will be deemed protected

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[38]New York has since prohibited the use of referral fees:

> [N]o person, firm, partnership, association or corporation, or agent or employee thereof, shall engage in for profit any business or service which in whole or in part includes the referral or recommendation of persons to a physican, hospital, health related facility, or dispensary for any form of medical care or treatment of any ailment or physical condition. The imposition of a fee or charge for any such referral or recommendation shall create a presumption that the business or service is engaged in for profit.

N.Y. PUB. HEALTH LAW § 4501.1 (McKinney 1971). Virginia adopted a similar statute. VA. CODE ANN. § 18.1-417.2 (Cum. Supp. 1974).

[39]*See, e.g.*, North Dakota Pharmacy Bd. v. Snyder's Stores, 414 U.S. 156 (1973); Williamson v. Lee Optical Co., 348 U.S. 483, 490-91 (1955); Semler v. Dental Examiners, 294 U.S. 608, 612 (1935).

[40]95 S. Ct. at 2238.

[41]*Id.* at 2239-40. The majority opinion rejected this health protection argument because the State's attorneys made no claim that this particular advertisement in any way affected the quality of medical services within Virginia.

[42]Of course, one obvious interpretation of this case in its narrowest form is that the decision was merely the reversal of one man's conviction. Since the statute is no longer in effect and the Court failed to apply the 1972 amendment to this case, one could claim that no grounding for a precedent was set. A rationale for taking this position is seen in the majority's statement that Virginia could not apply the statute "as it read in 1971" to appellant's publication of the advertisement in question without unconstitutionally infringing upon his first amendment rights. The fact that the Court limited its decision to the prior statute and failed to discuss the effect of the amendment might lead to the conclusion that the Court only intended to reverse one man's conviction.

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> [C]ommercial advertising might be distinguished from political and social advocacy because the advertiser's motive or purpose appears to be economic gain, or because the advertisement seeks to influence private decisions among economic alternatives.

78 HARV. L. REV. 1191, 1192 (1965). *See also* 51 N.C.L. REV. 581 (1973); 40 U. CIN. L. REV. 870 (1971); 24 VAND. L. REV. 1273 (1971).

[44]95 S. Ct. at 2232.

by the first amendment, the court enlarged the scope of protected rights. Prior to this case, the court had recognized the right of a state to regulate the business of commercial solicitation and advertising within its borders.[45] Further, the courts had drawn arbitrary distinctions on the basis of the use of the advertising form to grant or not grant first amendment protection. Ideas in books and speeches received constitutional favor, while the same idea conveyed in the form of a commercial advertisement did not.[46] The *Bigelow* decision now eliminates the classification of material by the courts on the basis of the form in which it appears. Advertisements are not per se commercial. When there is an element of public interest, then the advertisement is removed from the commercial realm and offered the protection guaranteed under the first amendment.

A further and more liberal interpretation of this case is that it implies that any advertisement could obtain first amendment protection by including a statement which would be of public interest. It can be claimed that to circumvent the limitation of "commercialism," one need only attach a statement of genuine public interest to the advertisement. One can perhaps ask if the Court in future cases will go so far as to permit an advertiser of an automobile to print items prohibited by state statute where the automobile dealer places in his advertisement statements concerning pollution and emission standards. Further, will newspapers be permitted to include prostitution advertisements and drug sales on the basis that these are areas of social relevance to the general public? The opinion of the Court stresses the desire to keep public control separate from the newspaper. Quoting Chafee, the Court states that "liberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper."[47] The Court concluded with statements to the effect that censorship of the press or governmental action limiting free discussion should be kept to a minimum and only in those situations when it is absolutely essential should there be restrictions placed on the press.[48] The tendency of the court to use words which favor a non-restrictive policy by the government in what can and cannot be printed

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[45]*See, e.g.*, Head v. New Mexico Bd., 374 U.S. 424 (1963); Breard v. Alexandria, 341 U.S. 622 (1951); Packer Corp. v. Utah, 285 U.S. 105 (1932).

[46]Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 472 (1971).

[47]2 Z. CHAFEE, JR., GOVERNMENT AND MASS COMMUNICTIONS 1633 (1937), *quoted in* 95 S. Ct. at 2236.

[48]95 S. Ct. at 2236.

leads one to the conclusion that advertisements pertaining to prostitution and drugs might pass muster under the Court's standard.

Whatever view one takes as to the effect of this case, it is essential to note that the Court has taken a new position in defining "commercialism." The term no longer includes any advertisement but rather refers only to items which do not contain factual material of a "public interest." The Supreme Court in the *Bigelow* case has made a significant step in the direction of restoring the guarantees of "freedom of speech and press."

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