July 2015

First Amendment; Freedom of Speech; Commerical Speech and Advertising; Metpath, Inc. v. Imperato

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CONSTITUTIONAL LAW

First Amendment • Freedom of Speech

Commercial Speech and Advertising

Metpath, Inc. v. Imperato, 450 F. Supp. 115 (S.D.N.Y. 1978).

THE DECISION OF *Metpath, Inc. v. Imperato*[1] is indicative of the growing trend of the judiciary toward affording "commercial speech" the protective shield of the first amendment. As shown by *Metpath*, where the concern is advertising by a medical clinic, speech with commercial overtones is afforded protection where a public interest in the subject and content of the speech is demonstrated. However, the perimeters of such protection have not been defined by this or previous decisions.

The plaintiff, Metpath, is a New York corporation primarily engaged in conducting various medical tests. Defendants, the Department of Health and the Board of Health of New York City, and their commissioner, Pascal Imperato, M.D., were approached by Metpath in January and February, 1978. Metpath sought permission, as required by municipal regulation,[2] to publish certain advertisements in a daily New York City newspaper of general circulation.[3] The two proposed advertisements stated that HDL (high density lipoprotien) is a type of cholesterol which, medical researchers have discovered, apparently protects people from heart disease. The advertisement further stated that Metpath was available to perform laboratory testing to measure the HDL level of the blood, but specifically explained that these tests could only be performed on a physician's orders.[4]

Defendants, in response to Metpath's inquiry, stated that publication

[1] 450 F. Supp. 115 (S.D.N.Y. 1978).

[2] N.Y.C. HEALTH CODE § 13.21(h) (1973).

[3] Plaintiff Metpath submitted to defendants two proposed advertisements. Both advertisements contained general information concerning high density lipoproteins. 450 F. Supp. at 116 n.2, *citing* affidavit of Gary J. Cohen, ¶ 10, at 6, Metpath, Inc. v. Imperato, No. 78 Civ. 1016 (JMC) (S.D.N.Y., filed March 8, 1978). The court found the differences in the two proposed advertisements to be immaterial to the resolution of the dispute. 450 F. Supp. at 116 n.2.

[4] The text of one of the advertisements was as follows:

> Most People Think Eskimos Don't Know How to Live . . . They supposedly get their kicks by rubbing noses, for example. And there's something terribly fishy about their diet. However, what most people don't know is that Eskimos almost never die of heart disease. But, half a million black and white Americans do die of heart attacks each year—and about 30 million require treatment for some form of cardiovascular disease. We think there's something pretty fishy about that. Medical researchers have taken a closer look at Eskimos. One thing they discovered was that they have very high levels of a type of cholesterol known as HDL (High Density Lipoproteins) in their blood. So do a lot of other people who tend *not* to get heart disease—like young American women, vegetarians, and long-distance runners. HDL levels are highest in newborn

of the proposed advertisements would be in violation of a municipal regulation proscribing advertisement for patronage to the general public by a clinical laboratory,[5] and that any such advertising on the part of Metpath could result in revocation of the Metpath's clinical laboratory permit as well as possibly lead to criminal prosecution.[6]

Metpath thereupon commenced suit, by order to show cause, to declare the regulation unconstitutional and to enjoin enforcement of the regulatory ban on advertising.[7] The suit was consolidated with Metpath's application for a preliminary injunction at the consent of the parties.[8] The Board of Health subsequently officially decided that Metpath's proposed newspaper advertisement would be in direct violation of the regulation.[9]

Commissioner Imperato argued that the regulation should be viewed as a restriction on the "time, place, or manner of speech," as it did not prohibit Metpath from advertising in medical or scientific journals.[10] The court sharply rebuked this contention, stating that the regulation was not directed at the form of speech but rather at the identity of the listener as it forbade all

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babies—and decrease with age, especially in people who are physically inactive and eat high cholesterol diets. The encouraging thing about HDL is that it apparently *protects* people against heart disease—and it *can be increased* by regular exercise like jogging, by eating chicken and fish, instead of meat, and by giving up things like potato chips that are high in saturated fats. People are raising their HDL levels that easily. It's all possible because there's a simple medical laboratory test that measures HDL levels in your blood. It's a new test—performed by MetPath [*sic*], a medical laboratory which serves physicians, hospitals, and industry nationwide. We're doing a lot of HDL testing these days—for physicians whose patients want to check out their HDL levels and for people who are working to get their HDL levels up. We also perform hundreds of other tests that help physicians prevent, diagnose and treat disease—but we thought you should know about HDL. Because for once, a high level of something is good for you. And for once, you can do something about it. We're MetPath [*sic*]. We help your physician find out more about you. And even though all laboratory tests must be ordered through your physician, we thought you should know something about us. 450 F. Supp. at 121 app. B.

[5] The challenged regulation provides in full text: "A clinical laboratory shall not advertise for patronage to the general public by means of bills, posters, circulars, letters, newspapers, magazines, directories, radio, television, or through any other mediums." 450 F. Supp. at 116, *citing* N.Y.C. HEALTH CODE § 13.21(h) (1973).

[6] N.Y. CITY CHARTER § 558 (d) (1977), provides in pertinent part that "[a]ny violation of the health code shall be treated and punished as a misdemeanor . . . ." 450 F. Supp. at 117 n.4.

[7] Jurisdiction was based on the Civil Rights Act of 1964, 42 U.S.C. § 1983 (1970), and its jurisdictional counterpart, 28 U.S.C. § 1343(3) (1970). 450 F. Supp. at 116.

[8] 450 F. Supp. at 117.

[9] *Id.*

[10] *Id.* at 118.

advertising to the general public.[11] The court then balanced the first amendment interests against the interests which the defendants insisted the regulation sought to protect. The interests propounded by the defendants were found by the court to be wanting.

Defendants contended that the regulation sought to prevent the evils of:

> the alluring promise of relief, the raising of false hopes, the persuading of a doctor to run a test which in his opinion is not needed, will not help [the doctor] diagnose the patient any more and won't tell him a darn thing different to do about how he should treat the patient.[12]

As such, the regulation represents a valid exercise of the state's police power. The court rejected this contention, asserting that protecting a physician from annoying inquiries by his patient does not constitute a legitimate public interest.[13] However, even if such were a legitimate public interest, other interests protected by the first amendment clearly outweigh it.[14]

The court states that both Metpath and the public have significant first amendment interests "in the free flow of information concerning the relationship between heart disease and HDL levels in the blood."[15] The court used the decision of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[16] as well as various other Supreme Court examples,[17] to find that the Metpath advertisement contained information of "general public interest."[18] Addressing the issue that such information may harm the public, the court quoted from the decision of *Bates v. State Bar of Arizona*:[19]

> [T]he argument assumes that the public is not sophisticated enough to realize the limitations of advertising, and that the public is better

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[11] The court went on to say:

> Similarly, Metpath's ability to communicate directly with physicians cannot be deemed an alternative method of communicating with the general public. Individuals who do not see a doctor would be deprived of the information entirely. Others would not receive the information until their next doctor visit and then, only if the physician chose to disclose it.

Id.

[12] *Id., quoting* transcript of proceedings, at 14, Metpath Inc. v. Imperato, No. 78 Civ. 1016 (JMC) (S.D.N.Y. April 10, 1978).

[13] 450 F. Supp. at 118.

[14] *Id.*

[15] *Id.* at 117.

[16] 425 U.S. 748 (1976).

[17] Bigelow v. Virginia, 421 U.S. 809 (1975), recognized the right to information on the availability of abortion services; Bates v. State Bar of Ariz., 433 U.S. 350 (1977), recognized the public's right to know the cost of routine legal services.

[18] 450 F. Supp. at 117.

[19] 433 U.S. 350 (1977).

> kept in ignorance than trusted with correct but incomplete information. We suspect the argument rests on an underestimation of the public. In any event, we view as dubious any justification that is based on the benefit of public ignorance.[20]

Further, the court declared that Metpath's economic interest in advertising its services did not in and of itself serve to disqualify it from protection under the first amendment, since a free flow of information concerning the availability of services is essential to the individual economic decisions that form the basis of our free enterprise system.[21] Furthermore, as the defendants conceded, the contents of the proposed advertisement were factually accurate.[22] Public interest, especially in view of the fact that the advertising was in no way false or misleading, far outweighed defendants' contentions of the public's need for protection.[23] The court stated that, even assuming the state had a legitimate interest in determining the type of medical treatment or testing to be received by its citizens, such an interest would in no perceivable way be furthered by a total advertising ban such as that contained in the challenged regulation.[24] The advertising ban did not serve to prevent unnecessary and useless tests since tests such as the one advertised may only be made on a physician's orders; thus, any complaint on behalf of the state in that regard must be directed at the medical profession, not at Metpath.[25]

By declaring the New York Health Code regulation unconstitutional, the court has put an additional nail in the coffin of the doctrine espoused by the United States Supreme Court in *Valentine v. Chrestensen*.[26] From this

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[20] 450 F. Supp. at 119, *quoting* 433 U.S. at 374-75.

[21] 450 F. Supp. at 117-18. *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Counsel, Inc., 425 U.S. 748 (1976); Terry v. California State Bd. of Pharmacy, 395 F. Supp. 94 (N.D. Cal. 1975). For a discussion of the public's "right to know," *see* Archer, *Advertising of Professional Fees: Does the Consumer Have a Right to Know?* 21 S.D.L. REV. 310 (1976).

[22] 450 F. Supp. at 117-18.

[23] Defendants argued that the regulation is justified because,

> [t]he interest served is to protect the health and purse of the private citizen as well as the public treasury, by not permitting the clinical laboratories to determine what clinical tests to perform on a person and also to prevent unnecessary and useless tests that the clinical laboratory would perform in order to reap financial profits.

450 F. Supp. at 119, *citing* Defendants' Memorandum of Law, at 11, Metpath, Inc. v. Imperato, No. 78 Civ. 1016 (JMC) (S.D.N.Y. filed April 4, 1978).

[24] 450 F. Supp. at 119.

[25] Defendants had directed the court's attention to a recent Senate Subcommittee Report concerned with Medicare fraud by clinical laboratories involving kickbacks to physicians and overpricing. SENATE SPECIAL COMM. ON AGING, SUBCOMM. ON LONG-TERM CARE, FRAUD AND ABUSE AMONG CLINICAL LABORATORIES, No. 94-944, 94th Cong., 2d Sess. (1976). However, this subcommittee, after an extensive six month investigation, did not recommend to Congress any restriction on advertising by clinical laboratories. 450 F. Supp. at 118.

[26] 316 U.S. 52 (1943). In this case, the owner of a former United States Navy submarine displayed the vessel at various areas for profit. He brought his submarine to New York City, mooring it at a state pier. He then prepared and printed a handbill which advertised

landmark decision came the view that commercial advertising falls outside of the purview of first amendment protection. The Court there held that, although the state may not unduly burden or proscribe the dissemenation of information and opinion in the public interest, "the Constitution imposes no such restraint on the government as respects purely commercial advertising."[27] *Valentine* has long been cited for the proposition that extensive legislative regulation of commercial expression is constitutionally permissible. However, as evidenced by the court in *Metpath,* the *Valentine* doctrine is no longer used. The cause may well be the concurrence by Justice Douglas in *Cammarano v. United States,*[28] handed down some fifteen years after *Valentine.* Since then, the courts have engaged in some rather fine distinctions through the process of "balancing of interests" to bring an ever-increasing amount of commercial speech under the protective cloak of the first amendment.

The process of the breakdown of the *Valentine* doctrine has been through a halting case-by-case analysis of the interests involved and the rights to be protected. The Court began with the pre-*Valentine* premise that all commercial speech was subject to state regulation,[29] but then quickly began to back away from such a blanket proposition.[30] It became recognized that

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the submarine and solicited visitors for a stated admission fee. When he attempted to distribute the handbills on the streets, the Police Commissioner advised him that his activity violated § 318 of the Sanitary Code of New York City, which prohibited distribution in the streets of commercial or business advertisement matter. The submarine's owner was informed, however, that there was no such restriction concerning the distribution of handbills containing "information or public protest." This prompted him to prepare a double-fared handbill containing the submarine advertisement minus the fee information on the one side and a protest against the action of the City Dock Department in denying him wharfage facilities on the other. The police stopped the distribution of the handbill, so the owner sought to enjoin the former from interfering with his distribution. The district court granted an interlocutory injunction, 34 F. Supp. 596 (S.D.N.Y. 1940), then granted a permanent injunction. The court of appeals affirmed. 122 F.2d 511 (2d Cir. 1941).

[27] 316 U.S. at 54.

[28] 358 U.S. 498 (1959). Only Justice Douglas, in his concurring opinion, referred to Valentine, stating that,

> [t]he ruling was casual, almost offhand. And it has not survived reflection. That "freedom of speech or of the press," directly guaranteed against encroachment by the Federal Government and safeguarded against state action by the Due Process Clause of the Fourteenth Amendment, is not in terms or by implication confined to discourse of a particular kind and nature.

Id. at 514 (Douglas, J., concurring).

[29] *See, e.g.,* Jones v. Opelika, 316 U.S. 584 (1941) (upholding a city ordinance requiring book agents to obtain a license before operating within the city, as applied to Jehovah's Witnesses); *see generally* Baker, *Commercial Speech: A Problem in the Theory of Freedom,* 62 IOWA L. REV. 1 (1976).

[30] Murdock v. Pennsylvania, 319 U.S. 105 (1943). The Court declared a licensing tax to be unconstitutional which, as construed, required Jehovah's Witnesses to pay tax as a condition to the pursuit of their religious activities, namely selling religious books and pamphlets door to door. Note that on the same day the Court vacated and reversed upon hearing the judgment entered in Jones v. Opelika. 319 U.S. 103 (1943).

competing interests exist on each side, and that these interests must be weighed against each other to determine which side would prevail. In *Beard v. Alexandria,*[31] the appellant was convicted of selling magazines door to door without having first obtained the consent of the owners of the residences, in violation of a municipal ordinance. The Court balanced the homeowners' desire for privacy against the publisher's right to distribute publications in the way he felt most profitable, and the homeowners' interest protected by the ordinance prevailed. However, the Court emphasized that "the fact that periodicals are sold does not put them beyond the protection of the First Amendment."[32]

These first steps bringing commercial speech under the protection of the first amendment led the Court to distinguish between "purely commercial," "informational" (*e.g.*, political opinions), and "commercial mixed with informational" speech as a means of circumventing the dictate of *Valentine.*[33] Speech in the form of a handbill, such as that in *Valentine,* became an example of the "purely commercial" speech which the states could validly regulate.[34] On the other hand, speech which communicated information, expressed opinion, or protected claimed abuses became examples of protected speech.[35] A state statute which made it an offense for a person or organization, not a party to a judicial proceeding and having no pecuniary right or liability therein, to solicit business for any attorney, and which forbade the solicitation of such business by attorneys themselves, was deemed unconstitutional; the statute contained "the gravest danger of smothering all discussion looking to the eventual institution of litigation on behalf of the rights of members of an unpopular minority."[36]

In declaring that various forms of speech fall outside of the protection of the first amendment, the courts have concentrated on the text of the speech and the affected interests of the public. One noted decision affirmed a Federal Communications Commission ruling requiring radio and television stations which carry cigarette advertising to devote a significant amount of broadcast time to the presentation of the case against cigarette smoking.[37] Considerations prompting the decision were threefold. First, the court noted that the ruling did not actually "ban" any speech.[38] Further, any speech

[31] 341 U.S. 622 (1951).

[32] *Id.* at 642.

[33] *See, e.g.,* Bevier, *Political Speech,* 30 STAN. L. REV. 299 (1978); Comment, *Freedom of Speech Protection for Commercial Advertising,* 42 TENN. L. REV. 573 (1975).

[34] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[35] NAACP v. Button, 371 U.S. 415 (1962).

[36] *Id.* at 434. *See also* United Trans. Union v. State Bar of Mich., 401 U.S. 576 (1971).

[37] Banzhaf v. F.C.C., 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied,* 396 U.S. 842 (1969).

[38] 405 F.2d at 1101.

which might be chilled by the ruling barely qualified as being constitutionally protected.[39] Finally, the court stated that "many cases indicate that product advertising is at least less rigorously protected than other forms of speech. Promoting the sale of a product is not ordinarily associated with any of the interests the first amendment seeks to protect."[40] Speech such as this was considered to be merely a form of merchandising subject to regulation for public purposes as with other business practices.[41] Cases such as *Banzhaf v. F.C.C.* point up the commercial nature of the disputed speech as totally dominant over any informational aspect. Where such commercial tones dominate, the courts have not been hesitant to declare the affected speech beyond the purview of the first amendment.[42]

As evidenced by *Metpath, Inc. v. Imperato,* the courts are looking with increased favor upon commercial speech containing information of value to the public. The fact that speech relates to an advertisement does not in and of itself brand the speech "commercial" and deprive it of all first amendment protection. However, this is not to say that all commercial speech is entirely free from reasonable regulation.[43] Regulatory statutes which, as an exercise of the state's police power, have a real and substantial relation to the health, morals, safety and welfare of the citizens are valid.[44] This, indeed, was one of the main arguments propounded by the defendants in *Metpath.*

There have recently been a number of cases dealing with the validity of statutes prohibiting the advertisement of the retail price of prescription drugs, prescription eyeglasses, and contraceptives.[45] The arguments for upholding such regulations include the contention that advertising such prices would increase the demand for such a product (thereby precipitating an atmosphere conducive to a drug crisis),[46] that such

[39] *Id.* at 1101-02.

[40] *Id.* at 1101.

[41] *Id.* at 1102.

[42] *See, e.g.,* Rowan v. United States Post Office Dept., 300 F. Supp. 1036 (C.D.Cal. 1969), *aff'd,* 397 U.S. 728 (1970) (concerning the 39 U.S.C. § 3008 (1970) prohibition of pandering advertisements in the mail); Associates & Aldrich Co. v. Times Mirror Co., 440 F.2d 133 (9th Cir. 1971) (federal court may not compel publisher of a daily newspaper to accept and print advertising in the exact form submitted); Heilman v. Wolke, 427 F. Supp. 730 (E.D. Wis. 1977) (state may validly regulate the advertisement of pirated records and tapes).

[43] *See* Terry v. California State Bd. of Pharmacy, 395 F. Supp. 94 (N.D.Cal. 1975).

[44] Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

[45] *See, e.g.,* Maryland Bd. of Pharmacy v. Sav-A-Lot, Inc., 270 Md. 103, 311 A.2d 242 (1973); Terry v. California State Bd. of Pharmacy, 395 F. Supp. 94 (N.D.Cal. 1975); Terminal-Hudson Electronics, Inc. v. Department of Consumer Affairs, 407 F. Supp. 1075 (C.D.Cal. 1976); Population Servs. Int'l v. Wilson, 398 F. Supp. 321 (S.D.N.Y. 1975); Florida Bd. of Pharmacy v. Webb's City, Inc., 219 S.2d 681 (Fla. 1969).

[46] 270 Md. at 109, 311 A.2d at 246.

regulations prevent unhealthy rivalry within the profession,[47] that encouraging consumers to shop around would remove pharmacists from a position in which they can monitor prescriptions to determine if the consumer is using antagonistic drugs,[48] and that the advertising of prices would subject physicians to pressures by their patients to prescribe larger quantities of drugs at one time to enable them to take advantage of quantity discounts.[49] The courts, for the most part, have dispensed with such arguments, finding the public interest in receipt of such information to be more deserving of protection.[50]

Two major pronouncements by the United States Supreme Court are most often cited and illustrate the "pure" commercial speech classification and the balancing theme followed by the courts. In *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*,[51] the Supreme Court upheld a city ordinance which prohibited using sex classifications in "help wanted" columns.[52] The Court discussed the commercial speech doctrine as being traceable to *Valentine* and went on to say that "subsequent cases have demonstrated, however, that speech is not rendered commercial by the mere fact that it relates to an advertisement."[53] The decision further stated:

> If a newspaper's profit motive were determinative, all aspects of its operation . . . would be subject to regulation . . . . Such a basis

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[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.* at 246-53.

[51] 413 U.S. 376 (1976).

[52] *Id.*

[53] 376 U.S. 254 (1964), *citing* New York Times Co. v. Sullivan. Respondent, an elected commissioner of Montgomery, Alabama, brought a civil libel action against four individuals and the New York Times. These individuals had placed and published a full-page advertisement in the New York Times entitled "Heed Their Rising Voices." They sought funds to support the nonviolent Southern Negro Student Movement, "the struggle for the right-to-vote," and the legal defense of Dr. Martin Luther King, Jr., against a perjury charge then pending in Montgomery. The advertisement also said the nonviolent protests had been met by intimidation, shotguns and tear gas by the "police." The jury in the Circuit Court of Montgomery County awarded respondent $500,000 in damages, the full amount claimed against all petitioners, and the Alabama Supreme Court affirmed. The United States Supreme Court reversed, rejecting respondent's argument that *Valentine* denied the advertisement protection of the first amendment. The advertisement, said the Court, "was not a 'commercial' advertisement in the sense in which the word was used in *Valentine*. It communicated information, expressed opinion, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest concern. *See* NAACP v. Button, 371 U.S. 415, 435. That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold." 376 U.S. at 265.

> for regulation clearly would be incompatible with the First Amendment. The critical feature of the advertisement in *Valentine v. Chrestensen* was that, in the Court's view, it did no more than propose a commercial transaction . . . . In crucial respects, the advertisements in the present record resemble the *Chrestensen* rather than the *Sullivan* advertisement . . . . Each is no more than a proposal of possible employment. The advertisements are thus classic examples of commercial speech.[54]

On the other hand, in *Bigelow v. Virginia,*[55] the Court found a redeeming factor in advertisements concerning the availability of help in obtaining an abortion in New York.[56] Citing both *Pittsburgh Press* and *New York Times Co. v. Sullivan,* the Court emphasized the fact that speech is not stripped of first amendment protection merely because it appears in the form of a paid commercial advertisement.[57] The Court distinguished *Chrestensen* by finding that "[this] holding is distinctly a limited one: the ordinance was upheld as a reasonable regulation of the manner in which commercial advertising would be distributed."[58]

The courts have seemingly rejected a broad application of the *Chrestensen* doctrine and have been willing to afford commercial speech a somewhat limited form of first amendment protection. In groping for identifiable guidelines as to what is and is not within the scope of the protection so allowed, a step-by-step process has been followed of identifying the disputed speech as "purely commercial" and thus generally denied protection, as opposed to speech of a "mixed nature" to which protection is generally extended. The latter result was reached by balancing the interests sought to be protected by the challenged statute or regulation against the interests forwarded by the first amendment.

Metpath is representative of the trend established by *Bigelow* and *Pittsburgh Press.* It serves to further entrench the "purely commercial" versus "mixed nature" dichotomy, emphasizing the balancing aspects involved

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[54] 413 U.S. at 394-95.

[55] 421 U.S. 809 (1975).

[56] *Id.* at 811-13. Bigelow, the director and managing editor of a weekly newspaper published in Virginia, printed an advertisement by the Women's Pavilion, an agency assisting in the procurement of abortions, in violation of VA. CODE § 18.1-63 (1960).

[57] The Court stressed that:

> [t]he fact that the particular advertisement in appellant's newspaper had commercial aspects or reflected the advertiser's commercial interests did not negate all First Amendment guarantees . . . . The existence of commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment.

Id. at 818.

[58] *Id.* at 819.

in the disputed constitutional issue. The focus of the court in *Metpath* on the fact that the proposed advertisements contain "information concerning scientific studies of 'general public interest' "[59] establishes the fact that the public interest which the disputed speech serves to benefit or further is of paramount importance in allowing certain speech of a commercial form to fall within the protective embrace of the first amendment. "Public interest" has become the watchword of first amendment protection in the commercial speech area.

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[59] 450 F. Supp. at 117.

CONSTITUTIONAL LAW

First Amendment • Freedom of Speech

Obscenity

Pinkus v. United States, 98 S. Ct. 1808 (1978).

IN its latest attempt to define a workable standard for obscenity rulings, the United States Supreme Court has held that children may not be included in a court's instruction as to the social group to whom the material would or would not be obscene. However, the Court held that sensitive persons and deviant groups may be included without unduly lowering the threshold of a finding of obscenity. Thus, *Pinkus v. United States*[1] clarified the "community" whose judgment should define obscenity.

William Pinkus was convicted by jury on eleven counts of sending obscene material through the U.S. mail.[2] The conviction was reversed on appeal as the violation occurred in 1971 and Pinkus had been tried under the *Miller v. California*[3] standards enunciated by the Supreme Court in 1973.[4] Pinkus was then convicted on the same eleven counts on retrial under the standards set forth in *Roth v. United States*[5] and *Memoirs v. Massachusetts,*[6] the conviction this time being affirmed by the court of appeals.[7] The

[1] 98 S. Ct. 1808 (1978).

[2] The charges were for criminal violations of 18 U.S.C. § 1461 (1970).

[3] 413 U.S. 15 (1973).

[4] United States v. Pinkus, No. 73-2900 (9th Cir. Feb. 5, 1975).

[5] 354 U.S. 476 (1957).

[6] 383 U.S. 413 (1966).

[7] United States v. Pinkus, 551 F.2d 1155 (9th Cir. 1977).