

RECENT DEVELOPMENT

UNITED STATES v. CBS: WHEN SKETCH ARTISTS ARE ALLOWED IN THE COURTROOM, CAN PHOTOGRAPHERS BE FAR BEHIND?

In *United States v. CBS*,¹ the Fifth Circuit Court of Appeals considered the question of whether the sketching of judicial proceedings by an artist for publication in connection with a news broadcast may be prohibited in the interest of preventing prejudicial publicity. The court held that a blanket prohibition of *publication* of sketches, regardless of whether they were made in the courtroom or elsewhere, was "too remotely related to the danger sought to be avoided" and "too broadly drawn to withstand constitutional scrutiny."² In addition, the court held that, in the absence of a showing that sketching was obtrusive or disruptive, a blanket prohibition of sketching *within* the courtroom was constitutionally impermissible as an overbroad limitation of first amendment rights.³

The analysis of the *CBS* court represents a departure from the traditional concept of the extent to which judicial authority may be exercised to control the conduct of the press in the courtroom and its environs. In tacitly extending a clear and present danger test as a limitation upon judicial authority to control conduct of the press within the courtroom, the Fifth Circuit may have inadvertently exposed a basic flaw in the rationale which has supported prohibitions against the taking of photographs in the courtroom for more than a quarter of a century. Further, the holding in *CBS*, considered together with the prohibitions against the making of photographs contained in Federal Rule of Criminal Procedure 53⁴ and its philosophical companion, Canon 3A(7) of the Code of Judicial Conduct,⁵ makes possible the following anom-

1. 497 F.2d 102 (5th Cir. 1974).

2. *Id.* at 106.

3. *Id.* at 107. The court's assumption that sketching is protected by the first amendment is implied by its citation of *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 499-502 (1952), in which case the Supreme Court held that expression by means of motion pictures is included within the free speech and free press guarantees of the first and fourteenth amendments. See 497 F.2d at 105.

4. The rule provides: "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." FED. R. CRIM. P. 53.

5. This subdivision of Canon 3 provides:

alous result: Highly inflammatory, subjective sketches of judicial proceedings could be published while relatively objective photographs of the same subject could not even be taken.

The controversy in *CBS* arose when a CBS news artist attended the pretrial hearing of the "Gainesville Eight"⁶ in July 1973, at which time federal district court Judge Arnow⁷ announced that he would not permit any sketches of the proceedings to be made for publication irrespective of where the sketches were actually made. The artist did not take sketching materials into the courtroom, but sketched the proceedings from memory. After four of the sketches were televised on the *CBS Morning News*, CBS was found guilty of criminal contempt for having defied the district court order.⁸ Both CBS and NBC sought writs of mandamus to require the district court judge to vacate those parts of his written orders which restricted sketching,⁹ and

A judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that a judge may authorize:

- (a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration;
- (b) the broadcasting, televising, recording, or photographing of investigative, ceremonial, or naturalization proceedings;
- (c) the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions:
 - (i) the means of recording will not distract participants or impair the dignity of the proceedings;
 - (ii) the parties have consented, and the consent to being depicted or recorded has been obtained from each witness appearing in the recording and reproduction;
 - (iii) the reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and
 - (iv) the reproduction will be exhibited only for instruction purposes in educational institutions. ABA CODE OF JUDICIAL CONDUCT, Canon No. 3A(7).

The Code was adopted in 1972 by a unanimous vote of the House of Delegates of the American Bar Association. Although the Canon reflects the contemporary concern for "instructional" use of technology, it implicitly restricts the discretion of the court and is consistent with its forerunner, ABA Canon 35 of the Canons of Judicial Ethics. See E. THODE, REPORTER'S NOTES TO CODE OF JUDICIAL CONDUCT (1973). Canon 35 is set out in note 72 *infra*.

6. The "Gainesville Eight" were accused of conspiring to disrupt the Republican National Convention in 1972.

7. Judge Arnow, of the United States District Court for the Northern District of Florida, sits in Pensacola, Florida.

8. The appeal from the criminal contempt conviction was considered in a separate opinion, *United States v. CBS*, 497 F.2d 107 (5th Cir. 1974).

9. The order issued on July 13 provided:

During the progress of or in connection with any judicial proceedings now or hereafter pending before the undersigned . . . sketching in the courtroom or its environs, whether or not court is actually in session, is prohibited.

This order extends to and prohibits the publication of any sketch of the courtroom or its environs or any proceedings therein, regardless of the place where such sketch is made. *United States v. CBS*, 497 F.2d 102, 103-04 (5th Cir. 1974).

CBS appealed the contempt conviction.

Judge Dyer, writing for the court in *CBS*, defined the issues as follows:

First we must examine the constitutionality of the order banning the publication of sketches, regardless of whether the sketches were made in the courtroom, its environs, or elsewhere. Then we must consider the prohibition on sketching itself in the courtroom or its environs during any judicial proceedings.¹⁰

The court's perception of the dual nature of the issues presented in *CBS* stems in part from the dichotomous nature of the contempt power: courts generally have greater discretion in punishing direct contempt, *i.e.*, conduct within the presence of the court,¹¹ whereas power to punish conduct not in the presence of the court is more restricted.¹² The contempt power is statutorily restricted in the federal courts,¹³ and judicial authority to punish an act of contempt manifested by publication is further limited by the right of freedom of expression.¹⁴

The court noted that this order was intended to supplement Local Rule 16, which proscribes radio and television broadcasting from the courtroom. There is a hint that the Fifth Circuit might have avoided the constitutional issues presented in the case since the order was improperly promulgated, there being no indication that a copy of the amendment had been sent to the Supreme Court as is required by Federal Rule of Civil Procedure 83. *Id.* at 103 n.3.

10. *Id.* at 104.

11. The distinction is actually between conduct within the "presence" of the court "or so near thereto as to obstruct the administration of justice" and conduct removed from the presence of the court or from affecting the administration of justice. See note 13 *infra*. The words "so near thereto" have been strictly limited in the context of attempts to control the press. See *Bridges v. California*, 314 U.S. 252 (1941). Before *CBS*, there appeared to be a consensus that the courtroom and its environs on the same floor were included in that area over which the judiciary might exercise greater discretion in controlling the conduct of the press. See *Dorfman v. Meiszner*, 430 F.2d 558 (7th Cir. 1970).

12. Contempt of court has been the subject of a substantial amount of commentary. See, *e.g.*, Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183 (1971); Comment, *Civil and Criminal Contempt in the Federal Courts*, 57 YALE L.J. 83 (1947).

13. The statute provides:

A court of the United States shall have the power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

- (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
- (2) Misbehavior of any of its officers in their official transactions;
- (3) Disobedience or resistance to its lawful writ, process, order, rule, decree or command. 18 U.S.C. § 401 (1970).

14. See, *e.g.*, *Craig v. Harney*, 331 U.S. 367, 373 (1947) (freedom of speech should not be impaired unless there is a serious and imminent threat to the administration of justice); *Pennekamp v. Florida*, 328 U.S. 331, 347 (1946) (freedom of speech should be given the widest latitude compatible with fair and orderly administration of justice); *Bridges v. California*, 314 U.S. 252, 268 (1941) (freedom of speech guarantees are applicable in contempt proceedings to out-of-court publications concerning a pending case).

The general rule is that the press can be punished for conduct outside the presence of the court only in the event that such conduct presents a clear and present danger to the administration of justice.¹⁵ Although the *CBS* court stated the issues of the case in a manner which implicitly recognized the distinction between the extent of judicial authority to control conduct depending upon the location of its occurrence, the court's ultimate resolution of the issues eroded that distinction.

The court began its analysis by acknowledging the affirmative duty of the trial judge to maintain a dispassionate forum as an essential element of a fair trial¹⁶ and then focused on the duty of the trial judge to safeguard the guarantees of the sixth amendment and the due process clause of the Constitution. This emphasis on the duty of the trial judge to protect the defendant from prejudicial publicity suggests that judicial authority to invoke its contempt power to control conduct derives at least in part from the substantive rights of the defendant to an impartial trial.¹⁷ Significantly, in *CBS* the defendants in the trial to which the press sought access made no complaint of prejudicial treatment at the hands of the press, but themselves actively sought publicity.¹⁸ This fact serves to emphasize the real question presented by the *CBS* case: to what extent may judicial authority be exercised to restrict news-gathering techniques where there is no complaint by the accused of prejudicial treatment by the press?¹⁹

The Fifth Circuit accepted without question the right of the press

15. *Bridges v. California*, 314 U.S. 252 (1941), first applied the "clear and present danger" language of *Schenck v. United States*, 249 U.S. 47 (1919), to a case involving contempt by publication. 314 U.S. at 260-63.

16. The duty of the trial judge to insure a fair trial by restraining the press from disrupting the proceedings is mandated by *Sheppard v. Maxwell*, 384 U.S. 333 (1966), and by *Estes v. Texas*, 381 U.S. 532 (1965). The affirmative duty of the judge to restrain the defendant from disrupting the proceedings is mandated by *Illinois v. Allen*, 397 U.S. 337 (1970).

17. *Cf. Illinois v. Allen*, 397 U.S. 337 (1970).

18. The trial judge noted in a statement accompanying the order that the defendants were "trying to place before the public, including persons who are potential jurors, their own version of the merits of the case." 497 F.2d at 104. He accused the defendants of cultivating prejudicial publicity by their assertions that the prosecution was politically motivated. *See id.*

19. In *CBS*, the defendants in the case to which the press sought access joined in the request that the sketching be allowed. Brief for Appellant at 2, *United States v. CBS*, 497 F.2d 102 (5th Cir. 1974). There appears to be no question that in certain circumstances the accused may have media representatives excluded. *See United States v. American Radiator & Standard Sanitary Corp.*, 274 F. Supp. 790, 793 (W.D. Pa.), *rev'd on other grounds*, 388 F.2d 201 (3d Cir. 1967), *cert. denied*, 390 U.S. 922 (1968); *State v. Meek*, 9 Ariz. App. 149, 150-54, 450 P.2d 115, 116-20, *cert. denied*, 396 U.S. 847 (1969).

to attend the court proceedings.²⁰ In *United States v. Dickinson*,²¹ Judge Brown stated:

We start, of course, with the proposition repeatedly reaffirmed by the Supreme Court that "a trial is a public event. What transpires in the courtroom is public property Those who see and hear what happened may report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it."²²

The *CBS* court cited *Dickinson* with approval, observing:

That case stands for the proposition that before a prior restraint may be imposed by a judge, even in the interest of assuring a fair trial, there must be "an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable, it must immediately imperil."²³

The *CBS* court specifically rejected the government's contention that because the ban on sketching involved only a minor restriction, the ban should be allowed. The court refused to apply a sliding scale of measuring first amendment rights according to the degree of restraint imposed.²⁴ Observing that the Kaufman Committee²⁵ had

20. It is important to note that the *CBS* case did not involve any examination of the right of the press to attend courtroom proceedings, nor did it reach any question with respect to the right of the press to obtain access to news sources. The right of access and right to gather problems were recently considered by the Supreme Court in the context of prison interviews in *Pell v. Procunier*, 417 U.S. 817, 829-35 (1974), and *Saxbe v. Washington Post Co.*, 417 U.S. 843, 846-50 (1974). While the Supreme Court concluded that the rights of the press were coextensive with the rights of the general public with respect to access to news sources, the *CBS* court did not consider the issue since neither the press nor the public was excluded from the proceedings.

21. 465 F.2d 496 (5th Cir. 1972). This case arose out of an attempt by a civil rights worker to get the federal court to block his trial in state court. During a hearing on whether the state prosecutorial motive was legitimate, the federal trial judge ordered the press not to make any report of the testimony taken in the case because he believed that publicity would prejudice the state proceedings that were likely to take place later. *Id.* at 500. When two newsmen reported the testimony in violation of the order and were found guilty of criminal contempt, the Fifth Circuit concluded that the order was constitutionally invalid, but that the newsmen could be punished for violating even an invalid order. *Id.* at 509. The case was remanded for the district court to decide if the contempt judgment was still appropriate in light of the fact that the order was unconstitutional.

22. *Id.* at 501, quoting *Craig v. Harney*, 331 U.S. 367, 374 (1947).

23. 497 F.2d at 104, quoting *Craig v. Harney*, 331 U.S. 367, 376 (1947).

24. 497 F.2d at 105.

25. See REPORT OF THE COMM. ON THE OPERATION OF THE JURY SYSTEMS ON THE FREE-PRESS—FAIR TRIAL ISSUE, 45 F.R.D. 391 (1968). The report was the product of the Kaufman Committee, which was chaired by Irving R. Kaufman, presently Chief Judge of the Second Circuit Court of Appeals.

warned against restraint of the press,²⁶ the *CBS* court declined to hold that sketches were among those “unnecessary dramatizations” which would threaten the impartiality of proceedings sufficiently to warrant their prohibition.²⁷ Equally fruitless was the government’s attempt to persuade the court that sketching should be prohibited because of the potentially prejudicial “awareness” of the trial participants that the proceedings were being sketched.²⁸ The court was not convinced that “being sketched for later publication can be equated with the uniquely prejudicial impact of telecasting.”²⁹ Focusing on the problem of distraction occasioned by television, as noted by the Supreme Court in *Estes v. Texas*,³⁰ Judge Dyer observed that sketching, unlike televising, could be done “quite unobtrusively.”³¹ Although the court agreed with the Court’s comment in *Estes* that the psychological considerations of being televised have significant impact, it declined to impute the same effect to sketching. The court noted that the televising of courtroom procedures is nearly universally condemned, while sketching is restricted in only a few jurisdictions.³² The *CBS* court concluded by observing that “the total ban on the publication of sketches is too remotely related to the danger sought to be avoided, and is, moreover, too broadly drawn to withstand constitutional scrutiny,”³³ for “it is basic constitutional law that the limitation can be no broader than necessary to accomplish the desired goal.”³⁴

The Fifth Circuit next considered the second issue in the case—whether an order prohibiting in-court sketching was valid. Judge Dyer

26. The Kaufman Committee was not consistent with its warning, however, in advising against restraint of the press. Its recommendations included prohibition of photography and broadcasting in the courtroom. *Id.* at 401, 414-15.

27. 497 F.2d at 105.

28. *Id.* “It is the awareness of the fact of telecasting that is felt by the juror throughout the trial. We are all self-conscious and uneasy when being televised.” *Estes v. Texas*, 381 U.S. 532, 546 (1964).

29. 497 F.2d at 105.

30. 381 U.S. 532 (1965). In his concurring opinion Chief Justice Warren observed: “The right of communications media to comment on court proceedings does not bring with it the right to inject themselves into the fabric of the trial process to alter the purpose of that process.” *Id.* at 585.

31. 497 F.2d at 107. The New Jersey Supreme Court reached the same conclusion and agreed to modify its Canon 35 in order to permit an artist to sketch the proceeding so long as the artist works unobtrusively and does not distract the attention of witnesses or jurors. Application of NBC, 64 N.J. 476, 317 A.2d 695 (1974).

32. 497 F.2d at 106. Only three of eighty federal district courts with written rules restrict sketching by forbidding the sketching as well as photographing of jurors. This restriction only applies to widely publicized cases and is intended to preserve the anonymity of the jurors.

33. *Id.*

34. *Id.*

briefly acknowledged the greater power of the trial judge in dealing with conduct of those within the presence of the court vis-à-vis the more restricted power of the trial judge in dealing with those outside the court's presence. The court observed that "[o]rordinarily, the trial judge has extremely broad discretion to control courtroom activity, even when the restriction touches on matters protected by the First Amendment" ³⁵ However, it quickly concluded that in the absence of a showing that "sketching is in any way obtrusive or disruptive," ³⁶ the prohibition against sketching was "overly broad and thus invalid." ³⁷ In so holding, the *CBS* court tacitly applied the clear and present danger standard as a limitation upon judicial authority to control conduct and shifted the inquiry from the authority of the judiciary to control courtroom conduct to the protection of the rights of the press. This dramatic change of emphasis is best illustrated by an examination of the Fifth Circuit's opinion in *Seymour v. United States*, ³⁸ which the *CBS* court cited with approval.

In *Seymour*, the Fifth Circuit considered a challenge to a standing order of the district court which prohibited the taking of photographs "in connection with any judicial proceeding on or from the same floor of the building on which courtrooms are located" ³⁹ *Seymour*, a television news photographer, was found guilty of contempt for having taken television photographs of a defendant and his attorney in the hallway outside a courtroom ⁴⁰ from which the defendant was being led following arraignment proceedings. *Seymour* did not question the constitutionality of the practice of excluding television photographers from the courtroom, but he contended that the court's order was "fatally vague because of its failure to define whether or not it applies to a terminated judicial proceeding" ⁴¹ Further, he asserted that "because the arraignment proceedings had terminated when he took the photographs, any reasonable relation the order may have had to the maintenance of orderly judicial administration was negated." ⁴²

The court rejected both of these contentions, ⁴³ noting that the federal contempt statute authorizes use of the contempt power by the

35. *Id.* at 106-07, citing *Seymour v. United States*, 373 F.2d 629 (5th Cir. 1967).

36. 497 F.2d at 107.

37. *Id.*

38. 373 F.2d 629 (5th Cir. 1967).

39. *Id.* at 630 n.1.

40. For a general discussion of what constitutes contempt in the presence of the court, see note 11 *supra* and accompanying text.

41. 373 F.2d at 631.

42. *Id.*

43. *Id.*

court to punish “[d]isobdience or resistance to its lawful writ, process, order, rule, decree or command.”⁴⁴ Judge Thornberry, writing for the court in *Seymour*, minimized considerations of first amendment issues and emphasized the right of the accused to a fair trial “as the only relevant constitutional consideration.”⁴⁵ The court refused to consider the question of prior restraint and neglected to inquire into the lawfulness of the order in terms of the rights of the press, suggesting that a distinction could be drawn between the right of the press to *report* the news and the privilege of *gathering* the news. However, no elaboration of that distinction, nor any citation to authority, was given in the opinion.⁴⁶ Furthermore, this court, unlike the *CBS* court,⁴⁷ failed to analyze the order to see if it might not be broader than was necessary to achieve the desired effect. Nevertheless, the court did note that the Third Circuit had considered the constitutional validity of a similar order proscribing photography from the courtroom and its environs in *Tribune Review Publishing Co. v. Thomas*,⁴⁸ but Judge Thornberry did not embrace that court’s unique approach of denying that any issue of freedom of expression was presented.⁴⁹ Having limited the extent of its inquiry into the first amendment issue, although not denying its existence, the *Seymour* court abruptly concluded:

[W]e are convinced that the order before us falls within the ambit of permissible maintenance of judicial decorum and represents a reasonable implementation of the due-process mandate to preserve at all costs an atmosphere essential to “the most fundamental of all freedoms” — a fair trial.⁵⁰

44. 18 U.S.C. § 401 (1970). For the full text of the relevant statutory provision, see note 13 *supra*.

45. 373 F.2d at 632 (emphasis in original), quoting *Estes v. Texas*, 381 U.S. 532, 589 (1965) (Harlan, J., concurring).

46. The distinction between gathering and reporting news was made in *Branzburg v. Hayes*, 408 U.S. 665 (1972), in which the Supreme Court held that requiring newsmen to appear and testify does not abridge the freedoms of speech and press guaranteed by the first amendment. The Court observed: “[N]or is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated.” *Id.* at 681. For further discussion of the distinction between the rights of the press to gather and to report the news, see note 20 *supra*.

47. See 497 F.2d at 106.

48. 254 F.2d 883 (3d Cir. 1958). See also 57 MICH. L. REV. 280 (1958).

49. The *Tribune* court stated:

Realizing that we are not dealing with freedom of expression at all, but with rules having to do with gaining access to information on matters of public interest, can it be argued that here there is some constitutional right for everybody not to be interfered with in finding things about everybody else? 254 F.2d at 885.

See also *United Press Ass’ns v. Valente*, 308 N.Y. 71, 123 N.E.2d 777 (1954).

50. 373 F.2d at 632, citing *Estes v. Texas*, 381 U.S. 532, 540 (1965).

In short, the *Seymour* court focused on considerations of judicial authority to the exclusion of first amendment issues.

The later decisions of the Fifth Circuit—*Dickinson* and *CBS*—appeared to afford greater protection to the rights of the press. An emphasis on the high standard of the clear and present danger test, along with a requirement that restraints be narrowly drawn, is manifest in those decisions. The same protective philosophy led the Seventh Circuit Court of Appeals, in *Dorfman v. Meiszner*,⁵¹ to declare invalid a rule prohibiting photography and radio and television broadcasting in a building which served both as a courthouse and federal office building.⁵² In *Dorfman*, the Seventh Circuit agreed with the Chicago press that the prohibition was overbroad in its description of the environs to which it applied.⁵³ The challenge to the rule was not directed at its application within the courtroom itself, and the specific question of the constitutionality of a rule prohibiting photography *within* the courtroom was not presented. The Seventh Circuit, however, announced that the district court might by rule exclude photography and broadcasting from those areas in “which [they] would lead to *disruption* or *distraction* of judicial proceedings”⁵⁴ In dictum, the *Dorfman* court observed that “the district court was acting within its discretion in prohibiting photography and broadcasting inside as well as in the areas adjacent to the courtrooms.”⁵⁵ The court offered no indication of the basis for its dictum, but it is clear that some courts have relied on one or both of two related arguments in upholding the validity of

51. 430 F.2d 558 (7th Cir. 1970).

52. This district court rule, promulgated September 1969, provided in pertinent part:

The taking of photographs in the courtroom or its environs or radio or television broadcasting from the courtroom or its environs, during the progress of or in connection with judicial proceedings, including proceedings before a United States Commissioner, whether or not court is actually in session, is prohibited. *Id.* at 560.

In *Dorfman*, the Seventh Circuit rejected an argument advanced by the government that because the rule would actually be enforced in much more limited circumstances than its literal terms might suggest, it should be allowed to stand. *Id.* at 563. Citing *NAACP v. Button*, 371 U.S. 415, 438 (1963), the court said, “We cannot assume that in subsequent enforcement, ambiguities will be resolved in favor of adequate protection of First Amendment rights Moreover, we do not think that the use of the conjunctive rather than the disjunctive would save the rule.” 430 F.2d at 563 n.6.

53. Although the prohibition of photography and televising did not apply to all twenty-seven occupied floors of the building, it did extend to an enclosed plaza and sidewalks surrounding the courthouse and included floors which had no connection with judicial proceeding. The court observed that one of the effects of the rule was to prevent a United States senator whose office was on the eighteenth floor of the building from holding press conferences during those periods when court was in session. 430 F.2d at 562.

54. *Id.* at 561 (emphasis added).

55. *Id.* at 562,

orders restricting the use of photographic equipment in and around the courtroom.⁵⁶

The first of these arguments is the traditional theory of inherent judicial authority to control conduct in the courtroom and its surroundings.⁵⁷ Both Federal Rule of Criminal Procedure 53⁵⁸ and Canon 3A(7) of the Code of Judicial Conduct⁵⁹ rest upon this theory of inherent judicial authority. The second argument in favor of prohibiting photography—that such restrictions are mandated as a matter of due process by the Supreme Court holdings in *Estes v. Texas*⁶⁰ and *Sheppard v. Maxwell*⁶¹—is based upon an interpretation of those cases which has by no means achieved universal acceptance.⁶² Neither of these arguments is more than superficially concerned with first amendment considerations of the rights of freedom of expression and freedom of the press. Courts which have employed these arguments do not speak in terms of the clear and present danger standard,⁶³ nor have these courts applied the rule that restrictions upon first amendment rights must be narrowly drawn.⁶⁴ Each of the arguments assumes the validity of the highly questionable premise that the taking of courtroom photographs is inherently obtrusive or disruptive.⁶⁵

56. See *Seymour v. United States*, 373 F.2d 629 (5th Cir. 1967); *In re Acuff*, 331 F. Supp. 819 (D.N.M. 1971).

57. In *Michaelson v. United States*, 266 U.S. 42 (1924), the Court observed, "That the power to punish for contempt is inherent in all courts has been many times decided and may be regarded as settled law." *Id.* at 65.

58. See note 4 *supra*.

59. See note 5 *supra*.

60. 381 U.S. 532 (1965).

61. 384 U.S. 333 (1966).

62. See notes 75-78 *infra* and accompanying text.

63. *E.g.*, *Seymour v. United States*, 373 F.2d 629 (5th Cir. 1967); *In re Acuff*, 331 F. Supp. 819 (D.N.M. 1971).

64. Compare *United States v. CBS*, 497 F.2d 102 (5th Cir. 1974), and *Dorfman v. Meiszner*, 430 F.2d 558 (7th Cir. 1970), with *Seymour v. United States*, 373 F.2d 629 (5th Cir. 1967), and *Tribune Review Publishing Co. v. Thomas*, 254 F.2d 883 (3d Cir. 1958).

65. For an early case which did not accept the inherent disruptiveness of courtroom photography, see *Ex parte Sturm*, 152 Md. 114, 123, 136 A. 312, 315 (Ct. App. 1927), where the court stated that the ability of a photographer to take a picture in court without noise or distraction is no reason to allow disobedience to a judicial order forbidding it. *Id.* at 123, 136 A. at 315. The *Sturm* case was decided twenty years before it was announced that "[w]hat transpires in the courtroom is public property." *Craig v. Harney*, 331 U.S. 367, 374 (1947). The *Sturm* decision, at least in part, rested on the now generally discarded theory of the privacy rights of the defendant. For a discussion of this theory, see the majority and dissenting opinions in *In re Mack*, 386 Pa. 251, 126 A.2d 679 (1956). Today, the right of privacy of the defendant is diminished by the public interest in his case. See *Elmhurst v. Pearson*, 153 F.2d 467 (D.C. Cir. 1946); *Berg v. Minneapolis Star & Tribune Co.*, 79 F. Supp. 957 (D. Minn. 1948). A defendant's right to exclude the public and the press is dependent not upon his right of privacy,

Federal Rule of Criminal Procedure 53, which prohibits photographing and radio broadcasting of judicial proceedings, was adopted in 1946.⁶⁶ In 1962, the Judicial Conference of the United States adopted a resolution⁶⁷ in which it recommended broadening the scope of the original rule to exclude any type of broadcaster⁶⁸ from the environs of the courtroom as well as from the courtroom itself.⁶⁹ While the constitutionality of Rule 53 in the face of first amendment challenges has been assumed,⁷⁰ the question appears never to have been directly at issue, and no court has felt compelled to reach it.⁷¹ The existence of the rule and its assumed constitutionality has supported the adoption of orders by state and federal courts restricting the use of photography pursuant to Canon 35 of the Canons of Judicial Ethics, and subsequently, pursuant to Canon 3A(7) of the Code of Judicial Conduct.⁷² One probable explanation for the general acceptance of the constitutionality of the rule is that shortly before its adoption the judiciary exercised more discretion in its use of the contempt power for controlling the press.⁷³ While limitations upon a court's authority to punish the press for out-of-court conduct were well recognized, it was not until

but upon his right to a fair trial. *People v. Pratt*, 27 App. Div. 2d 199, 199-202, 278 N.Y.S.2d 89, 90-93 (1967); see *People v. Holder*, 70 Misc. 2d 31, 33, 332 N.Y.S.2d 933, 935 (Sup. Ct. 1972).

66. 3 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 861, at 376 (1969). For the text of Rule 53, see note 4 *supra*.

67. See 1962 ABA ANNUAL REP. OF THE PROCEEDINGS OF THE JUD. CONF. OF THE UNITED STATES 10. The Resolution has been implemented in a number of jurisdictions by local rule. 3 C. WRIGHT, *supra* note 66, § 861, at 377.

68. The original rule did not extend to television broadcasters. See note 4 *supra*.

69. See 3 C. WRIGHT, *supra* note 66, § 861, at 377.

70. See *id.*

71. In *Estes v. Texas*, 381 U.S. 532 (1965), the Supreme Court referred to both Rule 53 and Canon 35, but the specific question of the constitutional legitimacy of the policy of excluding photographers from the courtroom was not presented. Interestingly, in *CBS* it was contended by the network that the case did not involve a challenge to Rule 53. Brief for Appellant at 17, *United States v. CBS*, 497 F.2d 102 (5th Cir. 1974).

72. Canon 35 of the Canons of Judicial Ethics was adopted in 1937 and amended in 1952. It provides in pertinent part:

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. ABA CANONS OF JUDICIAL ETHICS NO. 35 (1952).

The Canons were adopted in most jurisdictions. See E. THODE, *supra* note 5, at 5.

73. Only recently have the courts recognized that the right to a public trial belongs to members of the general public who wish to attend the trial as well as to the accused. See *United States v. American Radiator & Standard Sanitary Corp.*, 274 F. Supp. 790 (W.D. Pa. 1967). But see *Geise v. United States*, 262 F.2d 151 (9th Cir. 1958), *cert. denied*, 361 US. 842 (1959).

1947 that the Supreme Court recognized that the proceedings in a courtroom were public property.⁷⁴ Although the rule and its kindred orders have survived uncontested, it is doubtful that they could withstand the level of scrutiny applied in *CBS*. If one adopts the clear and present danger test and the principle that restrictions must be narrowly drawn, the current blanket restrictions prohibiting photography in the courtroom appear to be impermissibly broad in scope.

The second argument in support of prohibiting courtroom photography—that such restrictions are either approved or mandated by the Supreme Court in *Estes* and *Sheppard*—is as vulnerable as the theory of unlimited judicial discretion. There can be no doubt that *Estes* and *Sheppard* stand for an affirmative duty on the part of a trial judge to preserve the dignity and impartiality of the proceedings. However, the Court did not give a definitive mandate for the exclusion of television and broadcasting equipment, let alone for the exclusion of photographers, since only four of the five Justices in favor of reversing the conviction in *Estes* were willing to pronounce the televising of proceedings a per se deprivation of due process.⁷⁵ The *Estes* Court did state that a different case would be presented when advances in technology permitted televising without its “present hazards to a fair trial.”⁷⁶ In *Sheppard*, the Court noted that “[w]here there was ‘no threat or menace to the integrity of the trial,’ . . . we have consistently required that the press have a free hand, even though we sometimes deplored its sensationalism.”⁷⁷ The circumstances surrounding the *Estes* and *Sheppard* cases make it clear that the constitutionally objectionable factor in each case was the level of publicity and disruption occasioned by members of the press. In each case, a carnival atmosphere reigned, making a fair trial impossible.⁷⁸

74. *Craig v. Harney*, 331 U.S. 367, 374 (1947); see *Nelles & King, Contempt by Publication in the United States*, 28 COLUM. L. REV. 401 (1928).

75. The fact that only four of the Justices constituting the majority in *Estes* were willing to find that courtroom photography constituted a per se due process violation was pointed out by the dissent of Justice Brennan. 381 U.S. at 617. The four Justices who agreed that televising criminal proceedings was unconstitutional were Chief Justice Warren and Justices Clark, Douglas, and Goldberg. *Id.*

76. *Id.* at 540.

77. 384 U.S. at 350 (citation omitted).

78. The atmosphere surrounding the *Sheppard* trial prompted the following comment by Judge Bell of the Ohio Supreme Court: “Murder and mystery, society, sex and suspense were combined in this case in such a manner as to intrigue and captivate the public fancy to a degree perhaps unparalleled in recent annals.” *State v. Sheppard*, 165 Ohio St. 293, 294, 135 N.E.2d 340, 342 (1956), *rev’d on other grounds sub nom. Sheppard v. Maxwell*, 384 U.S. 333 (1966).

In *Estes*, it was conceded that the activities of the television crews and news photographers led to considerable disruption of the hearings. On one occasion, videotapes

Perhaps because it is difficult to conceive of a televised trial which would not have similar prejudicial and disruptive impact,⁷⁹ courts have sometimes cited *Estes* as holding that the televising of criminal trials constitutes an inherent denial of due process. In *Bell v. Patterson*,⁸⁰ a district court which subscribed to this interpretation of *Estes*⁸¹ distinguished televising from still photography, saying that the reasons for holding television inherently prejudicial do not apply to still photography. Among the reasons listed for this distinction were the court's finding that televising a trial automatically renders it a *cause célèbre*,⁸² that limited photography does not cause the uneasiness nor the disruption which television causes,⁸³ and that televising tends to work profound changes on behavior which photography does not.⁸⁴ In addition, the court found that the danger presented by television in exposing the jury to detailed scrutiny did not arise with the allowance of limited photography.⁸⁵

The rationale of the *Bell* court in distinguishing televising from still photography bears a striking similarity to the analysis of the *CBS* court in its comparison of televising and sketching. While the *Bell* court held that the unobtrusive making of still photographs in the courtroom was not a per se deprivation of defendant's due process rights, the *CBS* court in effect concluded that the only acceptable justification for limiting the conduct of the press would be that such conduct presented a clear and present danger to the orderly administration of justice and to the rights of the accused.⁸⁶ The apparent combined effect of these decisions is to put still photography on an equal footing with sketching for purposes of determining the extent of allowable restraints upon the press within the courtroom and its environs.

By making the judicial determination that sketching should be

of the hearings on motions to exclude the press were rebroadcast in place of the "late movie." 381 U.S. at 538.

79. Both *Estes* and *Sheppard* dealt not only with the impact of the presence of the press within the courtroom, but also with the impact of publicity on the jury. The Court found as a matter of fact, in each case, that the defendant had been prejudiced by the publicity and that the interference of the press had surpassed the level required to justify the exercise of judicial contempt power.

80. 279 F. Supp. 760 (D. Colo.), *aff'd on other grounds*, 402 F.2d 394 (10th Cir. 1968), *cert. denied*, 403 U.S. 955 (1971).

81. *See* 279 F. Supp. at 769.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. There seems no question that disruptive conduct may warrant exclusion of spectators. *United States v. Kobl*, 172 F.2d 919 (3d Cir. 1949).

allowed unless it is obtrusive,⁸⁷ the *CBS* court may have unwittingly extended an invitation to photographers to challenge the constitutionality of blanket orders prohibiting them from taking photographs in the courtroom and its environs. If, where there is neither a need to protect the anonymity of the jury nor an objection by the defendant,⁸⁸ a newsman's right to attend and report on judicial proceedings is qualified only where his conduct presents a clear and present danger to the administration of justice,⁸⁹ the question arises as to how the courts may sustain the constitutionality of the prohibition against photography while rejecting the ban on sketching. Courts have not revealed what is inherent in the nature of photography which is of a sufficient constitutional dimension to distinguish it from sketching.⁹⁰

As was noted by the *Bell* court, courtroom photography is not inherently obtrusive.⁹¹ One state supreme court judge has posed the question: "How can there be an 'obstructing the administration of justice, when the act complained of cannot be seen, heard or felt?'"⁹² Although it might be supposed that the art of photography has only recently reached the point of sophistication making it possible to photograph unobtrusively, a 1927 decision revealed that newsman were secretly making photographs in court nearly half a century ago.⁹³ In 1956, the Supreme Court of Colorado refused to adopt Canon 35 of the Canons of Judicial Ethics⁹⁴ and approved a report of a referee who stated, "Canon 35 assumes the fact to be that the use of camera . . . instruments must in every case interfere with the administration of justice."⁹⁵ The referee was convinced that those supporting continuance

87. 497 F.2d at 107; accord Application of NBC, 64 N.J. 476, 317 A.2d 695. (1974).

88. See note 19 *supra*.

89. See note 15 *supra* and accompanying text.

90. In *Estes*, the Court rejected an argument that permitting newspapermen in the courtroom while forbidding radio and television broadcasters presented a question of equal protection. The Court pointed to the obtrusiveness of the equipment accompanying broadcasters as the distinguishing feature. 381 U.S. at 540. If photographers can be as unobtrusive as sketch artists, it would appear, after *CBS*, that a challenge to the proscription of photography based on equal protection grounds would be difficult to overcome. See *In re Hearings Concerning Canon 35 of the Canons of Judicial Ethics*, 132 Colo. 591, 296 P.2d 465 (1956).

91. 279 F. Supp. at 769.

92. *In re Mack*, 386 Pa. 251, 285, 126 A.2d 679, 695 (1956) (Musmanno, J., dissenting). The majority of the court upheld the rule forbidding the taking of photographs on the ground that it bore "a reasonable relation to the aim sought"—maintenance of the dignity and decorum of the court for the orderly administration of justice. *Id.* at 258, 126 A.2d at 682.

93. See *Ex parte Sturm*, 152 Md. 114, 136 A. 312 (Ct. App. 1927).

94. For the text of Canon 35, see note 72 *supra*.

95. *In re Hearings Concerning Canon 35 of the Canons of Judicial Ethics*, 132 Colo. 591, 596, 296 P.2d 465, 468 (1956).

of Canon 35⁹⁶ had "failed, neglected, or refused to expose themselves to the information, evidence and demonstrations of progress" available in the field.⁹⁷

The ability to photograph unobtrusively and the holding in *CBS* cast considerable doubt on the viability of a rule which excludes all photographers from the courtroom. Of course, the problem lies not in allowing a few photographers to make photographs inconspicuously. The real difficulty arises from the fact that once photographers are again allowed in the courtroom and its environs, new lines will have to be drawn to circumscribe the permissible limits of obtrusiveness.⁹⁸ The ultimate result of the courts' providing new standards of obtrusiveness conceivably could be a shift from the clear and present danger standard and the necessity enunciated in *CBS* of drawing restrictions narrowly⁹⁹ to a standard less protective of the rights of the press.

In the past, courts have sustained restrictions imposed upon the conduct of the press within the courtroom if such restrictions bore a reasonable relation to the maintenance of the order and decorum of the court.¹⁰⁰ Clearly, the "reasonable relation" standard allows for greater judicial discretion than does the clear and present danger standard. However, there is a possibility that the courts might redefine the rights of the press by applying the "probability of prejudice" test applied by the Supreme Court in *Rideau v. Louisiana*.¹⁰¹ In that case, the United States Supreme Court reversed a conviction on the grounds that the evidence showed the *probability* of prejudice to the rights of the defendant by the conduct of the press. The case represented a departure from the Court's earlier approach of examining the particular facts of the case before it in order to determine if prejudice *actually*

96. For a sample of the debate over Canon 35, see Miller, Wiggins, & Tinkham, *Should Canon 35 Be Amended?—A Symposium*, 42 A.B.A.J. 834 (1956).

97. *In re Hearings Concerning Canon 35 of the Canons of Judicial Ethics*, 132 Colo. 591, 596, 296 P.2d 465, 468 (1956). The referee's comments and the Colorado Supreme Court's adoption of his views extended not only to still photography but also to television.

98. It is likely that the court would use a press pool arrangement if there was widespread interest in the case. (Of course, none of the photographers would be allowed to use flash attachments.)

99. See Warren & Abell, *Free Press—Fair Trial: The "Gag Order," A California Aberration*, 45 S. CAL. L. REV. 51 (1972).

100. See *Seymour v. United States*, 373 F.2d 629 (5th Cir. 1967); *Tribune Review Publishing Co. v. Thomas*, 254 F.2d 883 (3d Cir. 1958); *In re Acuff*, 331 F. Supp. 819 (D.N.M. 1971); *In re Mack*, 386 Pa. 251, 126 A.2d 679 (1956).

101. 373 U.S. 723 (1963); accord, *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Turner v. Louisiana*, 379 U.S. 466 (1965); see 21 Sw. L.J. 560 (1967). See also *Estes v. Texas*, 381 U.S. 532, 542-44 (1965).

resulted.¹⁰² If the mere *probability* of prejudice is sufficient to justify reversal of a conviction, it is possible that the *probability* of prejudice may be deemed sufficient grounds for controlling the press from the outset, both within and outside the courtroom. The following comment by the Supreme Court in *Sheppard v. Maxwell* has a particularly ominous ring with respect to the problem of prior restraint on the press: "Reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception."¹⁰³ In view of the facts of the *Sheppard* case, which dealt not only with in-court conduct of the press but also with publication of prejudicial materials, it would appear that the "probability of prejudice" standard could be applied to broaden the parameters of judicial discretion at the expense of the rights of the press both within and outside the courtroom.¹⁰⁴

In order to avoid a redefinition of the rights of the press and to avoid potential litigation on the issue, the courts must formulate a clear distinction between the making of photographs and the making of sketches. The *CBS* court offers one, albeit weak, distinction: photography in the courtroom, like broadcasting, is nearly universally condemned.¹⁰⁵ Even if the current widespread exclusion of news photographers is some justification for contending that due process contemplates such an exclusion,¹⁰⁶ the popularity of a rule is a poor constitutional ground for sustaining it. Indeed, it may be persuasively argued that the "consensus" approach often takes on the appearance of a purely rhetorical device.¹⁰⁷ The *CBS* court might have embraced a distinction based on the differences between mechanical and non-mechanical equipment, allowing sketching but excluding photography, but it is doubtful that such an artificial distinction could conceal the underlying constitutional issues.¹⁰⁸ Another approach would have

102. See *Irvin v. Dowd*, 366 U.S. 717 (1961); *Stroble v. California*, 343 U.S. 181 (1952).

103. 384 U.S. at 363.

104. See *Seymour v. United States*, 373 F.2d 629 (5th Cir. 1967).

105. See *Estes v. Texas*, 381 U.S. 532, 580-83 & nn.38-39 (1965). See also *In re Acuff*, 331 F. Supp. 819 (D.N.M. 1971).

106. See *Estes v. Texas*, 381 U.S. 532, 581-83 (1965), citing *Mapp v. Ohio*, 367 U.S. 643, 651 (1961).

107. That general approval or disapproval of a practice is not an acid test of due process can be seen in the following cases: In *Bolling v. Sharpe*, 347 U.S. 497 (1954), the Supreme Court announced that segregation, then a widespread practice, was violative of due process. In *Apodaca v. Oregon*, 406 U.S. 404 (1972), the Supreme Court, after noting the historical background of the generally approved practice of requiring an unanimous jury verdict for conviction, announced that unanimity was not within the mandates of the due process clause.

108. See note 90 *supra*.

been to focus on the different effects achieved by the use of photography and sketching; although sketches are broadcast and reprinted in newspapers in the same manner as photographs, it might be argued that sketches are by their nature sufficiently subjective to put their viewers on notice that they are not accurate reproductions of the image of the subject. The suggestion is that sketches are not taken as seriously by the viewing public and hence do not have as much of an impact on formulating public opinion as do photographs.¹⁰⁹

Another possible basis for distinguishing sketching from photography is the number of practitioners; while few persons can sketch, many members of the general public own cameras. Since the rights of the press in the courtroom seem to be only coextensive with those of the general public,¹¹⁰ the argument might be made that if the press is allowed to photograph in the courtroom, the same privilege must be allowed to members of the general public. Because the presence and use of numerous cameras would almost invariably be obtrusive, it is likely that a court would validly proscribe photography, basing its decision on "equal proscription" grounds. Alternatively, a court could restrict courtroom photography to members of the press by extending a limited privilege to the press beyond the rights of the public. Indeed, at least one court has hinted that this is a possible and advisable approach, saying: "[I]n public meetings, including trials, the right of the press to be present should, if not preferred, at least be safeguarded because of their ability to disseminate the information concerning the proceedings to an interested public much larger than those able to attend."¹¹¹

In view of the potential litigation-breeding problems raised by the *CBS* opinion, perhaps the most surprising aspect of the case is that it neglected an obvious opportunity to uphold the rights of the press and simultaneously maintain the status quo with respect to the authority of the trial judge to control the press in the courtroom. The court could have upheld the restriction against sketching in the courtroom, while declaring the restrictions against sketching from memory outside the courtroom to be impermissible. Such a holding would have preserved

109. District Judge Arnov, however, objected to sketching at least in part because he felt a sketch "would be a representation that the public would accept or believe or accept a representation of what actually went on" Brief for Appellant at 11-12, *United States v. CBS*, 497 F.2d 102 (5th Cir. 1974).

110. See *Courier-Journal & Louisville Times v. Curtis*, 335 S.W.2d 934 (Ky. Ct. App. 1960); *United Press Ass'ns v. Valente*, 308 N.Y. 71, 77, 123 N.E.2d 777, 778 (1954). See also *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974); *Pell v. Procunier*, 417 U.S. 817 (1974).

111. *Johnson v. Simpson*, 433 S.W.2d 644, 647 (Ky. Ct. App. 1968).

the tenuous balance among the rights of the press, the rights of the accused, and the duty of the judiciary to control conduct in the courtroom and its environs.¹¹² By tacitly extending the clear and present danger standard to restraints on the press *within* the courtroom, the Fifth Circuit may have unlocked a Pandora's box of litigation. The problems inherent in the *CBS* decision seem to lend support to Chief Judge Brown's observation in *Dickinson* presaging a confrontation between the rights of the press and the rights of the accused: "[T]he Day of Armageddon has not yet dawned on this great conflict"¹¹³

112. For various professional viewpoints of this balance, see Dowd *et al.*, *A Symposium on a Free Press and a Fair Trial*, 11 VILL. L. REV. 677 (1966).

113. *United States v. Dickinson*, 465 F.2d 496, 499 (5th Cir. 1972); see *Washington Post*, Nov. 17, 1974, at c3, col. 1.