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Comments: Linmark Associates, Inc. v. Township of Willingboro, 97 S. Ct. 1614 (1977) — "For Sale" Signs: The Right to Yell "Fire" in an Integrating Neighborhood?

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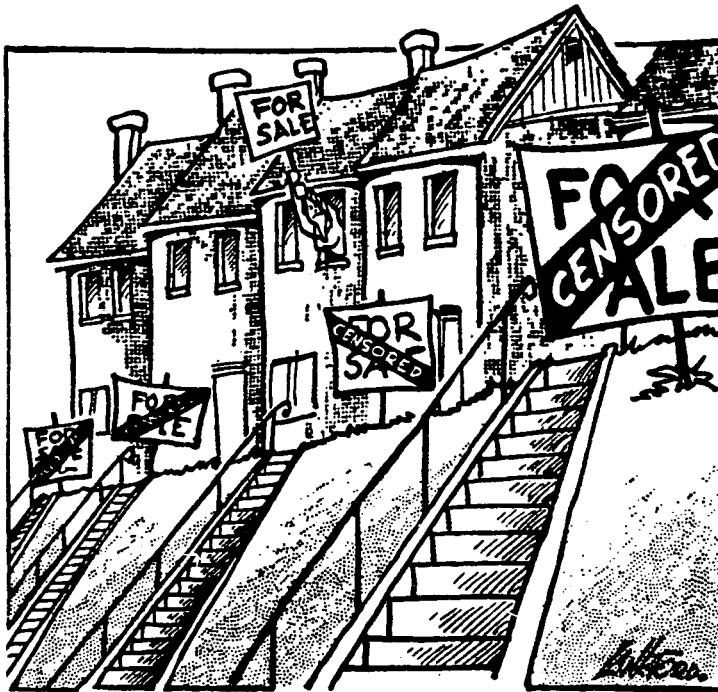
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COMMENTS

LINMARK ASSOCIATES, INC. v. TOWNSHIP OF WILLINGBORO, 97 S. Ct. 1614 (1977) – “FOR SALE” SIGNS: THE RIGHT TO YELL “FIRE” IN AN INTEGRATING NEIGHBORHOOD?

In Linmark, the Supreme Court held unconstitutional a ban on “For Sale” and “Sold” lawn signs that was enacted to curb what residents perceived as panic selling by white homeowners. The authors analyze the effect of this case on “For Sale” sign bans that exist in Maryland. The authors also examine the decision in light of other recent commercial speech cases which have established a first amendment interest in the free flow of truthful and legitimate commercial information.



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I. INTRODUCTION

Since the mid-1960's, enormous progress has been made in the field of civil rights, particularly in the effort to end housing segregation. With the enactment of a comprehensive federal fair housing law¹ and the United States Supreme Court's landmark

1. Title VII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3631 (1970).

decision in *Jones v. Alfred H. Mayer Co.*,² the law opened the way for the influx of minority citizens into previously all white neighborhoods. The integration of minorities into many once segregated areas has not always been a smooth process, however.³ This has been partially the result of the infection of fear among residents that their formerly all white, presently integrating, communities were being steadily metamorphosized into disproportionately black enclaves. Searching for the causes of their perceived problem, many communities arrived at the conclusion that "For Sale" and "Sold" lawn signs created the impression that "too many" whites were leaving, and "too many" blacks were entering, their communities. This impression, in turn, was believed to be the cause of a panic psychology that further catalyzed white egress from these communities.

Many communities, including some in Maryland,⁴ enacted ordinances prohibiting persons from posting "For Sale" or "Sold" signs in front of homes.⁵ While there are a number of conceivable reasons for the enactment of these ordinances,⁶ local governments have acted, typically, for two reasons. One reason for sign ban ordinances is to prevent "blockbusting" or "panic peddling," the practice of inducing property owners to sell their homes at a price lower than fair market value because of the actual or rumored entry

2. 392 U.S. 409 (1968) (held that an 1886 civil rights law, 42 U.S.C. § 1982, enacted under the authority of the thirteenth amendment, barred all discrimination in housing, private as well as public).

3. See generally United States Commission on Civil Rights, *Twenty Years After Brown: Equal Opportunity in Housing* (1975).

4. See text accompanying notes 134-152 *infra*.

5. For examples of these ordinances, see Comment, *The Constitutionality of a Municipal Ordinance Prohibiting "For Sale," "Sold," or "Open" Signs to Prevent Blockbusting*, 14 ST. LOUIS L.J. 686 (1970).

6. Some reasons include: (1) encouragement of "racial steering," the practice of showing prospective black home buyers only homes in black areas while steering them away from white areas. See, e.g., *Linmark Associates, Inc. v. Township of Willingboro*, 535 F.2d 786, 803-04 (3rd Cir. 1976). See generally Note, *Racial Steering: The Real Estate Brokers and Title VIII*, 85 YALE L.J. 153 (1975); (2) concern for the safety and health of the neighborhood residents. Laska & Hewitt, *Are Laws Against "For Sale" Signs Constitutional? Substantive Due Process Revisited*, 4 REAL ESTATE L.J. 153, 155 (1975); (3) to maintain the appearance of the community, i.e. aesthetic concerns. *Id.* See also Note, *Aesthetic Zoning: A Current Evaluation of the Law*, 18 U. FLA. L. REV. 430 (1965).

The first purpose is illegal under the Federal Fair Housing Act, 42 U.S.C. § 3604 (Supp. V 1975) (this section also makes the practice of "blockbusting" or "panic peddling" illegal). And as "For Sale" signs are too few and too small to be of genuine aesthetic concern or to present a realistic danger to the safety and health of a community's residents, the latter purposes cannot be legitimately asserted as rational bases for the ban of "For Sale" signs. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); Note, *Architecture, Aesthetic Zoning and the First Amendment*, 28 STAN. L. REV. 179 (1975); Annot., 58 A.L.R.2d 1314 (1958).

of minorities into the neighborhood.⁷ The other typical reason for sign bans is to prevent or stem "panic selling," which occurs when a resident, who is otherwise disposed to remain in his neighborhood, succumbs to any one or more of a number of pressures to move out, when it appears that minorities are moving in.⁸

While there have been numerous attacks on the constitutionality of bans on "For Sale" signs,⁹ nearly all of these ordinances were held to be constitutional, prior to *Linmark*. A typical community which perceived that it ailed from a steadily increasing depletion of white homeowners and applied a sign ban as its hoped-for cure was the Township of Willingboro, New Jersey. The citizens of Willingboro soon learned from the United States Supreme Court that the township's proposed cure, from a constitutional perspective, was worse than the perceived disease. The Supreme Court in *Linmark* held that Willingboro's ordinance was an unconstitutional abridgment of free, albeit commercial, speech.¹⁰

II. THE LINMARK SETTING

At the time of trial of *Linmark*, approximately fifty thousand people lived in Willingboro, New Jersey, which had always been a transient community, partly due to its proximity to Fort Dix, McGuire Air Force Base, and offices of several national corporations.¹¹ Because of racial discrimination by Willingboro's developer during the 1950's, the township was initially an almost all white enclave.¹² By 1970, however, Willingboro had substantially achieved

7. See, e.g., *State v. Wagner*, 15 Md. App. 413, 419, 291 A.2d 161, 164 (1972) (upholding constitutionality of Maryland's antiblockbusting statute, MD. ANN. CODE art. 56, §230A). For further treatment of "blockbusting," see generally Comment, *Blockbusting: Judicial and Legislative Response to Real Estate Dealers' Excesses*, 22 DEPAUL L. REV. 818 (1973); Note, *Blockbusting: A Novel Statutory Approach to an Increasingly Serious Problem*, 7 COLUM. J. L. & SOC. PROB. 538 (1971); Note, *Blockbusting*, 59 GEO. L. J. 170 (1970).

8. See, e.g., *Barrick Realty Inc. v. City of Gary Indiana*, 354 F. Supp. 126, 135 (N.D. Ind. 1973), *aff'd*, 491 F.2d 161 (7th Cir. 1974). The district court distinguished "blockbusting" or "panic peddling" from "panic selling" by pointing out that the former depends upon direct inducements or face-to-face contact between people while the latter does not. 354 F. Supp. at 134-35.

9. Such attacks have usually challenged the ordinances on the basis of: 1) the municipality's statutory constitutional authority to so legislate, 2) the general acceptability of the methods which the municipality uses, 3) preemption of the subject matter by other state law, usually the real estate broker licensing statute, 4) freedom of speech and contract, or 5) the restriction on the right to travel. Laska & Hewitt, *supra* note 6, at 154 n.2.

10. 97 S. Ct. 1614 (1977).

11. *Id.* at 1615, 1617.

12. Willingboro was developed by Levitt & Sons in the late 1950's as a middle-income, residential community. When Levitt refused to sell its houses to minority group members, the New Jersey Supreme Court enjoined such discrimination. *Levitt and Sons, Inc. v. Division Against Discrimination in State Department of Education*, 31 N.J. 514, 158 A.2d 177, *appeal dismissed*, 363 U.S. 418 (1960). A Human Relations Commission was then formed, and the development of the

its goal of racial integration; from 1960 to 1973, the township experienced an expansion in its nonwhite population from a low of .005 percent to a high of 18.2 percent.¹³ By the early 1970's, however, the residents of Willingboro became concerned about the possibility that the township's population would become disproportionately black in race and that property values would decline accordingly.¹⁴ The Willingboro Township Council held public meetings at which it was concluded that the major cause of the township's population change was the proliferation of "For Sale" and "Sold" lawn signs in front of Willingboro homes.¹⁵ These lawn signs, the township council concluded, had created a panic psychology among whites that led to panic selling. The council determined that the rate of white egress and black ingress would stabilize if there were no "For Sale" and "Sold" signs on front lawns in Willingboro. The councilpersons enacted an ordinance banning the posting of any such signs on residential property in the township.¹⁶ Consequently, an action was brought by a corporate property owner and a real estate broker against the township, alleging that the ordinance unconstitutionally deprived them of their right of free speech under the first and fourteenth amendments of the United States Constitution.¹⁷

The United States District Court for the District of New Jersey held the ordinance unconstitutional, reasoning that the sign ban amounted to "censorship" by denying home owners the right freely to express their desires to sell their property.¹⁸ The court added that "it appears that the true thrust of these sign ban ordinances is to promote a racial balance, or more properly, a racial imbalance in order to perpetuate existing racial lines."¹⁹ Without these signs, the court continued, buyers would be forced to turn to realtors who would "steer" blacks away from white areas.²⁰ The district court concluded

community with full integration was actively encouraged. "Willingboro became a racially integrated community with each of its ten 'parts' having all racial and ethnic groups living together, with no section which could be denominated a white section, a black section or a Spanish-speaking section." *Linmark Associates, Inc. v. Township of Willingboro*, 535 F.2d 786, 789 (3rd Cir. 1976).

13. 97 S. Ct. at 1615.

14. *Id.* at 1615-16.

15. *Id.*

16. *Id.* at 1616.

17. The first amendment guarantee of free speech has been held applicable to the states under the fourteenth amendment "due process" clause. *Gitlow v. New York*, 268 U.S. 652, 666 (1925). Other constitutional questions raised at the district court and court of appeals levels, 535 F.2d at 789, were not addressed by the Supreme Court. *Linmark Associates*, a New Jersey corporation, sold the property in question, and the case therefore became moot as to its interests. The Court ruled, however, that there remained a case and controversy as to the realtor Mellman. 97 S. Ct. at 1615 n.1.

18. *Linmark Associates, Inc. v. Township of Willingboro*, No. 74-1120 (D.N.J. Feb. 20, 1975). The district court's unreported opinion is reproduced in a footnote to the opinion of the court of appeals, 535 F.2d 786, 792-93 n.5.

19. *Id.*

20. *Id.*

that the ultimate effect of the sign ban could be to freeze in past discrimination by denying blacks a fair opportunity to find suitable housing.²¹

The United States Court of Appeals for the Third Circuit reversed the district court and upheld the ordinance.²² The court based its analysis on the "commercial speech" exception to the first amendment's free speech guarantee, first recognized in the 1942 Supreme Court case of *Valentine v. Chrestensen*.²³ Recognizing the questionable authority of the doctrine as initially pronounced and in light of recent decisions,²⁴ the court of appeals updated the standard for determining whether commercial speech should be accorded first amendment protection.

The standard applied by the court was two-pronged. The court first determined whether the speech involved — the message communicated by "For Sale" signs — was primarily commercial.²⁵ Finding that it was, because the signs merely proposed a commercial transaction,²⁶ the court applied a balancing test: The governmental interest²⁷ in the regulation of the signs was weighed against any potential infringement of first amendment rights.²⁸ The court of appeals experienced little difficulty in tipping the scales in favor of the valid governmental interest in preventing panic selling.²⁹ The court reasoned that the evidence established that Willingboro had been integrated remarkably free of discriminatory practices, that there was no evidence of actual or intended racial discrimination in the sale of homes in Willingboro, and that it was to resist the threat to the township's integrated status that the council enacted the sign ban ordinance.³⁰

21. *Id.*

22. *Linmark Associates, Inc. v. Township of Willingboro*, 535 F.2d 786 (3rd Cir. 1976), *rev'd*, 97 S. Ct. 1614 (1977).

23. 316 U.S. 52 (1942). See text accompanying notes 42-47 *infra*.

24. See *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973); text accompanying notes 51-64 *infra*.

25. 535 F.2d at 794-95.

26. *Id.*

27. The court stated that the "paramount governmental public interest" here was the "termination of a panic selling psychology and its impetus to housing segregation." *Id.* at 795.

28. *Id.* at 795-805.

29. *Id.* at 795, 805.

30. *Id.* at 798. The court also commented, *id.* at 801:

To slow an artificial, fear-accelerated pace of racial change is not to seek a specific population ratio and is not itself a form of racial discrimination. When a fact of human experience, such as panic selling, is recognized and acted against by those on the firing line in the community, we the more cloistered should not interpose our conjectures regarding motive to stifle such action, in the absence of clear evidence of violation of fundamental constitutional rights.

The United States Supreme Court reversed.³¹ The Court framed the issue as "whether the first amendment permits a municipality to prohibit the posting of 'For Sale' or 'Sold' signs when the municipality acts to stem what it perceives as the flight of white homeowners from a racially integrated community."³² Justice Marshall expressed the unanimous view of the eight participating members of the Court,³³ in holding that the Willingboro ordinance was constitutionally infirm. The Court affirmed that commercial speech was within the scope of the free speech guarantee of the first amendment, and found that Willingboro's ordinance violated the petitioners' right to free speech for two reasons. Willingboro failed to establish a sufficient relationship between the sign ban and a diminution of panic selling³⁴ and, more importantly, impaired the free flow of truthful information of "vital concern" to the township's residents.³⁵

A complete analytical understanding of *Linmark* can best be gained through an item by item examination of the considerations faced and dealt with by the Supreme Court in its decision. Essentially, both the Supreme Court and the Court of Appeals for the Third Circuit applied a "balancing test"³⁶ in arriving at their respective conclusions. Why, then, did their results differ? The answer lies in the two courts' resolutions of two questions. How strong is the first amendment interest in commercial speech which takes the form of lawn signs advertising the availability of homes for sale? How important is the governmental interest in banning these signs in order to diminish what the community perceives to be panic selling?

III. COMMERCIAL SPEECH

A. Definition

The standards by which particular speech has been deemed to be "commercial" have never been delineated by the Supreme Court. The most that the Court has said about the subject is that commercial speech is speech "which does no more than propose a commercial transaction."³⁷ One student commentator recently proposed a definition of commercial speech that seems to have been implicit in the Court's approach to the concept:

31. *Linmark Associates, Inc. v. Township of Willingboro*, 97 S. Ct. 1614 (1977).

32. *Id.* at 1615.

33. Rehnquist, J., did not participate. *Id.* at 1621.

34. *Id.* at 1619-20.

35. *Id.* at 1619.

36. The court of appeals' use of this test can be found at 535 F.2d at 796-805, while the Supreme Court's analysis is at 97 S. Ct. at 1619-20.

37. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976).

[T]he definition of commercial speech . . . is (1) speech that refers to a specific brand name product or service, (2) made by a speaker with a financial interest in the sale of the advertised product or service, in the sale of a competing product or service, or in the distribution of the speech, (3) that does not advertise an activity itself protected by the first amendment.³⁸

The speech in "For Sale" signs fits very neatly into this proposed definition. A real estate "For Sale" sign refers to a specific home, is made by either the homeowner or broker, both of whom possess a financial interest in the sale of the home, and does not advertise an activity — the buying and selling of homes — itself protected by the first amendment.³⁹ A "For Sale" sign is, therefore, a form of commercial speech.⁴⁰

B. History

Commercial speech, initially accorded no first amendment protection, today enjoys a large measure of such protection.⁴¹ This form of speech was first recognized by the Supreme Court in the 1942 case of *Valentine v. Chrestensen*,⁴² in which the Court upheld the constitutionality of a New York City ordinance forbidding distribution of printed handbills bearing commercial advertising matter. Chrestensen printed and distributed handbills which solicited the public to tour his submarine exhibit, on one side, and protested the city's denial of wharfage for his submarine, on the other side.⁴³ In a brief opinion, the Supreme Court held that "purely commercial advertising" was not accorded first amendment protection and was subject to state legislative regulation.⁴⁴

38. Comment, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205, 236 (1976) [hereinafter cited as *Commercial Advertising*].

39. Compare *Bigelow v. Virginia*, 421 U.S. 809 (1975) with *Linmark*. The buying and selling of homes has never been held to be protected by the first amendment.

40. 535 F.2d at 794-96.

41. For a fuller treatment of the background of the commercial speech doctrine and its status today, see generally Redish, *The First Amendment in the Market Place: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429 (1971); Comment, *The Right to Receive and the Commercial Speech Doctrine: New Constitutional Considerations*, 63 GEO. L.J. 775 (1975); *Commercial Advertising*, *supra* note 38.

42. 316 U.S. 52 (1942).

43. *Id.* at 54. The Court stated that the protest against official action had been added only in an attempt to evade the ordinance, and therefore ignored this aspect of the handbill, classifying it as "commercial advertising."

44. *Id.*

The Court espoused a standard, later labeled the "primary purpose" test,⁴⁵ for determining whether speech was considered commercial.⁴⁶ Under this test, if the speaker's objective was motivated by monetary profit, the speech would be deemed commercial and given no first amendment protection. If the speaker's objective was to disseminate information or views concerning issues of public interest, the speech was afforded the full protection of the first amendment. There was, thus, a two-level theory of the first amendment that classified speech as either fully protected or wholly unprotected.⁴⁷

The commercial speech doctrine lay relatively dormant until 1964, when, in *New York Times Co. v. Sullivan*,⁴⁸ the Supreme Court rejected the primary purpose test in favor of the "content" test.⁴⁹ Under this test, if the content of the communication expressed information of public interest and concern, it was afforded the full protection of the first amendment. The *Sullivan* Court, however, distinguished *Chrestensen's* "purely commercial" advertising from the "editorial" advertising at issue in *Sullivan*,⁵⁰ thereby leaving

45. *Commercial Advertising*, *supra* note 38, at 208. In cases involving Jehovah's Witnesses, the Court has held that since the primary purpose of the Witnesses was to engage in religious activities, their solicitations were clearly more than "purely commercial speech." *E.g.*, *Martin v. Struthers*, 319 U.S. 141 (1943); *Jamison v. Texas*, 318 U.S. 413 (1943).

46. 316 U.S. at 53-54. The reasoning of the Court was later to be severely criticized by Justice Douglas who had joined the majority in *Chrestensen*, apparently unaware of its implications. *See Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 397-404 (1973) (Douglas and Stewart, JJ., dissenting) (*Chrestensen* should be limited to its facts); *Dun & Bradstreet, Inc. v. Gorge*, 404 U.S. 898, 905 (1971) (Douglas, J., dissenting from denial of certiorari) (*Chrestensen* "ill-conceived"); *Cammarano v. United States*, 358 U.S. 498, 513-14 (1959) (Douglas, J., concurring) (*Chrestensen* ruling was "casual, almost offhand, and does not survive reflection").

47. *Commercial Advertising*, *supra* note 38, at 208-09. When first amendment rights are deemed to exist, the Court accords them a "preferred" position, *Thomas v. Collins*, 323 U.S. 516, 530 (1945), and requires a demonstration of a "legitimate," "significant," or "compelling" governmental interest to justify infringements. *See, e.g.*, *Miller v. California*, 413 U.S. 15, 18 (1973) (mailing of unsolicited pornography); *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972) (black student demonstration at high school); *NAACP v. Button*, 371 U.S. 415, 438 (1963) (Virginia statute banning improper solicitation of legal or professional business held inapplicable to NAACP activities). Wholly unprotected forms of speech include "fighting words," *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); obscenity, *Roth v. United States*, 345 U.S. 476 (1957), libel, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and incitement, *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

48. 376 U.S. 254 (1964). *Sullivan* was a landmark libel case involving a paid advertisement in a newspaper criticizing police action against members of the civil rights movement in the South. *Sullivan* elevated the tort of libel to a constitutional level. *See generally* Murnaghan, *Ave Defamation*, *Atque Vale Libel and Slander*, 6 U. BALT. L. REV. 202 (1976).

49. 376 U.S. at 266.

50. *Id.* at 265-66. The Court stated:

The publication here was not a 'commercial' advertisement in the sense in which the word was used in *Chrestensen*. It communicated

unquestioned *Chrestensen's* holding that purely commercial speech was subject to state legislative regulation.

In *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*,⁵¹ the Supreme Court held that an ordinance prohibiting the classification of job advertisements by sex did not violate the first amendment.⁵² Though the Court stated that the speech involved was a "classic example of commercial speech,"⁵³ the Court apparently considered the sex-conscious ads to be unprotected because discriminatory hiring was in itself illegal,⁵⁴ rather than purely because of the ads' commercial nature. More significantly, the Court stated in dictum that had such hiring practices not been illegal, it would have had to balance the first amendment interest in advertising jobs against the governmental interest in discouraging sex discrimination.⁵⁵ The proverbial foot was in the door.

This dictum in *Pittsburgh Press* was the first sign of erosion in the "absolutely" unprotected status of commercial speech pronounced in *Chrestensen*. This erosion continued in *Bigelow v. Virginia*,⁵⁶ in which the Supreme Court labeled *Chrestensen's* holding as "distinctly limited,"⁵⁷ and held that speech was not stripped of first amendment protection merely because it appeared in the form of advertising.⁵⁸ The *Bigelow* Court overturned the conviction of a Virginia newspaper editor who had published an advertisement for a New York abortion referral agency, in violation of a Virginia statute forbidding the publication of information that might "encourage or prompt the procuring of abortion."⁵⁹ The Court

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. . . . 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. . . . Any other conclusion would discourage newspapers from carrying 'editorial advertisements' of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities — who wish to exercise their freedom of speech even though they are not members of the press. *Id.* at 266 (citations omitted).

51. 413 U.S. 376 (1973).

52. *Id.* at 391.

53. *Id.* at 385.

54. *Id.* at 388.

55. *Id.* at 389. The Court there stated: "Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity."

56. 421 U.S. 809 (1975).

57. *Id.* at 819.

58. *Id.* at 818.

59. VA. CODE ANN. § 18.1-63 (1960). The Court had initially vacated and remanded *Bigelow's* conviction for further consideration, 413 U.S. 909 (1973), in light of the landmark abortion cases of *Doe v. Bolton*, 410 U.S. 179 (1973), and *Roe v. Wade*, 410 U.S. 113 (1973). The Virginia Supreme Court then reaffirmed the conviction,

applied a balancing test to determine whether the Virginia statute was unconstitutional. This test involved "assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation."⁶⁰ The stronger the first amendment interest, the greater the governmental interest had to be in order to justify constitutionally any regulation of the content of the speech.

The *Bigelow* Court found that the abortion advertisement publicized an activity protected by the constitution,⁶¹ and conveyed information of potential interest and value to the general public.⁶² *Bigelow*, therefore, did not involve purely commercial speech, but rather, a mixture of commercial and pure⁶³ speech. As such, the advertisement was protected by the first amendment. The Court found it unnecessary to describe the precise extent to which commercial speech could be regulated, because it was necessary only to establish that the ad had a sufficient public interest in order to cloak it with first amendment protection.⁶⁴

Finally, in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,⁶⁵ the Supreme Court held that speech which does no more than propose a commercial transaction deserved some first amendment protection.⁶⁶ The Court overturned a Virginia statute that made advertising the prices of prescription drugs "unprofessional conduct" subjecting violators to suspension or revocation of their licenses and to civil penalties.⁶⁷ Adopting the *Bigelow* balancing test, the Court first found that the consumers' interest in making intelligent and well-informed economic decisions made the free flow of commercial information "indispensable."⁶⁸ The Court then decided that the disseminators and recipients of advertising had first amendment rights, respectively, to disseminate and receive truthful commercial information.⁶⁹ Balancing these first amendment rights against Virginia's paternalistic and unsubstanti-

Bigelow v. Commonwealth, 214 Va. 341, 200 S.E.2d 680 (1973). The Supreme Court took the case again and agreed with the state that this was a first amendment case rather than an abortion case. 421 U.S. 809, 815 n.5 (1975).

60. 421 U.S. at 826.

61. *Id.* at 822. See *Doe v. Bolton*, 410 U.S. 179 (1973); *Roe v. Wade*, 410 U.S. 113 (1973).

62. 421 U.S. at 822.

63. Speech that communicates information or opinion on political or social policies or other matters of great public interest has been labeled "pure speech" and held to enjoy the protections of the first amendment. See, e.g., *Cox v. Louisiana*, 379 U.S. 559 (1965).

64. 421 U.S. at 825.

65. 425 U.S. 748 (1976).

66. *Id.* at 762.

67. VA. CODE ANN. § 54-524.35 (1974). In an interesting due process analysis, the Maryland Court of Appeals struck down as unconstitutional a similar statute prohibiting drug price advertising in *Maryland Board of Pharmacy v. Sav-A-Lot, Inc.*, 270 Md. 103, 311 A.2d 242 (1973).

68. *Virginia Pharmacy*, 425 U.S. at 765.

69. See *id.* at 756-57, 762-65.

ated⁷⁰ belief that the impact of drug price advertisements would be detrimental to the public, the Court determined that the best approach was to "open the channels of communication rather than to close them."⁷¹

The *Virginia Pharmacy* Court constructed a new foundation for first amendment protection of commercial speech. Professor Meiklejohn argued that the first amendment was intended by its framers to protect "pure" or "political" speech.⁷² Pure speech should be protected almost as absolutely, argued Meiklejohn, because it is speech that effectuates rational self-government.⁷³ Professor Redish contended that Meiklejohn's rationale for protecting political speech should also be made applicable to speech that aids in "rational self-fulfillment" in the economic world.⁷⁴ It was clear that the *Virginia Pharmacy* Court was in accord with Redish's position. The Court's new foundation, then, was the need for truthful commercial information in a free enterprise economic system.⁷⁵

By the time *Linmark* was decided by the Supreme Court, certain guidelines had already been established in analyzing commercial speech cases. These guidelines concerned permissible forms of commercial speech regulation the presence of any one of which would render a balancing test unnecessary:

- (1) time, place, or manner restrictions which
 - (a) are justified without reference to the content of the regulated speech,
 - (b) serve a significant governmental interest, and
 - (c) leave open ample alternative channels for communication of the information.⁷⁶
- (2) Restrictions on false or misleading advertising.⁴⁴
- (3) Restrictions on advertisements which propose illegal transactions.⁷⁸
- (4) Possible restrictions on the electronic broadcasting media which, because of their unique characteristics make regulation more appropriate in the public interest.⁷⁹

70. See *id.* at 766-70. The Court found that the State could maintain professional standards and protect pharmacists from harmful competition without keeping the public in ignorance of the lawful terms that competing pharmacists were offering.

71. *Id.* at 770.

72. See generally A. MEIKLEJOHN, *POLITICAL FREEDOM* 26 (1960).

73. See generally Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255.

74. See Redish, *The First Amendment in the Market Place: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 434-47 (1971).

75. See 425 U.S. at 762-65.

76. *Id.* at 771.

77. *Id.* at 771-72.

78. *Id.* at 772-73.

79. See *id.* at 773. This is implied by the Court's cryptic reference to *Capitol Broadcasting Co. v. Mitchell*, 333 F. Supp. 582 (D.C. 1971), *aff'd sub nom.* *Capitol*

C. Application to *Linmark*

The "For Sale" and "Sold" signs at issue in *Linmark* constituted a form of commercial speech.⁸⁰ The Court determined that the first amendment interest at stake in these types of signs was an important one:

That ["For Sale" sign] information, which pertains to sales activity in Willingboro, is of vital interest to Willingboro residents, since it may bear on one of the most important decisions they have a right to make: where to live and raise their families. . . . If dissemination of this information can be restricted, then every locality in the country can suppress any facts that reflect poorly on the locality, so long as a plausible claim can be made that disclosure would cause the recipients of the information to act "irrationally."⁸¹

The *Linmark* Court determined, then, that there existed a strong right to receive information from lawn signs relating to the availability of homes for sale. The right to receive that information carried with it the right to disseminate the information.

The right to receive and disseminate information about homes for sale does not, however, automatically entail the right to disseminate that information at every time and place and in every manner. A sign ban can be upheld if it can be categorized successfully as a valid time, place, or manner restriction.⁸² An important hurdle cleared by the *Linmark* Court was the determination of the proper categorization of the sign ban ordinance — whether the ordinance was aimed at the content of the signs' speech, in which case a *Bigelow*-type balancing test would have to be

Broadcasting Co. v. Acting Attorney General, 405 U.S. 1000 (1972) which upheld the congressional ban on electronic communication of cigarette advertisements. This reference is disturbing, as the district court there expressly relied on *Chrestensen* to support its opinion. Note Judge Wright's interesting dissent, 333 F. Supp. 582, 587-94 (D.C. 1971) (Wright, J., dissenting).

80. See text accompanying noted 37-40 *supra*.

81. 97 S. Ct. at 1620.

82. The Supreme Court has held that the first amendment permits reasonable regulations of the time, place and manner of protected speech when those regulations are necessary to further significant governmental interests. See, e.g., *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (ban on willful making of any noise which disturbs the good order of school session on grounds adjacent to a school); *Cox v. Louisiana*, 379 U.S. 559 (1965) (ban on demonstrations in or near a courthouse with the intent to obstruct justice); *Kovacs v. Cooper*, 336 U.S. 77 (1949) (limitation on use of sound trucks). Such restrictions, however, must be justified without reference to the content of the regulated speech and leave open ample alternative channels for communication of the information. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976).

applied,⁸³ or merely at the form of the speech, in which case it *could* be held valid.⁸⁴ The Court found that the ordinance was not a time, place, or manner restriction at all.

The sign ban ordinance did not leave open ample alternative channels for the communication of home sale availability to prospective home buyers. The Court pointed out that the options to which sellers were realistically relegated, such as newspaper advertising and real estate broker listing, involved more expense and less autonomy than "For Sale" signs, were less likely to reach persons not deliberately seeking sales information, and were less effective methods of communicating the message than were "For Sale" signs posted in front of available houses.⁸⁵ The ordinance did not serve a significant township interest in regulating signs as such. Not all lawn signs were prohibited, but only those which contained the message that a particular house was for sale or was already sold.⁸⁶ Presumably, political campaign signs, garage sale signs, and the like were permissible. The prohibited signs were not unavoidsably intrusive,⁸⁷ were not inappropriate for the eyes of any class of citizen,⁸⁸ and did not produce a detrimental "secondary effect" on Willingboro.⁸⁹ Finally, the sign ban could not be justified without reference to the content of the prohibited signs. The signs were prohibited, the Court explained, because of their alleged "primary effect" — that whites would flee Willingboro because of the implications of the signs' message.⁹⁰

Application of the other pre-balancing test guidelines did not result in upholding the Willingboro sign ban ordinance. The types of signs involved in *Linmark* did not propose illegal transactions⁹¹ and did not contain false or misleading matter.⁹² They were signs that merely announced the fact that particular homes were for sale or had been sold, messages both legal and unambiguous in import. The stage was set for the *Linmark* Court to apply a balancing test.

83. See 97 S. Ct. at 1617, 1619.

84. See *id.* at 1618-19.

85. *Id.* at 1618.

86. *Id.* at 1619.

87. Cf. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975) (adult drive-in movie theater screen visible from public streets).

88. Cf. *Capitol Broadcasting Co. v. Mitchell*, 333 F. Supp. 582, 585-86 (D.C. 1971), *aff'd sub nom. Capitol Broadcasting Co. v. Acting Attorney General*, 405 U.S. 1000 (1972) (relationship of cigarette commercial broadcasts on electronic media and their potential influence on young people).

89. Cf. *Young v. American Mini Theatres*, 427 U.S. 50, 71 n.34 (1976) (claim that concentration of adult movie theaters would cause area to deteriorate and become a focus of crime).

90. 97 S. Ct. at 1619.

91. Cf. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973) (illegal sex discriminatory ads).

92. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 (1976).

IV. STRIKING THE BALANCE

In *Linmark*, the Court did not question the truth of Willingboro's contention that the maintenance of a racially integrated community was the object of the township's attempt to diminish alleged panic selling by banning "For Sale" lawn signs. In fact, the Court recognized the importance of maintaining a racially integrated community.⁹³ The strength of Willingboro's interest could not, however, rest only in the ultimate, long range goal of the sign ban. The importance of that governmental interest also had to lie in the substantiality of the relationship between the more immediate purpose of the sign ban — diminution of panic selling — and the sign ban itself.⁹⁴ The Court attempted to determine whether the sign ban diminished panic selling. Basic to that determination was the Court's inquiry into whether there was panic selling in Willingboro in the first place.

The Supreme Court concluded that the evidence indicated only that there was special concern among the citizens of Willingboro that "For Sale" signs would cause panic selling, not that there was, in fact, panic selling.⁹⁵ Although the number of signs posted in Willingboro substantially decreased after the ordinance went into effect, there was no evidence of a decrease in transiency.⁹⁶ In fact, the evidence indicated that the sign ban had little or no effect upon the number of home sale transactions in Willingboro.⁹⁷ Moreover, the Willingboro Township Council enacted the sign ban ordinance with knowledge that Willingboro homes were not only not declining in value, but in fact increasing in value at a rate greater than that in comparable communities.⁹⁸ The Court stated, in sum, that there was scant proof that the sign ban reduced public awareness of, or decreased public concern about, realty sales.⁹⁹ The sign ban, the Court continued, had only unfortunate effects. Thirty-five percent of

93. 97 S. Ct. at 1619 (citing *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972)).

94. *See id.* at 1619.

95. *See id.* at 1619-20.

96. *Id.* at 1617.

97. Willingboro's real estate agent witnesses at trial both stated that their business had increased by 25% since the ordinance was enacted. *Id.*

98. *Id.* at 1616.

99. *Id.* at 1619-20. The Court stated: "[T]he evidence does not support the council's apparent fears that Willingboro was experiencing a substantial incidence of panic selling by white homeowners. *A fortiori*, the evidence does not establish that 'For Sale' signs in front of 2% of Willingboro homes were a major cause of panic selling." *Id.* at 1620. The Court also cited a law journal article which suggested that a prohibition on signs may, in fact, incite panic selling. Though not discussed by the Court, the same article argued that no legislation prohibiting "For Sale" signs could be rationally justified on due process grounds by panic selling. Laska & Hewitt, *Are Laws Against "For Sale" Signs Constitutional? Substantive Due Process Revisited*, 4 REAL ESTATE L.J. 153 (1975).

all prospective home purchasers learned of available for-sale homes through lawn signs.¹⁰⁰ This group of potential buyers was cut off from that convenient source of information, and was left with no alternative but to turn to real estate brokers in order to find available homes, a more expensive and less autonomous route.¹⁰¹

Willingboro proved an insubstantial relationship between the sign ban and doubtfully existent panic selling. The township possessed a weak governmental interest in banning the signs, at best. The petitioners, on the other hand, had a strong first amendment interest in the use of "For Sale" signs on their property.¹⁰² It was an easy matter for the Court to conclude that the *Bigelow* balance between first amendment and government interests weighed heavily in favor of the former in *Linmark*.

V. THE THIRD CIRCUIT COURT OF APPEALS' DECISION

The Court of Appeals for the Third Circuit upheld the constitutionality of the Willingboro sign ban ordinance. The court of appeals decided *Linmark*, however, without the benefit of the Supreme Court's holding in *Virginia Pharmacy*.¹⁰³ The principle that persons have the right to receive and disseminate truthful commercial information was not a part of constitutional law at the time of the court of appeals' decision, therefore. Even with the backdrop of *Bigelow*, the theme of *Chrestensen* was still prevalent in the court of appeals' opinion.¹⁰⁴

In determining whether the sign ban constituted a time, place, or manner restriction, the court of appeals, contrary to the Supreme Court, was satisfied that ample alternative means of expression existed. The third circuit stated that "[n]ewspaper ads, in-town window displays or other possible means of conveying the desire to sell remain[ed] fully available to all."¹⁰⁵ The Supreme Court rejected these alternatives, and also rejected as unrealistic the use of leaflets, sound trucks, and demonstrations.¹⁰⁶

The court of appeals and the Supreme Court differed in their respective analyses of Willingboro's governmental interest in the sign ban. The Supreme Court demanded that the detrimental effect of permitting the posting of "For Sale" signs be well substantiated.¹⁰⁷ The court of appeals, however, was satisfied that an adverse

100. 97 S. Ct. at 1616.

101. *Id.* at 1618.

102. *Id.* at 1620-21. The court of appeals decided *Linmark* on April 28, 1976, just twenty-six days before the Supreme Court decided *Virginia Pharmacy* on May 24, 1976.

104. See *Linmark Associates, Inc. v. Township of Willingboro*, 535 F.2d 786, 795-96 (3rd Cir. 1976).

105. *Id.* at 797.

106. 97 S. Ct. at 1618.

107. *Id.* at 1619-20.

effect was apt to occur if the posting of signs was allowed to continue,¹⁰⁸ taking the approach that "an ounce of prevention is worth a pound of cure."¹⁰⁹ The court of appeals did not have at its disposal the Supreme Court's analysis of the state interest in *Virginia Pharmacy*.¹¹⁰

VI. BARRICK REALTY: IS ACTUAL PANIC SELLING ENOUGH?

It is still not clear whether a jurisdiction could advance a justification of sufficient strength to support constitutionally a prohibition on "For Sale" signs on residential property. Prior to *Linmark*, the leading case in the sign ban field was *Barrick Realty, Inc. v. City of Gary*.¹¹¹ In *Barrick*, a federal district court upheld the constitutionality of a Gary, Indiana, ordinance prohibiting "For Sale" signs, which was enacted in order to reduce "panic selling" by whites.¹¹² The district court noted that the ordinance was enacted for the ultimate purpose of promoting, rather than impeding, integration, and that the sign ban had a reasonable tendency toward achieving that objective.¹¹³ In dealing with the free speech issue, the district court cited *Chrestensen* as authority for its statement that "reasonable regulations upon communication of a purely commercial nature are not subject to scrutiny under the First Amendment."¹¹⁴ The court emphasized that the potential public benefit from the sign ban outweighed any harm to those wishing to post "For Sale" signs.¹¹⁵ Any additional expense or delay which might result from having to use alternative means of advertising were considered to be "minimal."¹¹⁶

108. See 535 F.2d at 799-800.

109. *Id.* at 800.

110. See 425 U.S. 748, 770 (1976).

111. 354 F. Supp. 126 (N.D. Ind. 1973), *aff'd*, 491 F.2d 161 (7th Cir. 1974).

112. 354 F. Supp. at 134. In the period between 1960 and 1970, the white population of Gary decreased by 24.9% while the nonwhite population increased by 34.9%. *Id.* The court of appeals for the Seventh Circuit added that the presence of numerous "For Sale" signs in some white neighborhoods was causing whites to move out "en masse." 491 F.2d at 163-64.

113. 354 F. Supp. at 136. The court pointed out that fair housing laws attack the problem of segregation on two fronts: 1) they outlaw discrimination in the sale and rental of housing, thereby softening the barriers to the entry of blacks into white areas; 2) they attack the causes of panic among whites, thereby slowing their flight from changing neighborhoods. *Id.* at 135. The court reasoned that integration could not occur without proceeding on both fronts. It felt that the proliferation of "For Sale" signs in an integrating neighborhood aggravated the fears of white residents who were afraid of "being left behind," and consequently provoked panic selling. It added that "[t]he challenged ordinance therefore removes a significant source of panic and selling pressure from those who wished to remain in a transitional neighborhood." *Id.*

114. *Id.* at 132. Using *Chrestensen* as authority that commercial speech is subject to "reasonable regulation" is an understatement of the case's former scope.

115. *Id.* at 136.

116. *Id.*

On appeal, the Court of Appeals for the Seventh Circuit affirmed.¹¹⁷ Adopting much of the district court's opinion, the court of appeals added that "the right to open housing means more than the right to move from an old ghetto to a new ghetto,"¹¹⁸ and that Gary's policy would encourage stable, integrated neighborhoods.¹¹⁹

The only significant factual distinction between *Linmark* and *Barrick* is that the court of appeals in *Barrick* believed substantial panic selling to be extant,¹²⁰ while the Supreme Court¹²¹ and the Third Circuit Court of Appeals¹²² in *Linmark* determined that panic selling was only incipient. Whether that distinction would make a difference to the Supreme Court should a *Barrick*-like case present itself is somewhat doubtful. The first amendment interest in disseminating and receiving information from "For Sale" signs is strong.¹²³ It is doubtful that any more ample alternatives to "For Sale" signs than existed in Willingboro could be found in any other jurisdiction.¹²⁴ To demonstrate a strong governmental interest in a sign ban in a jurisdiction in which panic selling is extant, the government would still be required to prove that its sign ban diminishes panic selling.¹²⁵

The district court and court of appeals in *Barrick* did not apply these principles. The Seventh Circuit Court of Appeals rendered its decision before the Supreme Court decided *Bigelow* and *Virginia Pharmacy*.¹²⁶ The court of appeals in *Barrick* analyzed the facts of that case, therefore, without the benefit of the Supreme Court's holding that there is a right to disseminate and receive truthful commercial information.¹²⁷ Whereas the court of appeals in *Barrick* believed the "inconvenience of having to utilize alternative methods of advertising and information gathering" to be "minor,"¹²⁸ the *Linmark* Court was convinced that the alternative means of disseminating this type of information were insufficient.¹²⁹ The *Linmark* Court demanded that Willingboro show an *actual* diminution of panic selling in consequence of its sign ban.¹³⁰ The court of appeals in *Barrick*, however, was satisfied that a diminution of

117. 491 F.2d 161 (7th Cir. 1974).

118. *Id.* at 164.

119. *Id.* at 164-65.

120. *See id.* at 163-64.

121. *See* 97 S. Ct. 1614, 1619-20 (1977).

122. 535 F.2d 786, 799 (3rd Cir. 1976).

123. *See* 97 S. Ct. at 1620.

124. *See id.* at 1618.

125. *See id.* at 1619-20.

126. The Seventh Circuit decided *Barrick* in 1974 while *Bigelow* and *Virginia Pharmacy* were handed down in 1975 and 1976 respectively.

127. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

128. 491 F.2d 161, 165 (7th Cir. 1974).

129. 97 S. Ct. at 1618.

130. *See id.* at 1619-20.

panic selling was a *conceivable* consequence of Gary's sign ban.¹³¹ In short, had the Supreme Court also decided *Barrick*, it probably would have struck down Gary's ordinance for the same reasons it struck down Willingboro's ordinance. The *Barrick* situation would not have deterred the application of the principles that people have the right to disseminate and receive truthful commercial information, that they have the option to act irrationally upon that information, and that "the remedy to be applied is more speech, not enforced silence."¹³²

If a jurisdiction can prove both that it is suffering from panic selling and that its sign ban actually diminishes that panic selling substantially, then it is uncertain whether the sign ban is consistent with the first amendment's guarantee of some commercial speech protection. The Supreme Court has never faced a situation of this type. On the one hand, a sign ban's actual diminution of real panic selling strengthens the governmental interest in the sign ban, and a much closer case than was presented in *Linmark* is present. On the other hand, the first amendment interest in "For Sale" signs is a weighty one. The only possible clue provided by the *Linmark* Court was that Court's use of the words of former Justice Brandeis from a political speech case:

"If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence. Only an *emergency* can justify repression."¹³³

It is arguable, therefore, that in the absence of an "emergency" which threatens the very existence of a community, panic selling is a *prima facie* insufficient justification for a ban on "For Sale" signs.

VII. MARYLAND LAW

The Baltimore City Council, the Baltimore County Council, and the Maryland General Assembly have enacted legislation which either bans or provides for the ban of "For Sale" and "Sold" signs in their respective jurisdictions. To date there has been no judicial determination of whether these Maryland laws will survive the *Linmark* decision.

Baltimore City Ordinance No. 701 impliedly prohibits the display of "For Sale" signs outside of single-family residences.¹³⁴

131. See 491 F.2d at 163-65.

132. 97 S. Ct. at 1620 (citing Justice Brandeis in *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

133. *Id.*

134. BALTIMORE CITY, MD., CODE art. 30, § 10.0-22-(b)(1) as amended by Ordinance 701 (July 19, 1974). Article 30 (1966) was superseded by Ordinance 1051 (April 20,

Because of the *Linmark* decision, the constitutionality of this ordinance is a hotly debated issue among many interested parties. Potential challenges to the constitutionality of the city ordinance are emerging in three forms: (1) violations of the ordinance, earmarked as "test cases;" (2) a declaratory judgment action; and (3) legislation.

A group of black realtors has attempted to test the ordinance by posting approximately 100 "For Sale" signs in residential communities in Baltimore.¹³⁵ The Greater Baltimore Board of Realtors decided to confront the issue directly, and announced its intention to file a petition in the Baltimore City Circuit Court for a declaratory decree.¹³⁶ On the political front, a city councilperson introduced a bill before the city council to repeal the city's sign prohibition.¹³⁷ The councilperson stated that "[t]he city has ignored the constitutional mandate of the highest court in the land. Because of the Supreme Court's decision in the [*Linmark*] case, it's incumbent upon Baltimore to void the ordinance."¹³⁸ Although it is not certain which forum will first force the issue, or when that will happen, it seems likely that a determination of the constitutionality of Baltimore City's sign ban ordinance is in the offing.

The *Linmark* decision has not persuaded all involved that the city's ordinance must fall. The city solicitor's office has stated that it will continue to enforce the "For Sale" sign prohibition, as the office considers the ordinance dissimilar to the Willingboro ordinance.¹³⁹ Although the solicitor's office has yet to couch its contention in more

1971), a comprehensive zoning ordinance. Ordinance 701 amends this 1971 ordinance. It states, in pertinent part:

b. The following types of signs, subject to the limitations prescribed for them, shall be permitted for uses authorized as principal or conditional uses in Residence and Office-Residence Districts:

1. One non-illuminated sale or lease sign for [each street frontage of the lot, not exceeding a height of five feet, and having an area not exceeding six square feet. For] multiple family dwellings, apartment hotels, and non-residential buildings. *Such* [such] sign shall not exceed a height of eight feet if free standing, and *shall not extend* above the roof line if attached to a building and *shall not exceed* an area of 36 square feet.

The bracketed material indicates matter stricken from Ordinance 1051 while the italicized material indicates matter added to Ordinance 1051. By deft draftmanship, Ordinance 701 therefore excised language permitting "For Sale" signs in front of single family homes, thereby impliedly prohibiting such signs. Violation of the 1974 ordinance is a misdemeanor and punishable by a fine of between \$25 and \$100. § 11.0-7.

135. *The Sunday Sun*, July 24, 1977, at F1, col. 1.

136. *Id.* As of mid-November, 1977, however, the Board had not yet filed such a petition.

137. City Council of Baltimore Bill No. 1031 (introduced June 27, 1977 by City Councilperson Michael B. Mitchell).

138. *The Sun*, June 24, 1977, at D18, col. 6.

139. *The Sunday Sun*, July 24, 1977, at F1, col. 1. Despite the publicity given the black realtors' posting of "For Sale" signs, the solicitor's office innocently reported that no violations have been referred to it for prosecution. The city zoning administrator, the person responsible for reporting the violations, stated that his

definitive terms, a community organization president has specifically asserted why he considers the two ordinances distinguishable.¹⁴⁰ He argued that, unlike the single-purpose Willingboro ordinance, which prohibited *only* "For Sale" and "Sold" signs, the implied ban in Baltimore City is part of a larger ban on "all" signs in residential neighborhoods.¹⁴¹ It is, however, a fundamental principle that a statute may be constitutional in one part while unconstitutional in another.¹⁴² If the invalid part is severable from the rest, the portion that is constitutional can stand, while that part that is unconstitutional can be stricken and rejected.¹⁴³ The aesthetic objectives behind the Baltimore City ordinance may support bans on other types of signs.¹⁴⁴ The ban on "For Sale" signs, however, is clearly severable and must be supported by a strong governmental interest in order to outweigh — or possess a chance of outweighing — the important first amendment concerns at stake. The city's interest in its sign ban would seem to be weakened by the fact that its ordinance contains thirteen express exceptions to the prohibition of "all" signs.¹⁴⁵

The only manner in which the Baltimore ban on "For Sale" signs can possibly pass constitutional scrutiny is by a showing of *en masse* panic selling that creates an "emergency" situation. In addition, the city would have to prove that its sign ban diminishes such panic selling. It is doubtful, however, that sufficient evidence of an emergency situation could be adduced in Baltimore. Should the issue ripen into a judicial dispute, the Maryland courts will probably find that panic selling in Baltimore is not of a magnitude sufficient for the state interest to overshadow the first amendment interest in the free flow of truthful information about available for-sale homes.

In 1972, the Baltimore County Council enacted an ordinance prohibiting persons from displaying "For Sale" or "Sold" signs in

inspectors have not yet received any complaints, and will not issue citations unless someone calls and objects. The city is obviously avoiding a confrontation while it reexamines the continued validity of its ordinance in light of *Linmark*.

140. Pretl, *Should "For Sale" Signs Be Banned Here?* *The Sun*, June 25, 1977, at A14, col. 3.

141. *Id.*

142. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Baltimore v. O'Connor*, 147 Md. 639, 128 A. 759 (1925).

143. *Id.* Article 30, § 2.0-3 of the Baltimore City Code (as amended by Ordinance 1051) provides that in case of judicial determination of the unconstitutionality of a portion of the statute, the Mayor and City Council declare that they would have supported the remaining provisions of the statute. *But see Anne Arundel County v. Moushabek*, 269 Md. 419, 428, 306 A.2d 517, 522 (1973).

144. While aesthetic considerations may play a role in the zoning process, an ordinance based on aesthetics alone, which does not enhance the public welfare, is invalid as an impermissible use of police powers. *Mayor and City Council of Baltimore v. Mano Swartz, Inc.*, 268 Md. 79, 299 A.2d 828 (1973). *See generally* 3 U. BALT. L. REV. 125 (1973).

145. BALTIMORE CITY, MD. CODE art. 30, § 10.0-1(f)(1-5), -2(b)(1-8).

any area designated by the Council as "prohibited."¹⁴⁶ In an unreported *per curiam* opinion¹⁴⁷ handed down twenty-five days after *Linmark* was decided, the Maryland Court of Special Appeals avoided first amendment questions by upholding a lower court decision which invalidated the ordinance on procedural grounds.¹⁴⁸

Section 230C of Article 56¹⁴⁹ grants the Maryland Real Estate Commission the authority to suspend the use of "For Sale" and "Sold" signs by *real estate licensees* in areas determined by the commission to be "Real Estate Conservation Areas." Such a ban can only be imposed after a finding that either:

(1) the racial or economic stability of a neighborhood is threatened by the volume of real estate transactions, or

(2) an abnormal real estate market with depressed values is developing in a neighborhood because of excessive sales offerings, or

(3) certain methods of advertising or solicitation could be damaging to the public or to the dignity and integrity of the real estate profession.¹⁵⁰

Although the constitutionality of this statute has never been tested in the Maryland courts, it is vulnerable to attack under the first and fourteenth amendments.

A Georgia statute, similar to § 230C was held to be violative of the due process and equal protection clauses of the fourteenth amendment in *DeKalb Real Estate Bd. v. Chairman of Bd. of Comm'rs*.¹⁵¹ The *DeKalb* court found that, as the statute applied only to real estate brokers and not to homeowners, it unconstitutionally "put persons into classes based upon criteria unrelated to the purpose of the legislation."¹⁵² Should the Maryland courts find *DeKalb* unpersuasive, it will still be necessary to justify the state's interest in the statute in light of *Linmark's* mandatory authority.

Whether the real estate sign ban ordinances now in effect in Maryland, or any other jurisdiction, can pass constitutional muster turns solely on how narrowly the *Linmark* decision is read. In view of the lack of striking differences between the Maryland and *Linmark* settings, the Maryland ordinances will likely be found unconstitutional.

VIII. OTHER IMPLICATIONS

The ramifications of the *Linmark* decision extend well beyond the Court's disaffirmance of "For Sale" sign proscriptions. The

146. BALTIMORE COUNTY, MD. CODE, § 14-24 to -29 (Cum Supp. 1975).

147. Baltimore County, Md. v. Wallich, No. 644 (Ct. Spec. App. May 27, 1977).

148. *Id.* The court found that Baltimore County failed to take the requisite procedural steps for enacting a zoning ordinance.

149. MD. ANN. CODE art. 56, § 230C (Supp. 1977).

150. *Id.*

151. 372 F. Supp. 748 (N.D. Ga. 1973).

152. *Id.* at 754.

marked death of the commercial speech exception coupled with the enhanced constitutional value in the free flow of commercial information raise other questions.

One fertile topic of interest also concerns the dissemination of speech involving real estate transactions. Section 3604(e) of the Civil Rights Act of 1968¹⁵³ proscribes certain speech for the purpose of preventing "blockbusting." In a typical blockbusting situation, a realtor persuades an individual to sell his property because, allegedly, minorities are "moving in" and property values are declining as a result. Consequently, the homeowner sells to the realtor at a deflated price, and the realtor then sells to a minority group member at an inflated price.

Several realtors prosecuted for "blockbusting" under § 3604(e) have attempted to assert a constitutional right to disseminate truthful information about the changing racial characteristics of a neighborhood.¹⁵⁴ Whether a lone congressional policy of promoting racial integration, without the benefit of the now laid-to-rest commercial speech exception, will sustain a court ruling under § 3604(e) is now in doubt. This is particularly true since the statute is not a time, place or manner restriction, but is a proscription on content in that it proscribes realtors from dispensing information about particular subjects, whether or not the information is truthful. In support of the continued validity of § 3604(e) is the *Pittsburgh Press* principle that when speech is part of unlawful conduct it is not entitled to first amendment protection.¹⁵⁵ Since the Fair Housing Act proscribes steering and blockbusting by realtors, speech related to such unlawful conduct may be unprotected also.

Another question impliedly raised by *Linmark* and other post-*Virginia Pharmacy* cases is whether the Public Health Cigarette Smoking Act of 1969,¹⁵⁶ which prohibits cigarette advertising on television and radio, remains constitutionally sound. In *Capitol Broadcasting Co. v. Mitchell*,¹⁵⁷ the Supreme Court affirmed without opinion a district court's holding that the federal government has the power to regulate advertising on the broadcasting media.¹⁵⁸ The district court relied, in part, on the now extinct commercial speech exception to the first amendment. The court reiterated the *Chrestensen* principle that "product advertising is less vigorously

153. 42 U.S.C. § 3604(e) (Supp. V 1975).

154. *E.g.*, U.S. v. Bob Lawrence Realty, Inc., 474 F.2d 115 (5th Cir.), *cert. denied*, 414 U.S. 826 (1973). The constitutionality of Maryland's antiblockbusting statute, MD. ANN. CODE art. 56, § 230A (Cum. Supp. 1977), has similarly withstood a first amendment challenge in *State v. Wagner*, 15 Md. App. 413, 291 A.2d 161 (1972).

155. *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973).

156. 15 U.S.C. §§ 1331-1340 (1970).

157. 333 F. Supp. 582 (D.D.C. 1971), *aff'd sub nom.* *Capitol Broadcasting Co. v. Acting Attorney General*, 405 U.S. 1000 (1972).

158. 333 F. Supp. at 584.

protected than other forms of speech."¹⁵⁹ Should the Act face a constitutional challenge, it is possible that the Court will recognize an insurmountable right of the American public to receive information about the availability and individual merits of cigarettes, even if the reception of such advertisements would cause Americans to make the irrational decision to smoke. On the other hand, the Court might yield to the strong state interest in public health and find the personal decision of whether or not to smoke to be a first amendment interest of a lesser magnitude than those in *Virginia Pharmacy* or *Linmark*.

IX. CONCLUSION

Linmark is one of the rippling effects of *Virginia Pharmacy* in the real estate and fair housing areas. The principles of *Virginia Pharmacy*, as solidified in *Linmark*, will have a far-reaching impact on the commercial world. Having created a new constitutional interest in the free flow of truthful and legitimate commercial information, the Court has rapidly expanded its coverage in a case-by-case analysis. It has already placed a dent in the once impenetrable edifice of legal advertising bans¹⁶⁰ and has even reached into such areas as the sale of contraceptives to minors.¹⁶¹ Questions remain, however, as to the strength of the governmental interest necessary to restrict different kinds of commercial speech under particular circumstances.

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ADDENDUM

Since the initial printing of this Comment, there have been two significant developments in Maryland with respect to "For Sale" sign prohibitions. Ordinance No. 701 has been undergoing judicial scrutiny in Baltimore City, while a new sign ban of dubious constitutional validity has been adopted in Baltimore County.

As mentioned in the Comment, a group of black realtors, with the intent to challenge the city ordinance, posted "For Sale" signs on various properties in Baltimore. Their challenge was accepted by the city. On December 13, 1977, the city filed a bill of complaint seeking a permanent injunction in the Circuit Court of Baltimore City against James Crockett, a black realtor from West Baltimore.

159. *Id.*

160. See *Bates v. State Bar of Arizona*, 97 S. Ct. 2691 (1977).

161. See *Carey v. Population Services International*, 97 S. Ct. 2010 (1977).

The sign which triggered the action was posted in front of a row house in the 1900 block of McCulloh Street in Baltimore. As this area has had a predominantly black population for many years, the city will be hard pressed to establish en masse panic selling of the type necessary to possibly avoid the application of the *Linmark* ruling in court. The ordinance will probably be overturned because its application to a predominantly black area is overbroad and because of the *Linmark* rule.

On January 3, 1978, the Baltimore County Council voted five-to-two to accept Bill No. 172-77, as amended, which imposes a thirty-day limit on the display of "For Sale" signs in designated "prohibited display areas." In so doing, the council remedied the procedural defects that invalidated its 1972 sign ban. The bill was not signed by County Executive Theodore Venetoulis, but became law, nevertheless.

As originally conceived by Councilperson Gary Huddles (D., 2d), the sign ban bill would have permitted the council to prohibit real estate sales signs in a designated area for up to two years at a time if fifteen percent of the property owners (at least ten persons required) petitioned the council. If the council received a petition, held a public hearing, and determined that "the sales displays could be damaging to the health and/or general welfare of the public within all or any portion of the area under petition," then the council would be permitted to impose a "For Sale" sign prohibition.

The sting of Bill No. 172-77 was markedly soothed — but only temporarily — by an amendment by Councilperson Clarence E. Ritter (R., 3d), which was passed four-to-three. The Ritter Amendment provided that even if an area obtained a sign prohibition designation from the county council, signs could still be placed on properties in the area for "a period not longer than thirty days after the date of the real estate listing." Councilperson John V. Murphy (D., 1st), a supporter of the original Huddles version of the bill, stated that the council had "taken the heart out of the bill . . . because the thirty-day period is when the damage is done." After expressing their dismay at the passage of the Ritter Amendment, Councilperson Huddles and his supporters nevertheless voted for the amended bill, recognizing political realities and wanting some form of sign ban. On February 7, 1978, however, a final amendment striking the thirty-day grace period was passed; presently, then, the enactment conforms to the original Huddles proposal.

The Baltimore County sign ban bill is probably in violation of the United States Constitution. That an "emergency" situation might be an exception to *Linmark* will be of no aid to supporters of the bill, for sign bans can be imposed under the bill in situations far less serious than emergencies.