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Constitutional Law -- Contempt of Court -- Newspaper Photographers

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facts and presentation of the plaintiff's case, the decision of the court, based on the immunity of governmental discretion, cannot be questioned.

RONALD E. KAY

CONSTITUTIONAL LAW—CONTEMPT OF COURT—NEWSPAPER PHOTOGRAPHERS

Plaintiff newspaper sought to enjoin enforcement of a state court order prohibiting representatives of the press from taking pictures in and in the vicinity of the court room during the progress of a trial. *Held*, injunction refused. The state court has the right to prohibit the taking of pictures during a trial. This restriction to uphold the dignity of the court is not a violation of freedom of the press. *Tribune Review Publishing Company v. Thomas*, 153 F. Supp. 484 (W.D. Pa. 1957.)[1]

It has never been questioned that the courts have a right to punish persons disturbing the administration of justice when these disturbances are committed in the presence of the court.[2] An inherent function of the judicial system is the duty of the courts to conduct proceedings with fitting dignity and decorum.[3] Where photographers disturbed the proceedings of a trial by exploding flash powder, they were held in contempt for detracting from the decorum of the court.[4] Court orders have been promulgated which bar photographers from taking pictures during court proceedings on the theory that the presence of cameramen would potentially detract from the dignity and decorum of the court.[5]

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1. The Westmoreland County Court during the trial of John Wesley Wabel, "The Phantom Killer of the Turnpike," Commonwealth v. Wabel, 382 Pa. 80, 114 A. 2d 334 (1955), promulgated a court rule prohibiting the taking of pictures in the court house or within 40 feet of the entrance of any court room. *Rule 6084 of the courts of Westmoreland County, Pennsylvania.* Press photographers took pictures of Wabel on his way into court for sentencing in direct violation of this order. They used infra-red camera and did not attract attention or distract the court. The photographers were cited for contempt of court when the pictures appeared in print. On appeal to the Supreme Court of Pennsylvania, the convictions were upheld although the jail sentences were vacated. *In re* Mack, 386 Pa. 251, 126 A. 2d 679 (1956). The Supreme Court of the United States *denied certiorari*, Mack v. Pennsylvania, 352 U. S. 1002 (1956), and the plaintiffs brought this test case into the Federal Court.

2. *Ex parte* Terry, 128 U. S. 289 (1888).

3. Judicial canon 35 provides; "Proceedings in court should be conducted with fitting dignity and decorum. The taking of Photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings are calculated to detract 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 mind of the public and should not be permitted."

4. *In re* Seed, 140 Misc. 681, 251 N. Y. S. 615 (Sup. Ct. 1931).

5. State v. Clifford, 162 Ohio St. 370, 123 N. E. 2d 8 (1954).

It is generally accepted that a defendant in a criminal trial cannot avail himself of the right of privacy.[6] An accused has become an object of legitimate public interest.[7] He has become an "actor" in a newsworthy event and it is not a violation of his right of privacy to publish his photograph with an account of the event.[8] The right to a public trial is a fundamental constitutional right,[9] and an accused is entitled to a public trial no matter with what offense he is charged.[10] However, at least one case has construed the right to public trial to mean not only the right of the accused to be tried in open court, but also the *right of the public* to be present.

> But the defendants cannot waive *the right of the people* to insist that the proceedings of the courts, insofar as practicable and in the interests of the public health and public morals, be open to public view. In other words, a defendant has no right, constitutionally or otherwise, to a private trial, that is, one hidden from public view.[11] (*Italics added.*)

Freedom of the press is a basic constitutional right.[12] This fundamental freedom includes the right of the press to report a trial to its readers.[13] Freedom of the press is not absolute but is subject to restrictions when other substantive rights are threatened.[14] The right to a fair and impartial trial cannot be subordinated to the right of freedom of press. Justice Holmes in *Schenck v. United States*[15] established the "clear and present" danger doctrine which the Supreme Court has followed in determining when the freedom of the press can be constitutionally restricted. The publications must constitute a clear and present danger to the administration of justice. The Supreme Court of the United States has held that the conviction of a person for contempt of court for publishing criticisms of the trial judge in the conduct of a case,[16] or for publishing cartoons critical of the conduct of a trial judge[17] violates the constitutional guarantee of freedom of the

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6. Elmhurst v. Pearson, 153 F. 2d 467 (1946); Coverstone v. Davies, 38 Cal. 2d 315, 239 P. 2d 876 (1952); PROSSER, TORTS, § 97 (2d ed. 1955).
7. Leverton v. Curtis Publishing Company, 192 F. 2d 974 (3rd Cir. 1951) (This case was concerned with an injured person's right of privacy and not an accused.)
8. Jacova v. Southern Radio and Television Company, 83 So. 2d 34 (Fla. 1955).
9. U. S. CONST. art. VI.
10. *In re* Oliver, 333 U. S. 257 (1947) (The accused was tried for contempt without a jury and in closed chambers).
11. E. W. Scripps Company v. Fulton, 100 Ohio App. 157, 167, 125 N. E. 2d 896, 903 (1955).
12. U. S. CONST. amend. I.
13. Craig v. Harney, 331 U. S. 367 (1946). "A trial is a public event. What transpires in the court room is public property . . . Those who see and hear what transpired can report it with impunity."
14. Beauharnis v. Illinois, 343 U. S. 250 (1951); State v. Coleman, 347 Mo. 1238, 152 S. W. 2d 640 (1941).
15. Schenck v. United States, 249 U. S. 47 (1918).
16. Bridges v. California, 314 U. S. 252 (1941).
17. Pennekamp v. Florida, 328 U. S. 331 (1946).

press unless said publications create a clear and present danger to the administration of justice.

On the basis of the constitutional freedoms of press and public trial it appears that the public cannot be denied admittance to a trial;[18] and the press, as representatives of the public, may report the trial subject to restriction only when this would constitute a clear and present danger to the administration of justice. Photography must certainly be included as an integral part of news dissemination.[19] It seems incongruous to apply the constitutional guarantee of freedom of the press to the use of word descriptions but not to photographs. To deny one is to deny both.[20]

In the instant case the court did not find it necessary to discuss the clear and present danger doctrine and found little difficulty in accepting the trial court's order as a reasonable exercise of court power to uphold dignity.

> The very thought of members of the press and/or amateur photographers and others, no matter how silent and concealed, to photograph different parties and witnesses to a court proceeding while the parties and the courts are engrossed in the determination of matters of tremendous moment to the parties involved, is repugnant to the high standards of judicial decorum to which our courts are accustomed, and, indeed, may prove an opening wedge to a gradual deterioration of the judicial process.[21]

Some jurists would find it difficult to reconcile the well ordered use of cameras with a threat to the dignity and decorum of court proceedings. The Colorado Supreme Court held hearings with respect to permitting cameras and radio and television instruments in court.[22] The court found, *on experiment*, that court proceedings could be reported on television without disturbing the court or witnesses and without the court seeing the cameras or microphones. There is increasing support for the contention that photographs can be taken in court without disturbing the proceedings.[23]

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18. An exception is made when the trial involves sordid matters. People v. Jelke, 308 N. Y. 56, 123 N. E. 2d 769 (1954). Public and press were excluded during portion of trial involving testimony of sodomy. However complete exclusion of the public and the press is a violation of the defendant's constitutional rights. Kirtowsky v. Superior Court, 143 Cal. App. 2d 745, 300 P. 2d 163 (1956).

19. State v. 8th Judicial District Court, 66 Nev. 166, 207 P. 2d 990 (1949); Note, 102 U. Pa. L. Rev. 1085 (1954). But see *ex parte* Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S. E. 68 (1905); Sturm, 152 Md. 121, 136 Atl. 312 (1927).

20. *In re* Mack, 386 Pa. 251, 126 A. 2d 679 (1956) (*Dissenting* opinion).

21. Tribune Review Publishing Co. v. Thomas, 153 F. Supp. 484, 494 (W. D. Pa. 1957).

22. *In re* Hearings Concerning Canon 35, 296 P. 2d 465 (Sup. Ct. Colo. 1956).

23. Brownell, *Press Photographers and the Courtroom - Canon Thirty-five and Freedom of the Press*, 35 Nebr. L. Rev. 1 (1955); Brownell, *Freedom and Responsibility of the Press in a Free Country*, 24 Ford. L. Rev. 178 (1955); Cedarquist, *The Case for Canon* 35, 45 Ill. B. J. 698 (1957); Geis, *Canon* 35 *in the light of recent events*, 43 A. B.A. J. 419 (1957); The Miami Herald, Nov. 10, 1957, p. 16-A, Col. 1.

The power of the court to prohibit the taking of pictures at a trial was voiced when flash powder[24] and flash bulbs[25] distracted the court proceedings. Judicial canon 35 was adopted as a result of the distraction caused by the myriad of wires and equipment used by the press in covering the *Hauptman Trial*.[26] In *ex parte Sturm*[28] a surreptitious photograph taken in the court room was held to be grounds for contempt and now the instant case extends the power of the court to bar photographs when taken outside the court room and without causing a disturbance to the proceedings.[28]

The clear and present danger doctrine applied in freedom of speech and press cases should also be the criterion for determining when a photographer may be prohibited from taking pictures during a trial. Certainly if the photographer's actions constitute a clear and present danger to the impartial administration of justice, the photographer should be restricted from taking pictures. However, restrictions of the liberty guaranteed by the first amendment should be narrowly drawn, and free speech as well as freedom of the press, limited *only* by the *real* necessities of the clear and present danger doctrine, should be paramount and unequivocal instead of being subject to the arbitrary mercy of state legislatures, executive and *judicial agencies*.[29] Judicial canon 35[30] and rules of court similar to rule 53 of the Federal Rules of Criminal Procedure[31] appear to be an arbitrary denial of freedom of the press. To categorically deny photographers the right to take pictures at a trial, whether or not they would actually detract from the dignity of the court and thus create a clear and present danger, is unreasonable.

HENRY J. PROMINSKI

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24. *In re Seed*, 140 Misc. 681, 251 N.Y.S. 615 (Sup. Ct. 1931).
25. State v. Clifford, 162 Ohio St. 370, 123 N.E.2d 8 (1954).
26. State v. Hauptman, 115 N.J.L. 412, 180 Atl. 312 (1935).
27. *Ex parte* Sturm, 152 Md. 121, 136 Atl. 312 (1927).
28. *In re* Mack, 386 Pa. 251, 126 A.2d 679 (1956); In the matter of attachment for criminal contempt of Robert Brumfield, criminal case No. 1871-F in the circuit court of the eleventh circuit, in and for Dade County, Florida (Nov. 22, 1957). Photographers of a television service were convicted of contempt of court for taking pictures in violation of an order patterned by circuit Judge Giblin on the Westmoreland County Court Rule. This "test" case is in the process of appeal.
29. Mr. Justice Black of the United States Supreme Court has steadfastly dissented when restrictions have been imposed upon the First Amendment freedoms. Yates v. United States, 26 U.S.L. Week 4017 (U.S. Nov. 26, 1957) (Dissenting opinion); Poulos v. New Hampshire, 345 U.S. 395 (1952) (Dissenting opinion); United Public Workers v. Mitchell, 330 U.S. 75 (1951) (Dissenting opinion); Beauharnais v. Illinois, 343 U.S. 250 (1951) (Dissenting opinion); American Communications Association C.I.O. v. Douds, 339 U.S. 382 (1949) (Dissenting opinion).
30. See note 2 *supra*.
31. 30 FED. R. CRIM. P. 53, "The taking of photographs in the court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the court room shall not be permitted by the court."