COMMENTS

THE "CLEAR AND PRESENT DANGER" TEST AS APPLIED TO SEXUALLY ORIENTED FILMS—SOME PITFALLS

Chemline, Inc. v. City of Grand Prairie, 364 F.2d 721 (5th Cir. 1966)

It is felt by many that the existing Supreme Court obscenity standards do not provide adequately for regulation of certain materials considered harmful to children.[1] This concern over the protection of children is usually based on the theory that rising juvenile delinquency and declining moral standards are in some way caused by the dissemination of objectionable matter to minors. In *Chemline, Inc. v. City of Grand Prairie,*[2] the Fifth Circuit ruled, in effect, that films which are not obscene under Supreme Court standards[3] can be suppressed on the ground that they create a "clear and present danger" of causing psychological harm to child viewers. Although the court could have relied upon the facts before it, as evidence of socially undesirable conduct actually resulting from showing the films, it chose not to do so. Instead, the court held that, as a general proposition, showing films containing nude sequences threatens psychological harm to children sufficient to constitute a clear and present danger justifying legislative suppression.

The plaintiffs in *Chemline,* operators of a drive-in theater, presented "art films" depicting nude or semi-nude women. Although the audience was restricted to persons over eighteen, adolescents frequently watched the

1. *See, e.g.,* People v. Kahan, 15 N.Y.2d 311, 312, 258 N.Y.S.2d 391, 392 (1965) (per curiam) (Fuld, J., concurring); State v. Settle, 90 R.I. 195, 198, 156 A.2d 921, 924 (1959); Comment, *Exclusion of Children From Violent Movies,* 67 COLUM. L. REV. 1149 (1967); Note, *Constitutional Problems in Obscenity Legislation Protecting Children,* 54 GEO. L.J. 1379 (1966); Note, *The Youth-Obscenity Problem—A Proposal,* 52 KY. L.J. 429 (1964).

2. 364 F.2d 721 (5th Cir. 1966).

3. In Roth v. United States, 354 U.S. 476 (1957) the Supreme Court sought to take the plethora of existing rules on obscenity and reform them into a standard definition. The *Roth* test is whether "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." *Id.* at 489. In addition, the Court established a "social value" test, under which a form of expression is protected by the First Amendment if it can be considered to have the slightest value to society. *Id.* at 484. The first significant refinement of these standards occurred in Manual Enterprises, Inc. v. Day, 370 U.S. 478, 482-83 (1961), in which the "patent offensiveness" test was added to the *Roth* definition. Material is patently offensive if it affronts contemporary standards of decency relating to the description or representation of sexual matters. In 1964 the Court, in Jacobellis v. Ohio, 378 U.S. 184 (1964), re-examined and re-affirmed the validity of the *Roth* standards. *Jacobellis* did change the "contemporary community" standard into a "contemporary national" one. *Id.* at 195.

films from outside theater property. Certain morals offenses, including public masturbation and the rape of a fourteen year-old girl, occurred in areas adjoining the theater while the movies were being shown. There was also evidence that parking violations and traffic accidents in the area increased. The city council reacted by passing an ordinance regulating theater operation. One of its provisions prohibited the exhibition of films showing the nude or semi-nude female body on screens visible from public streets.[4] The plaintiffs brought an action in the Federal District Court to enjoin enforcement of the ordinance, challenging this provision as a violation of their right to free speech. Although the city argued that the provision was a constitutional exercise of its police power to curb a clear and present danger to the community's morals and safety,[5] the District Court, in an unreported opinion, enjoined enforcement of it. On appeal, the Fifth Circuit held the ordinance to be constitutional in its entirety.[6] Although the provision restricting exhibition of films containing nude sequences did not itself indicate an intent to protect children, the court ruled that the ordinance was a valid means of preventing exhibition to children of films that might create a clear and present danger of psychological harm to them.[7]

There are at least two other grounds which the *Chemline* court might have used to uphold the challenged ordinance without relying on the broad proposition that any film portraying nudism may be suppressed as creating a clear and present psychological danger to child viewers. It is arguable that the clear and present danger test could have been legitimately applied on the basis of the particular facts before the *Chemline* court. The plaintiffs' films were probably responsible for the traffic problems[8] and the morals

4. It shall be unlawful for any licensee, ticket seller, ticket taker, usher, motion picture machine operator and any other person connected with or employed by any licensee to show or exhibit at a theater in the City or to aid or assist in such exhibition any motion picture, slide, or other exhibit which is visible from any public street or highway in which the bare buttocks or the bare female breasts of the human body are shown or in which striptease, burlesque or nudist-type scenes constitute the main or primary material of such movie, slide or exhibit. Grand Prairie, Tex., Ordinance 1621, Paragraph VIII (1966).

5. The city conceded that the plaintiffs' films could not necessarily be subjected to censorship under the Supreme Court's obscenity standards. Chemline, Inc. v. City of Grand Prairie, 364 F.2d 721, 724 (5th Cir. 1966).

6. Chemline, Inc. v. City of Grand Prairie, 364 F.2d 721 (5th Cir. 1966).

7. Several related issues were raised by the court, the most significant being the problem of prior restraints on free expression. *See* Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961); Near v. Minnesota, 283 U.S. 697 (1931). Issues of secondary importance included the power of a municipality to tax communication under the First Amendment, and the possible pre-emption of local by state law in the regulation of motion pictures. These issues, like the principal one, were determined in favor of the City.

8. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940); State v. Brown, 240 S.C. 357, 126 S.E.2d 1 (1962).

offenses in the vicinity of the theater. An application of the clear and present danger test to these particular facts might be acceptable, if there is a causal connection between the movies and the socially undesirable conduct. However, it is apparent that the *Chemline* court requires no proof of causation in applying the clear and present danger test, because there is no available evidence that psychological harm to child viewers is caused by films portraying nudism.[9] The Supreme Court has ruled that the clear and present danger test is not applicable to obscenity,[10] and application of the test, presuming causation can be shown, would be limited to material not denied the protection of the First Amendment under existing obscenity standards.

The court also might have upheld the ordinance on the theory that a special standard of obscenity can be applied to legislation designed to protect youth.[11] The so-called "variable obscenity" approach would reqiure a court to determine whether the material is obscene to children under existing community obscenity standards. In *Jacobellis v. Ohio*,[12] Justice Brennan recognized the "legitimate . . . interest of States and localities . . . in preventing the dissemination of materials deemed harmful to children."[13]

9. *See* Roth v. United States, 354 U.S. 476, 508 (1957) (dissenting opinion of Justice Douglas); State v. Jackson, 224 Ore. 337, 359, 356 P.2d 495, 505 (1960); B. KARPMAN, THE SEXUAL OFFENDER AND HIS OFFENSES: ETIOLOGY, PATHOLOGY, PSYCHODYNAMICS, AND TREATMENT (1954); N. ST. JOHN—STEVAS, OBSCENITY AND THE LAW 196 (1956); ABA-ALI DRAFTING AN OBSCENITY STATUTE (Paulsen ed. 1961); Cairns, Paul & Wishner, *Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence*, 46 MINN. L. REV. 1009 (1962); Green, *Obscenity, Censorship, and Juvenile Delinquency*, 14 U. TORONTO L.J. 229 (1962); Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391 (1963); Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUPREME COURT REV. 1. *But See* Gaylin, Book Review, 77 YALE L.J. 579 (1968).

Some state legislatures have apparently sought to solve the problem by fiat:

> It is declared that the publication, sale and distribution to minors of comic books devoted to crime, sex, horror, terror, brutality and violence . . . are a contributing factor to juvenile crime, a basic factor in impairing the ethical and moral development of our youth and a clear and present danger to the people of the state . . . .

N.Y. PEN. LAW § 484-e (McKinney Supp. 1966); Act of April 19, 1956, ch. 3686, [1956] R.I. Public Acts & Resolves 219.

10. Roth v. United States, 354 U.S. 476 (1957).

11. *See* Dibbles, *Obscenity: A State Quarantine to Protect Children*, 39 S. CAL. L. REV. 345 (1966); Note, *Constitutional Problems in Obscenity Legislation Protecting Children, supra* note 1; Note, *The Youth Obscenity Problem—A Proposal, supra* note 1; Comment, *Exclusion of Children From Violent Movies, supra* note 1.

12. 378 U.S. 184 (1964).

13. *Id.* at 195. The validity of the variable obscenity doctrine is soon to be considered by the Supreme Court. Interstate Circuit, Inc. v. City of Dallas, 366 F.2d 590 (5th Cir. 1966), *petition for cert. filed*, 36 U.S.L.W. 3010 (U.S. Jan. 13, 1967) (Nos. 971, 978, 1966-67 Term; renumbered Nos. 42, 44, 1967-68 Term); Ginsberg v. New York (N.Y. Sup. Ct. App. Term, 2d Dept. 1966), *appeal docketed*, 36 U.S.L.W. 3010

While the variable obscenity approach would have avoided the causation problem, it would have left the courts with the problem of determining community standards at a second level and deciding ultimately, if not in the present case, whether a redeeming social value limitation ought to be applied in the case of material found obscene for children.[14] However, the court based its decision on neither the known harm nor the variable obscenity concept, but without proof of a causal connection based its clear and present danger argument on the supposed psychological harm to child viewers.

The clear and present danger test was originally developed by Justice Holmes in *Schenck v. United States*[15] as a test of the constitutional legitimacy of restraints on expression. The test is whether "the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that [the legislature] has a right to prevent."[16] In *Dennis v. United States*[17] *a* "balancing test" was articulated as a corollary to the *Schenck* clear and present danger test. This corollary requires the court to determine whether the gravity and probability of the evils threatened by speech in each instance outweigh the value of freedom of expression.

The *Chemline* decision creates two traps for the unwary which will be encountered in an effort to apply the clear and present danger doctrine and, more particularly, its balancing test corollary in obscenity cases. First, the balancing test distracts attention from the need to establish that a causal relation actually exists. Second, if a balancing test is adopted, for material not claimed to be obscene under the *Roth* test but only harmful to children, the issue will almost invariably be resolved in favor of censorship.

In *Chemline* the existence of a causal relation between the plaintiffs' films and the psychological harm which allegedly results from children viewing them was not established as a fact and probably could not have

(U.S. Feb. 1, 1967) (No. 1022, 1966-67 Term; renumbered No. 47, 1967-68 Term); United Artists Corp. v. City of Dallas, 402 S.W.2d 770 (Tex. Civ. App. 1966), *appeal docketed,* 36 U.S.L.W. 3011 (U.S. Mar. 3, 1967) (Nos. 1109, 1155, 1966-67 Term; renumbered Nos. 56, 64, 1967-68 Term).

14. A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 383 U.S. 413 (1966).

15. 249 U.S. 47 (1919).

16. *Id.* at 52.

17. 341 U.S. 494 (1951). The test as enunciated in *Dennis* was "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." *Id.* at 510, quoting the opinion of Judge Learned Hand in Dennis v. United States, 183 F.2d 201, 212 (2d Cir. 1950). The force of the *Dennis* ruling is qualified by the fact that Chief Justice Vinson spoke on behalf of only four justices in his plurality opinion.

been. In trying to establish a clear and present danger of psychological harm, a court would face the dual problem of determining what the psychological harm is, and of establishing a causal relationship between viewing the movies and the harm. Defects in present sociological and psychological knowledge would preclude any definite conclusions regarding either.[18] Indeed, it may well have been the desire to avoid these problems which led the Supreme Court to reject the clear and present danger test in the area of obscenity.

It is true that the Court in *Schenck* did not require factual proof that the proscribed speech caused a substantive evil. It is clear, however, that the decision in *Schenck* was founded upon an assumption that a causal relationship did exist. The Court was willing to make this assumption because it was dealing with speech which communicated "subversive ideas," speech whose obvious purpose was to instill socially dangerous attitudes in those who were exposed to it.[19] The Court pointed out that such speech could only have been disseminated because it was intended to have socially disruptive consequences.[20] The probable effect was inferred from the intent. By contrast, obscene material, whether verbal or pictorial, does not typically contain exhortations to engage in anti-social acts. It is deemed objectionable not because of ideas it communicates, but because of the nature of what it portrays. It is much more difficult to evaluate the probable effects of a mere portrayal than of an idea which possesses an inherent tendency, readily discernible to all who comprehend the idea, to motivate action. Allowing the court to speculate as to the probable detrimental effects of obscene portrayals would give free reign to purely subjective inclinations of the judge, without even the assistance of inferred intent to bridge the causal gap. In obscenity cases factual proof is the only way to close that gap. Therefore, application of the clear and present danger test in pseudo-obscenity cases would normally require factual proof that the material does cause socially harmful results.[21]

The extent to which the *Chemline* court's use of the clear and present danger test can undermine the protections established by the Supreme Court in *Roth* and subsequent obscenity decisions is indicated by *Chem-*

18. *See* note 9 *supra* and accompanying text.

19. "Of course the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out." Schenck v. United States, 249 U.S. 47, 51 (1919).

20. *Id.*

21. *See* Katzev v. County of Los Angeles, 52 Cal. 2d 360, 367, 341 P.2d 310, 315 (1959); 48 CAL. L. REV. 145, 147 (1960); *cf.* P. FREUND, ON UNDERSTANDING THE SUPREME COURT 27-28 (1951).

line's reliance upon *American Communications Association, CIO v. Douds.*[22] The court quotes *Douds'* declaration that "[w]hen the effect of a statute . . . upon the exercise of First Amendment freedoms is relatively small and the public interest to be protected is substantial, it is obvious that a rigid test requiring a showing of imminent danger to the security of the Nation is an absurdity."[23] The quoted language embodies the "balancing test" developed as a corollary to the clear and present danger test established in *Schenck v. United States.*[24] The first objection to *Chemline's* use of the balancing test is that the social value of allowing free expression is to be balanced against the state's interest in suppressing speech; but the Supreme Court, in holding that material can be suppressed as obscene only if totally devoid of redeeming social value, has foreclosed an approach which treats social value as only one factor to be balanced against others.[25] In addition, if a balancing test is used to determine whether films portraying nudism may be suppressed, the issue will almost invariably be resolved in favor of censorship. The value of showing such films can be viewed as negligible in comparison with the value of allowing dissemination of other material, especially that which expresses political dissent; and even the value of political dissent was found to lie on the light end of the scale as the balance was struck in *Dennis* and *Douds.* The value of free expression will appear particularly slight in a case like *Chemline,* in which the court is called upon to apply the balancing test not to a single film, but to a process of exposing minors to many films at plaintiffs' theater. When the court's attention is focused in this way, no attention is paid to the merits of any particular film, so that a finding that there is any value in showing the film is almost necessarily precluded. These considerations suggest that the balancing test is weighted in favor of censorship when applied to the facts of the *Chemline* case.

The traps hidden in the clear and present danger and balancing tests are such that, used without proof of causation, they could open the door to general restriction on materials not obscene under the standards of *Roth* and subsequent cases.[26] They could thereby be used effectively to undermine the protections conferred by the existing Supreme Court standards of obscenity.

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22. 339 U.S. 382 (1950).

23. *Id.* at 397.

24. 249 U.S. 47 (1919).

25. A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 383 U.S. 413 (1966).

26. *See* note 3 *supra* for discussion of these cases.