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Constitutional Law--Freedom of Speech--Parental Advice on Birth Prevention [*State v. McLaughlin*, 4 Ohio App. 2d 327, 212 NE.2d 635 (1965)]

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cian. The court felt that such testimony would have been merely cumulative.[33]

If the Ohio courts adopt the *Forman* reasoning, then it becomes evident that *Oleksiw v. Weidener*[34] establishes nothing more than a new test of fairness. However, if the *Oleksiw* case was truly decided upon statutory compliance, it should be of no consequence whether plaintiff introduces other expert testimony.

The decision of the Ohio Supreme Court in the subject case and the other decisions upon which it relied seem to indicate a growing concern with the burden of procuring expert witnesses imposed upon a plaintiff in a malpractice suit. In an attempt to partially alleviate this burden, the courts have established a rule which can be utilized to avoid a directed verdict for a defendant-physician when a plaintiff fails to produce expert witnesses. Although plaintiffs' attorneys will laud this decision, it is doubtful that the medical profession will similarly react. It would not be surprising if the medical profession were to carry this controversy to the Ohio legislature.

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CONSTITUTIONAL LAW — FREEDOM OF SPEECH — PARENTAL ADVICE ON BIRTH PREVENTION

State v. McLaughlin, 4 Ohio App. 2d 327, 212 N.E.2d 635 (1965).

A provision of the Ohio Revised Code,[1] enacted by virtue of the state's police power,[2] makes it a crime to contribute to the delinquency of a minor. Ohio recently sought to extend the purview of this statute in order to support the conviction of a mother whose allegedly criminal conduct consisted solely of imparting advice to her minor daughter concerning methods of preventing pregnancy. In *State v. McLaughlin,*[3] the Ohio Court of Appeals reversed the juvenile court conviction of that parent for her use of words alone because such an application of Section 2151.41[4] would constitute an indirect governmental restriction upon free speech which could not be justified under the first amendment to the United States Constitution as applied to the states through the fourteenth amendment.[5]

[33] Forman v. Azzura, 23 App. Div. 2d 793, 797, 259 N.Y.S.2d 120, 122 (1965).

[34] 2 Ohio St. 2d 147, 207 N.E.2d 375 (1965).

The evidence in the *McLaughlin* case disclosed that upon discovering her thirteen year-old daughter's pregnancy, Mrs. Virginia McLaughlin warned the girl she was not to have future sexual relations. The mother added, however, that if her daughter did have sexual relations in the future, she was to be certain that the boys used protective devices which were available in any drugstore. Less than a year later, Mrs. McLaughlin learned of her daughter's second pregnancy and again cautioned the girl not to engage in sexual activity. Again, however, she told her daughter to use protective methods if she did have such relations. After the second child was born, Mrs. McLaughlin's daughter was adjudged a delinquent and was placed on probation by the juvenile court; yet barely ten months

[1] OHIO REV. CODE § 2151.41 declares in part: "No person shall . . . aid, abet, induce, cause, encourage, or contribute to the . . . delinquency of a child or a ward of the juvenile court, or act in a way tending to cause delinquency in such child." The forerunner of § 2151.41, OHIO GEN. CODE § 1639-45, was held sufficiently certain and uniform in operation to meet constitutional standards. State v. Coterel, 97 Ohio App. 48, 123 N.E.2d 438 (1953), *appeal dismissed*, 162 Ohio St. 112, 120 N.E.2d 590 (1954). The language of these two sections is so close that a similar ruling under § 2151.41 would no doubt result today.

The offense of contributing to the delinquency of a minor is purely statutory. Annot., 84 A.L.R.2d 1254, 1255 (1962). Today forty-eight states hold parents criminally liable for contributing to the delinquency of their child; only Delaware and Vermont do not. Kenny & Kenny, *Shall We Punish the Parents?*, 47 A.B.A.J. 804, 805 (1961). For a state-by-state analysis of this type of legislation, see Ludwig, *Delinquent Parents and the Criminal Law*, 5 VAND. L. REV. 719, 737-45 (1952). See also Geis, *Contributing to Delinquency*, 8 ST. LOUIS L. REV. 59 (1963); Young, *Charges Against Adult Offenders in the Juvenile Court*, 32 OHIO BAR 224 (1959).

[2] State v. McLaughlin, 4 Ohio App. 2d 327, 330, 212 N.E.2d 635, 637 (1965).

[3] 4 Ohio App. 2d 327, 212 N.E.2d 635 (1965).

[4] The Supreme Court of the United States generally admits the prerogative of a state, pursuant to its police power, to restrict certain types of speech that are beyond constitutional protection: "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." They are "no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). Other types of speech are protected by the Constitution unless the expression presents "grave and immediate danger to interests which the State may lawfully protect." West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943). Mr. Justice Brandeis has said: "The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State. Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgement of the rights of free speech and assembly." Whitney v. California, 274 U.S. 357, 378 (1927) (concurring opinion).

[5] The prevailing view is that a provision of the Bill of Rights that is enforced against the states under the fourteenth amendment is enforced according to the same standards as against federal encroachment. Malloy v. Hogan, 378 U.S. 1, 10 (1964). See 15 W. RES. L. REV. 797, 799-800 (1964). This is most emphatically the case with the first amendment. See Jacobellis v. Ohio, 378 U.S. 184, 194-95 (1964), noted in 16 W. RES. L. REV. 780 (1965).

later the girl gave birth to her third child. Consequently, the delinquent girl was committed to an industrial school, and, on the basis of Mrs. McLaughlin's instructions to her daughter regarding the prevention of pregnancy before marriage, a juvenile court jury found Mrs. McLaughlin guilty of contributing to the delinquency of a minor.[6]

Although it might have been possible for the Ohio Court of Appeals to set aside Mrs. McLaughlin's conviction without reaching the constitutional issue,[7] the court based its decision upon several of the "first amendment tests" which were developed by the United States Supreme Court in a long line of sedition and anti-communist cases. In *State v. McLaughlin*,[8] it was necessary to proceed largely without the aid of precedent;[9] therefore, it is significant that the Ohio Court of Appeals set an example of using the Supreme Court's "clear and present danger" and "balancing" tests to determine whether Ohio, in the exercise of its police power, might lawfully

[6] State v. McLaughlin, 4 Ohio App. 2d 327, 328, 212 N.E.2d 635, 636 (1965).

[7] A portion of the Ohio Court of Appeals' holding stated that "the verdict was against the weight of the evidence, since there is no evidence showing that what was said and done actually had any effect on the acts of the child." State v. McLaughlin, 4 Ohio App. 2d 327, 335, 212 N.E.2d 635, 640 (1965). This indicates that the state failed to prove a causal relation between Mrs. McLaughlin's words and her daughter's delinquent conduct. The fact that the girl's first pregnancy preceded Mrs. McLaughlin's birth prevention advice tends to negate the existence of a causal relation. Only if the mother's words were not an admonition against sexual behavior but were actually an invitation to have intercourse as long as the girl prevented pregnancy could the mother be said to have induced the child's delinquency.

[8] 4 Ohio App. 2d 327, 212 N.E.2d 635 (1965).

[9] Research disclosed no case in any American jurisdiction holding parents criminally responsible for having counseled their offspring in matters of birth prevention. If some prosecutions have been pressed forward under a statute similar to OHIO REV. CODE § 2151.41, then the customary lack of funds among parents convicted of contributing to the delinquency of their children may account for the infrequent appeals in this area and hence for the paucity of such cases in official reports. Ludwig, *supra* note 1, at 726. Prosecution might be founded upon statutes regulating the dissemination of birth control information; sixteen states, Ohio excluded, have these statutes at the present time. See 17 W. RES. L. REV. 601, 606 n.38 (1965). It should be noted, however, that conviction of parents for advising their children regarding birth preventive methods might be set aside not only on free speech grounds but also as a matter of public policy. For example, New York has held that no cause of action for maliciously procuring another to breach a contract can exist against a parent who advised his child to disaffirm a contract; public policy dictated that parents should have an absolute right freely to advise their infant children with regard to all matters, and such a right should not subject the parent to an inquiry as to motive. Lee v. Silver, 262 App. Div. 149, 28 N.Y.S.2d 333, *aff'd*, 287 N.Y. 575, 38 N.E.2d 233 (1941). Moreover, courts might adhere to the Arizona Supreme Court position that legislation regulating the dissemination of birth control information does not make the expression of those general ideas criminal nor does it prohibit person-to-person disclosure of devices and techniques. Planned Parenthood Comm. v. Maricopa County, 92 Ariz. 231, 239, 375 P.2d 719, 725 (1962). See generally Annot., 96 A.L.R.2d 955 (1964); 12 AM. JUR. 2d *Birth Control* §§ 2-5 (1964).

abridge Mrs. McLaughlin's constitutionally guaranteed right to freedom of speech. The applicability of the first of these tests was suggested by the Supreme Court's statement that "where an offense is specified by a statute in nonspeech or nonpress terms, a conviction relying upon speech or press as evidence of violation may be sustained only when the speech or publication created a 'clear and present danger' of attempting or accomplishing the prohibited crime. . . ."[10]

The Ohio Court of Appeals reasoned that the words which were spoken could possibly have contributed to further delinquent acts on the daughter's part. However, since there was no evidence of any affirmative acts by the mother other than the words she spoke, it was held that the danger that Mrs. McLaughlin's advice to her daughter might have induced the girl to engage in future sexual activity was not sufficiently imminent to warrant state criminal sanction.[11]

In 1949 Professor Paul Freund expressed his discontent with the traditional "clear and present danger" rule as applied to governmental regulation of speech. He felt that in addition to the imminence of the danger, the courts should consider, among other factors, the gravity of the threatened evil, the availability of more moderate controls than those imposed by the state, the relative seriousness of the danger as compared with the value of the speech,[12] and the

[10] Dennis v. United States, 341 U.S. 494, 505 (1951). The doctrine was first enunciated by Mr. Justice Holmes. In speaking for a unanimous Court, he asserted: "The question in every case 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 Congress has a right to prevent. It is a question of proximity and degree." Schenck v. United States, 249 U.S. 47, 52 (1919). In some later cases the Court failed effectively to use the "clear and present danger" test, and, accordingly, Justices Holmes and Brandeis dissented, as in Abrams v. United States, 250 U.S. 616, 624 (1919). When a majority of the Court refused to follow the test in Gitlow v. New York, 268 U.S. 652 (1925), both Justices again dissented. *Id.* at 672. But subsequent cases vindicated the Holmes-Brandeis formula. See, *e.g.*, Wood v. Georgia, 370 U.S. 375 (1962); Herndon v. Lowry, 301 U.S. 242 (1937). In the *Wood* case it was determined that the state lacked the power to punish a sheriff for contempt because of his public criticism of the grand jury. In deciding that the sheriff's speech created no clear and present danger to the administration of justice, the Court adopted the view that the danger must not be remote or even probable; instead, it must immediately imperil. Wood v. Georgia, 370 U.S. 375, 385 (1962). See generally KONVITZ, FIRST AMENDMENT FREEDOMS 333-35 (1963). For an authorative discussion of the tests which have developed in order to determine the scope of first amendment protection against state and federal abridgement of free speech, see Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965).

[11] State v. McLaughlin, 4 Ohio App. 2d 327, 334-35, 212 N.E.2d 635, 640 (1965).

[12] Of course, under a correct interpretation of the traditional "clear and present danger" test, not every evil which might be absolutely certain to occur is one of those

specific intent with which the words were spoken. "No matter how rapidly we utter the phrase 'clear and present danger,' or how closely we hyphenate the words, they are not a substitute for the weighing of values."[13] Accordingly, in 1951 the Supreme Court re-interpreted the "clear and present danger" test in *Dennis v. United States*;[14] Professor Freund's suggestions were incorporated into Mr. Justice Frankfurter's concurring opinion.[15] The new "balancing of interest" test reads as follows: "In each case [courts] . . . must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[16] This might well be denominated the "clear and *probable* evil" test because it does not require that the evil be one which is likely to occur without delay; rather, it is sufficient that the evil be likely to occur *sometime* in the future, provided that the public necessity for preventing the evil outweighs the public and private interest in protecting free speech.[17]

The Ohio Court of Appeals may have felt that the gravity of the evil was largely discounted by the improbability that Mrs. McLaughlin's words tended to induce her daughter's delinquent conduct. The court may also have given some weight to the absence of a specific intent on the mother's part to encourage her daughter's sexual activity and to the inhibiting effect the lower court's decision could have upon parental guidance in matters of sex and birth control. It is worthy of note that, heretofore, the "balancing" test had been applied to the detriment of free speech only when the threatening evil was a communist conspiracy to advocate the violent over-

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"substantive evils that Congress [or the state] has a right to prevent" by the abridgement of free speech. Schenck v. United States, 249 U.S. 47, 52 (1919). The test which had its genesis in the *Schenck* case should be applied with regard to whether the interest which the state is attempting to protect is itself too insubstantial to justify restriction of speech. Dennis v. United States, 341 U.S. 494, 508 (1951). See, *e.g.*, Terminiello v. Chicago, 337 U.S. 1 (1949).

13 FREUND, ON UNDERSTANDING THE SUPREME COURT 27-28 (1951).

14 341 U.S. 494 (1951).

15 Dennis v. United States, 341 U.S. 494, 543 (1951).

16 *Id.* at 510. In *Dennis* the Court was squarely presented with the application of the "clear and present danger" rule and was forced to decide what that phrase signified. The Court resolved to adopt a statement of the rule which was articulated by Chief Judge Learned Hand in the court below. United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494, 510 (1951). For a thorough commentary on the evolution of the "clear and present danger" rule, see Mendelson, *Clear and Present Danger — From Schenck to Dennis*, 52 COLUM. L. REV. 313 (1952); Mendelson, *Clear and Present Danger — Another Decade*, 39 TEXAS L. REV. 449 (1961).

17 See United States v. Dennis, 183 F.2d 201, 212-13 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).