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Constitutional Law - Contempt Conviction for Out-of-Court Photography

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Notes

CONSTITUTIONAL LAW — CONTEMPT CONVICTION FOR OUT-OF-COURT PHOTOGRAPHY

In view of public animosity against the accused in a rape trial, the judge issued an order prohibiting any photographing of the accused while he was in jail preceding his arraignment, or on the way to or from the courtroom for arraignment. In the face of this order, appellants, television photographers, took pictures of the accused a short distance from the courtroom entrance as he was being brought from the jail to the courtroom. These films were not actually used. Appellants were convicted of contempt. On appeal to the Florida Supreme Court, *held*, affirmed. The court order was a reasonable exercise of the judge's power to control activities in and around the courtroom. *Brumfield v. State*, 108 So.2d 33 (Fla. 1959).

The extent to which legislatures and courts may restrict the constitutionally guaranteed freedoms of speech and of the press[1] has been a fertile field of controversy. The United States Supreme Court has been reluctant to uphold restrictions of these liberties, and has stated that the restriction must be warranted by a substantive evil the danger of which is "clear and present."[2] This "clear and present danger" test has been applied as a limitation on the power of courts to restrain press comment on pend-

1. "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." U.S. CONST. amend. I.

The Fourteenth Amendment makes the First applicable to the states. Near v. Minnesota, 283 U.S. 697 (1931) (freedom of the press is protected by Amendment XIV); Fiske v. Kansas, 274 U.S. 380 (1927) (Fourteenth Amendment protects freedom of speech from state restriction).

2. "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." Schenck v. United States, 249 U.S. 47, 52 (1919).

During the period between 1787 and the beginning of World War I, there was virtually no litigation concerning the First Amendment, which served as little more than a historical reminder of the lively concern for personal freedom expressed during the formative years of the nation. Then in 1917 and 1918 Congress passed two laws — the Espionage Act of 1917 and the Sedition Law of 1918 — which resulted in extensive litigation. *Schenck v. United States, supra*, upheld the Espionage Act as applied to anti-conscription circulars; in that case Mr. Justice Holmes laid down the famous "clear and present danger" rule quoted above.

The "clear and present danger" test was not immediately adopted by the Court. During the next twenty years Mr. Justices Holmes and Brandeis filed numerous opinions, often in dissent, urging the applicability of this test, but a majority of the court did not accept this test until the case of Thornhill v. Alabama, 310 U.S. 88 (1940). From that time on, the formula has been fairly consistently applied

ing litigation.[3] In three cases involving newspaper comment on matters pending in court the Supreme Court reversed contempt convictions,[4] holding that although the out-of-court publications were directed toward influencing the decisions, they did not constitute a danger to the administration of justice which was "clear and present." It is difficult to enunciate a clear-cut statement of exactly what constitutes a "clear and present danger."[5] It would appear that the danger presented by press comment on pending litigation to the defendant's rights to a fair and impartial trial must be "extremely serious" and its "degree of immi-

in the area of the First Amendment freedoms. However, there has been some erosion of the test in the field of subversive activities. In Dennis v. United States, 341 U.S. 494 (1951), the Court, in sustaining the conviction of eleven Communist leaders under the Smith Act, adopted the following statement from Judge Learned Hand's opinion in the same case in the court of appeals: "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." *Id.* at 510.

On the basis of the *Dennis* case, the clear and present danger test will probably never be successfully invoked on behalf of persons charged with conspiring to incite unlawful anti-governmental activities. However, the test is still presumably to be applied in other First Amendment questions. Clearly, on the basis of Bridges v. United States, 314 U.S. 252 (1941), it applies to cases involving press comment on pending litigation.

3. Graham v. Jones, 200 La. 137, 7 So.2d 688 (1942) (editorials attacking Supreme Court judgment pending application for rehearing held not a clear and present danger to the administration of justice); Bates v. State, 210 Ark. 652, 197 S.W.2d 45 (1946) (editorial comment on pending litigation did not constitute a clear and present danger); People v. Goss, 10 Ill.2d 533, 141 N.E.2d 385 (1957) (television announcer's statements concerning veracity and credibility of witnesses in pending child custody proceedings held sufficiently prejudicial to constitute a clear and present danger); Baltimore Radio Show, Inc. v. State, 193 Md. 300, 67 A.2d 497 (1946) (radio broadcast concerning Negro held in custody for murder of eleven-year-old white girl did not constitute a clear and present danger to his rights to a fair trial).

4. Craig v. Harney, 331 U.S. 367 (1947) (unfair reporting of events in a case and editorial attack on trial judge); Pennekamp v. Florida, 328 U.S. 331 (1946) (editorial attack on trial court actions in non-jury proceedings); Bridges v. California, 314 U.S. 252 (1941) (editorial comment on pending cases and newspaper threat to cause labor strike in event of enforcement of court decree).

For a case upholding a contempt conviction for an out-of-court publication see Toledo Newspaper Co. v. United States, 247 U.S. 402 (1917), where a United States statute providing that the power to punish contempts shall not extend to any case except the misbehavior of any person in the presence of the court or so near thereto as to obstruct the administration of justice was therein construed to extend the contempt punishment to acts having a "reasonable tendency" to "obstruct the administration of justice." This case was overruled in Nye v. United States, 313 U.S. 33 (1941), which held that "so near thereto" is to be construed geographically, not causally.

5. In Pennekamp v. Florida, 328 U.S. 331, 334 (1946), Mr. Justice Reed said that the clear and present danger test had the "vice of uncertainty." In Bridges v. California, 314 U.S. 252, 261 (1941), the Court, after quoting the clear and present danger rule as it appeared in Schenck v. United States, 249 U.S. 47 (1919), stated: "We recognize that this statement, however helpful, does not comprehend the whole problem." And Mr. Justice Brandeis, concurring in Whitney v. California, 274 U.S. 357, 374 (1927), said: "This Court has not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present."

nence extremely high" before the comment can be restrained.[6] On the other hand, in cases involving judicial control of the order and decorum of the court, the stringent "clear and present danger" test has not been applied;[7] in these cases the court may restrain any conduct tending to detract from the dignity of the court and from the orderly administration of justice.[8] Excluding certain portions of the public from trials, generally in the interest of public morals in cases involving salacious testimony, has been upheld as a reasonable exercise of the court's discretion in the control of matters in and around the physical confines of the courtroom.[9] Courts have ordinarily not been allowed to exclude reporters from judicial proceedings,[10] but in-court photography is almost uniformly banned.[11] The power of courts to prohibit

6. In Bridges v. California, 314 U.S. 252, 263 (1941), Mr. Justice Black, delivering the opinion of the Court, stated: "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."

7. Both state and federal courts have the power to protect themselves from disturbance or disorder in the courtroom by use of contempt proceedings, and that power cannot be challenged as conflicting with constitutionally secured guarantees of liberty. See Bridges v. California, 314 U.S. 252 (1941).

8. The power to punish for contempt, which is the chief means by which courts control conduct in and around the courtroom, is inherent in all courts. Michaelson v. United States, 266 U.S. 42 (1924). This power is a necessary incident to the exercise of judicial power, its existence being essential to the preservation of order in judicial proceedings, to the enforcement of obedience to writs, orders, and mandates, and consequently to the due administration of justice. State v. Magee Publishing Co., 29 N.M. 455, 224 Pac. 1028 (1924). A judge may punish any act done in the presence of the court which disrupts proceedings, all acts calculated to impede or embarrass the court being construed to be within the presence of the court. Weldon v. State, 150 Ark. 407, 334 S.W. 468 (1921). A federal statute allows punishment for misbehavior of any person in the court's presence or so near thereto as to obstruct the administration of justice. 62 STAT. 701 (1945), 18 U.S.C. § 401 (1952).

9. United States v. Kobli, 172 F.2d 919 (3d Cir. 1949) (immature persons excluded from trial involving obscene matter); Hogan v. State, 191 Ark. 437, 86 S.W.2d 931 (1935) (courtroom cleared to enable an emotionally disturbed witness to testify); United Press Ass'n v. Valente, 308 N.Y. 71, 123 N.E.2d 777 (1954) (general public and press excluded from large portion of trial on ground that public decency compelled the exclusion).

10. People v. Jelke, 308 N.Y. 56, 123 N.E.2d 769 (1954) (order excluding public and press from trial held invalid on its face); Scripps v. Fulton, 100 Ohio App. 157, 125 N.E.2d 896 (1955) (writ of prohibition may be granted to restrain trial judge from excluding newsmen from criminal trial). *Contra*, United Press Ass'n v. Valente, 308 N.Y. 71, 123 N.E.2d 777 (1954).

11. Canon 35 of the Canons of Judicial Ethics of the American Bar Association: "Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom during sessions of the court or recesses between sessions and broadcasting or televising of court proceedings are calculated to distract from the essential dignity of the proceedings, distract the witness in giving his testimony, degrade the court and create misconceptions with respect thereto in the minds of the public and should not be permitted." This canon was written into the statutes of fourteen states, and became the basis for an amendment to Rule 53 of the Federal Rules of Criminal Procedure. This rule reads: "The taking of photographs in the courtroom during the progress of judicial pro-

photography in the immediate vicinity of the courtroom has also been upheld.[12]

The court in the instant case was fully cognizant of the rule that restraints upon publication must be subjected to the "clear and present danger" test.[13] However, it declined to pitch its opinion on that plane, stating that the order was not directed against *publication* at all,[14] but was instead a simple exercise of the court's power to control activities in and around the courtroom during judicial proceedings;[15] that as long as the measures

ceedings or radio broadcasting of judicial proceedings from the courtroom shall not be permitted by the court."

The question of whether to admit photographers to court proceedings is by no means a closed one. There has been substantial agitation for a revision of Canon 35. E.g., *In re* Hearings Concerning Canon 35, 296 P.2d 465 (Colo. 1955). The attitude toward courtroom photography which Canon 35 evinces was brought about by the newspaper practices of the 20's and 30's, which through abuse of their traditional freedom transformed the famous *Hauptmann* case, 115 N.J.L. 412, 180 Atl. 809 (1935) (trial of the kidnapper of the Lindbergh child) into a veritable circus. According to a special study of the *Hauptmann* trial conducted by Oscar Hallam, former Justice of the Minnesota Supreme Court, that case is illustrative of almost every conceivable abuse of freedom of the press. Hallam, *Some Object Lessons on Publicity in Criminal Trials.* 24 MINN. L. REV. 453 (1940). Those who favor relaxing the traditional restraints against photographers point to modern-day photographic techniques, which have permitted photographers to take pictures without the judge even being aware of it. E.g., *In re* Mack, 286 Pa. 251, 126 A.2d 679 (1955). It is argued that a camera in the hands of discreet and discerning press photographers could be a powerful weapon for the furtherance of justice and the enlightenment of the public. Brownell, *Press Photographers and the Courtroom — Canon Thirty-five and Freedom of the Press,* 35 NEB. L. REV. 1 (1955).

For additional discussions on Canon 35, see, *con*: Brucker, *Fair Trial and Free Press,* 29 CONN. B.J. 428 (1955); Howard, *A Newspaper Editor Looks at Canon 35,* 37 J. AM. JUD. SOC. 166 (1954); Miller, *Should Canon 35 Be Amended? A Question of Fair Trial and Free Information,* 42 A.B.A.J. 834 (1956).

Pro: Otterbourgh, *Fair Trial and a Free Press,* 20 CONN. B.J. 423 (1955); Holtzoff, *The Relation Between the Right to a Fair Trial and the Right of Freedom of the Press,* 1 SYRACUSE L. REV. 369 (1950); McCoy, *The Judge and Courtroom Publicity,* 37 J. AM. JUD. SOC. 167 (1954).

Cases involving applications of rules against courtroom photography include Tribune Review Publishing Co. v. Thomas, 254 F.2d 883 (3d Cir. 1958) (Pennsylvania county court rules prohibiting photography in and around the courtroom upheld); *Ex parte* Sturm, 152 Md. 114, 136 Atl. 312 (1927) (photographer convicted of contempt for taking pictures immediately outside courtroom door in contravention of court order); *In re* Seed, 140 Misc. 681, 251 N.Y. Supp. 615 (1931) (photographing prisoners in corridor approximately 100 feet from courtroom entrance contrary to judge's instructions constituted a disturbance of the court — was contempt); State v. Clifford, 118 N.E.2d 853 (Ohio App. 1954) (photographer convicted of contempt for taking pictures at court hearing in violation of court order); *In re* Mack, 386 Pa. 251, 126 A.2d 670, cert. denied, 352 U.S. 1002 (1957) (another application of the Pennsylvania county court rules).

12. See cases note 11 *supra.*

13. After a reference to Pennekamp v. Florida, 328 U.S. 331 (1946), and Craig v. Harney, 331 U.S. 367 (1947), the court said: "These cases construe applicable constitutional prohibitions to impose the 'clear and present danger' test as a condition or limitation of a court's power to restrain or penalize free comment." Brumfield v. State, 108 So.2d 33, 35-36 (Fla. 1959).

14. *Id.* at 35.

15. *Id.* at 36: "A court is [not] governed by the same rules in restricting ac-

taken appeared to be reasonably necessary to prevent conduct which would tend to obstruct the orderly administration of justice, they were justified.[16] Further, according to the court, such measures may not only be directed against breaches of physical decorum, but may be aimed toward any evil deemed likely to obstruct justice, including disadvantageous pre-trial publicity.[17] In other words, despite the fact that in past decisions the principal justification for excluding photography from the courtroom has been the supposed tendency of picture-taking to diminish the dignity and decorum of the court, it seems as though the court in the instant case is upholding an exclusion of photography in order to lessen the possibility of the defendant's rights to a fair and impartial trial[18] being abridged by adverse publicity.

There is apparently no case holding that photography may be excluded from judicial proceedings in order to insure that the defendant not be prejudiced by the added publicity that pictures would afford.[19] This consideration may have been instrumental in producing many such rulings, but the courts have not gone so far as to make an express statement of the proposition. It would seem, however, that the court in the instant case has come very

cess to its own proceedings (or penalizing a direct violation of such restrictions) as in restraining or penalizing independent conduct of third parties. The safeguard against an abusive judicial 'censorship' of its proceedings by such means is the same as that which controls all judicial action in this direction; the requirement that such measures must appear to be necessary to a fair trial."

16. *Ibid.*: "The usual rule [is that] . . . a court, pursuant to its duty to maintain an orderly system of justice and to conduct all proceedings in a manner which accords due process of law to the parties before it, may restrain or penalize conduct reasonably calculated to obstruct those ends."

17. *Id.* at 37: "The record before us is ample to sustain a finding of proper relationship between the order of the court and its duty to maintain order and decorum and accord due process to parties before it in a *case attended by such notoriety and emotional distress*, demonstrated by the *volume of attention by the press*. . . . That such *extensive publicity* can *adversely affect* the rights of a defendant to a fair trial is no longer debatable." (Emphasis added.)

18. "In all criminal prosecutions, the accused shall enjoy the right to a speech and public trial, by an impartial jury. . . ." U.S. CONST. amend. VI. The denial of a fair and impartial trial as guaranteed by this amendment is also a denial of "due process of law" demanded by the Fourteenth Amendment. Baker v. Hudspeth, 129 F.2d 779 (10th Cir. 1942), cert. denied, 317 U.S. 681 (1942), rehearing denied, 317 U.S. 711 (1942).

19. There have been several cases upholding court orders against photography, but none of the holdings was based on the proposition that photography may be excluded from judicial proceedings in order to insure that the defendant's rights to a fair and impartial trial be in no way abridged. In Tribune Review Publishing Co. v. Thomas, 254 F.2d 883 (3d Cir. 1958), the holding was based on the accused's right to have his privacy reasonably inviolate, and on the necessity for the orderly administration of justice. In the case of *In re* Mack, 386 Pa. 251, 126 A.2d 670 (1957), cert. denied, 352 U.S. 1002 (1957), court rules prohibiting photography were upheld as reasonably related to the maintenance of dignity and decorum in the court. In State v. Clifford, 118 N.E.2d 853 (Ohio App. 1954),

close to doing so. It is proposed by the court that the adverse effects of pre-trial publicity upon the rights of the accused pose an adequate justification for excluding photography from the court, but that since this exclusion does not amount to a restraint upon *publication*,[20] the dangers involved need not be "clear and present."[21] Yet it would appear that prohibiting photography at court proceedings will fairly effectively curtail any pictures of the proceedings being *published*. In the light of the fact that the court in the instant case admitted that such photography as was contemplated would not cause "inordinate disturbance or indignities,"[22] and that the order was issued for the purpose of curtailing publicity,[23] perhaps the better test of the validity of the order would have been the "clear and present danger" test. If this is true, then a further question is raised as to whether the order could have been sustained under that rule. It is by no means a certainty that it could not; it is at least conceivable that the adverse effects of the added publicity afforded by photographs could be deemed a "clear and present danger" to the procedural rights of the accused.[24] In any event, the court here has put a case strikingly similar to those in which the "clear and present danger" rule has been applied. It is true that circumventing the constitutional question in this manner will give the

the court rule was upheld as a reasonable exercise of the judge's power to quell courtroom disturbance. In the case of *In re* Seed, 140 Misc. 681, 251 N.Y. Supp. 615 (1931), the court order against photography was based on the inordinate disturbance thereby created. In *Ex parte* Sturm, 152 Md. 114, 136 Atl. 312 (1927), the court's order was upheld as a reasonable measure in order to safeguard against unwarranted abuses of the accused's rights of privacy.

20. See note 13 *supra*.

21. "None of the cited cases is authority for the proposition, nor does our search reveal one, which holds that the 'clear and present danger' rule governs a court's power to restrain, upon occasion, the public character of judicial proceedings or to regulate or place certain limitations on public access to persons in custody. The requirement has been that such limitations must appear to be reasonably necessary for the orderly administration of justice. The duty of the court in this respect is not confined to preserving order or decorum in the courtroom itself, . . . but obviously relates to the entire process from the inception . . . of official custody of the accused." Brumfield v. State, 108 So.2d 33, 37 (Fla. 1959).

22. *Id.* at 34-35.

23. See note 15 *supra*.

24. See memorandum of Mr. Justice Frankfurter concerning the denial of certiorari in the case of Leviton v. United States, 343 U.S. 946 (1952). The question in that case would have been whether to reverse a conviction because of a trial by newspaper publicity. Mr. Justice Frankfurter quoted with approval from Judge Frank's dissent in the lower court, 193 F.2d 848 (2d Cir. 1951): "I cannot see the relevance here of cases . . . applying the 'clear and present danger' tests to contempts by newspapers for articles relative to pending trials (*incidentally, all non-jury trials*). That test has been employed only when the newspaper itself was threatened with criminal punishment for the *publication*. It certainly should not be carried over to a case . . . where convicted defendants may well have been prejudiced by a newspaper article. In such a case the 'clear and present danger'

court more freedom in protecting the rights of the defendant from unwarranted publicity. However, in view of the traditional sanctity of the First Amendment liberties,[25] it is doubtful that such a result is wholly desirable.

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CRIMINAL LAW — MISCEGENATION — DEFINITION OF "COHABITATION"

Defendants were convicted of miscegenation. The indictment, tracing the language of Article 79 of the Louisiana Criminal Code,[1] charged that defendants did habitually cohabit with each other, he being of the Negro race and she being of the white race. The trial judge in charging the jury defined cohabitation as access for the purpose of sexual intercourse, and defined habitual cohabitation as access for the purpose of sexual intercourse as a matter of habit. On appeal, *held*, reversed. The phrase "habitual cohabitation" as used in Article 79 means customary or repeated acts of sexual intercourse. Under the trial court's instruction in the instant case an accused could be convicted of miscegenation without any evidence that sexual intercourse had occurred. *State v. Brown*, 108 So.2d 233 (La. 1959).[2]

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test would bar reversals for all but the most flagrantly scurrilous or deceptive newspaper attacks. Courts . . . have always recognized that printed matter may be prejudicial enough to require a new trial without evidencing so depraved an attitude of the publisher as to support a contempt citation." (Emphasis added.) Language to this effect, it could be argued, is at least a minute indication that the Supreme Court might see a clear and present danger in newspaper attacks inclined to prejudice a criminal defendant.

25. "The First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." Bridges v. California, 314 U.S. 252, 263 (1941).

1. LA. R.S. 14:79 (1905): "Miscegenation is the marriage or habitual cohabitation with knowledge of their difference in race, between a person of the Caucasian or white race and a person of the colored or negro race.

"Whoever commits the crime of miscegenation shall be imprisoned, with or without hard labor, for not more than five years."

Louisiana's miscegenation article is somewhat unique in that it combines a prohibition of intermarriage with a prohibition of "cohabitation." Twenty-six states prohibit intermarriage between Negroes and Caucasians and attach either civil or criminal sanctions, but only three other states have the double prohibition that Louisiana has. Five states besides Louisiana have various prohibitions relating to sex relations between Negroes and Caucasians. Of all these states, only one besides Louisiana uses the word "cohabit." MURRAY, STATES' LAWS ON RACE AND COLOR (1951).

2. The court also held in the instant case that Article 79 of the Criminal Code does not violate the equal protection clauses of the state and federal constitutions, but a discussion of this aspect is without the scope of this note.