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Sensationalized Crime and Freedom of Speech

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SENSATIONALIZED CRIME AND FREEDOM OF SPEECH

A negro was arrested in Baltimore for the fatal stabbing of an eleven-year old white girl. Shortly after he had confessed, the defendant radio stations broadcast the facts of the crime, and that the negro had confessed, with details of the confession, not only as to the slaying of the child but including also an earlier attack on a white woman. The broadcast announced that he had "served time" for a series of attacks on white women[1]

The negro was tried without a jury,[2] and convicted. Citations for contempt were issued against the defendant radio stations, all located in Baltimore, charging that broadcasting the confession in detail and that the negro had served a term in prison for attacks on women violated the general rules of contempt adopted by the trial court in 1939.[3] Defendants were convicted. *Held,* that the conviction should be reversed and charge dismissed. *Baltimore Radio Show v. State,* 67 A. (2d) 497 (Md. 1949).

The Court of Appeals of Maryland decided that these general rules of contempt were invalid as in conflict with recent United States Supreme Court decisions on freedom of speech.[4] The disputed question is whether a court can punish this type of activity under its inherent contempt power, without violating the right of freedom of speech guaranteed by the First and Fourteenth Amendments to the United States Constitution.

The landmark case in contempt proceedings against publication is *Bridges*

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1. Baltimore Radio Show v. State, 67A. (2d) 497, (Md., 1949). The broadcast stated, "The man now charged is Eugene James, a 31-year old Negro and convicted former offender. The police said James not only admitted the Brill murder and another recent assault in the same area but that he went over the scene of the crime with them late this afternoon and showed them where the murder weapon was buried. It turned out to be an old kitchen carving knife. James was taken into custody yesterday mainly because of his record. Police remembered that he had been charged or suspected in past years with a series of assaults and that about ten years ago he was sentenced to the Maryland Penitentiary for an attack on a ten-year old child."
2. Ibid, 504. The lawyer for the defense said that he feared his client could not get a fair trial with a jury after the radio broadcasts, in testimony on the contempt proceeding.
3. Ibid, 501. These rules included: A. "The making of photographs of the accused without his consent.
   B. The making of any photograph . . .
   C. The issuance by the police authorities, the State's Attorney, Counsel for the defense, or any other person having official connection with the case, of any statement relative to the conduct of the accused, statements or admission made by the accused, or other matters bearing upon the issue to be tried.
   D. The issuance of any statement of forecast as the future course of action of either the prosecuting authorities or the defense relative to the conduct of the trial.
   E. The publication of any matter which may prevent a fair trial, improperly influence the court or the jury, or tend in any way to interfere with the administration of justice.
   F. The publication of any matter obtained as a violation of this rule."
4. Bridges v. Cal., 314 U.S. 252, 62 Sup. Ct. 190, 86 L. Ed. 190, 159 ALR 1346 (1941); Pennekamp v. Fla., 328 U.S. 331, 66 Sup. Ct. 1029, 90 L. Ed. 1259 (1946); Craig v. Harney, 331 U.S. 367, 67 Sup. Ct. 1249, 91 L. Ed. 1546 (1947).

v. Cal.[5] Bridges had threatened in a public letter to the Secretary of Labor to call a strike of his union on the Pacific Coast if certain court action then pending in the California courts were continued. Bridges was subsequently cited for contempt of court and the contempt citation was affirmed by the Supreme Court of California.[6] In reversing the decision of the California courts, the United States Supreme Court utilized a rule announced twenty years earlier in a federal conspiracy case[7] by Chief Justice Holmes. The rule followed in the *Bridges* case was that a clear and present danger of a substantive evil must exist before freedom of speech may be violated by official act. "The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."[8] Bridges' words, decreed the United States Supreme Court, did not create such a clear and present danger.[9]

The *Bridges* decision was the first case to apply the "clear and present danger" rule to action in state courts.[10] Its effect was immediate and widespread. A trifle reluctantly perhaps, state courts followed or were forced to follow its lead. The United States Supreme Court has removed almost any question of the efficacy of the *Bridges* decision by two subsequent supporting decisions.[11]

Coming back to the instant case, the majority of the Maryland Court of Appeals stated that when this rule is applied to the facts in the instant case, freedom of speech, as delineated by the "clear and present danger" rule, should prevail. "We simply hold that upon this record the broadcasts did not create such a clear and present danger as to meet the constitutional test."[12] In the dissent, Judge Mackell sharply disagreed with the effect of the rule in the instant case. He questioned the extension of freedom of speech to sensationalized publications concerning the "facts" at issue in a jury trial so as to produce "trial by newspapers or radio."[13]

The importance of the instant case is that it gives a new extension to the *Bridges* decision by extending the "clear and present danger" rule without any qualification or differentiation to the jury trial. In the *Bridges, Pennekamp,* and *Craig*[14] cases, as well as in every reported state case citing *Bridges v. Cal.,* there has been no question of influence on a jury, existent or prospective. In the three

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5. Bridges v. Cal., note 4 supra.
6. Bridges v. Superior Court, 14 Cal. (2d) 464, 94 P. (2d) 983 (1940).
7. Schenck v. U.S., 249 U.S. 47, 39 Sup. Ct. 247, 63 L. Ed. 47 (1919).
8. Ibid.
9. Bridges v. Cal., note 4 supra.
10. Patterson v. Colo., 205 U.S. 454, 27 Sup. Ct. 556, 10 Ann. Cas. (1906).
11. Pennekamp v. Fla., 328 U.S. 331, 66 Sup. Ct. 1029, 90 L. Ed. 1295 (1946). (Editorials and cartoons directed at non-jury trials imputing partisanship to circuit judges were held by the U.S. Supreme Court to be within rights of freedom of speech); Craig v. Harney, 331 U.S. 367, 67 Sup. Ct. 1249, 91 L. Ed. 1546 (1947). (Editorials and stories about rulings of Texas County judges were likewise privileged as constitutionally guaranteed freedom).
12. Baltimore Radio Show v. State, note 1, supra at 511.
13. Id. at 521.
14. See notes 4 and 11 supra.

United States Supreme Court cases and approximately forty-three state cases reported, the acts alleged to constitute the contempt were directed at the judge or judges.

In the Federal cases as well as several of the state cases the Supreme Court Justices, by implication or statement, have placed judges somewhat above the general citizenry in fortitude and courage.[15] Vigorous dissent can be found.[16] There is no intimation that juries are above threats, coercion, and intimidation.

Prior to the *Bridges'* decision in 1941, there had been only a handfull of decisions on constructive contempt by publications involving jury trials. One of the most exhaustive cases in point was a Utah case.[17] The fact situation was much the same as in the instant case, but the decision, in reversing the contempt conviction, was upon the basis of trial procedure. A murder trial, with facts somewhat similar to those in the instant case, in which a publication was held guilty of contempt was *Globe Newspaper Co.* v. *Commonwealth*.[18] Another case with a similar result arose out of a criminal embezzlement in the Federal courts.[19] In these cases, evidence inadmissable in the trial had been published.

The absence of more of this type of contempt action in sensationalized jury trials is interesting. "In only fifteen out of forty-eight reported cases of publications held punishable since 1831 (to 1927) did the publication relate to a case on or near trial before a petit jury. Only five of these fifteen jury cases appear to have been of a character to interest the sensational press."[20] There apparently were no reported cases from 1927 up to the instant case, dealing directly with this question.[21]

The question would probably not arise at all in the lower Federal courts today. It is difficult, although not impossible, to have constructive contempt in the Federal courts. The United States Supreme Court held in *Nye* v. *United States*[22] (overruling *Toledo* v. *United States*[23]) that Federal contempt power was limited by statute[24] only to "acts done in the presence of the court or so near thereto as to obstruct the administration of justice." The word "near" was construed to mean, a geographical, not a casual, connotation. This necessitates a direct geographical connection between the act and the court so as to interrupt the quiet and orderly conduct of the court's business.[25] It is doubtful that a

15. See Mr. Justice Black in Bridges v. U.S., note 4 supra at 273.
16. Mr. Justice Frankfurter concurring in Pennekamp v. Fla., 228 U.S. 357, 67 Sup. Ct. 1042.
17. Harold Republican Pub. Co. v. Lewis, 42 Utah 188, 129 Pac. 624 (1913).
18. Globe Newspaper Co. v. Commonwealth, 188 Mass. 449, 74 N.E. 582 (1905).
19. Independent Publishing Co., 240 F. 849 (CCA 9th 1917).
20. Nelles and King, Contempt by Publication, 28 Col. L.R. 549 (1928).
21. Perhaps the absence of more reported cases of constructive contempt of publications of the type in the instant case could be explained by the general influence of newspapers.
22. 313 U.S. 33, 61 Sup. Ct. 810, 85 L. Ed. 1172 (1941).
23. 247 U.S. 402, 38 Sup. Ct. 560, 62 L. Ed. 1186 (1924).
24. Par. 268 of Jud. Code, 36 Stat. 1163, 28 U.S.C. Par. 385, 28 U.S.C.A. Par. 385.
25. Nye v. U.S., note 22 supra.

newspaper or radio by ordinary publication could come within this definition of contempt.*26*

The wide variance between American and English law on this question is interesting. On March 25, 1949, The London Daily Mirror was fined nearly $40,000 and its editor sent to jail by the English courts for a series of articles on a suspected murderer. The articles stated that the killer had confessed, and the details of the several suspected killings included within the confessions were given.*27* This case appears to state the current English law.*28* For example, the the publication in a newspaper, pending an action or before the trail of an action, of any observation which in any way might prejudice the parties to the action is technically a contempt of court.*29* Likewise it is contempt of court to publish anything in reference to the parties to, or the subject matter of, a pending litigation which tends to excite a prejudice against those parties or their litigation.*30* The English courts have reached this position without the aid of statute.

Some 99 articles have appeared in legal periodicals since 1926 concerning constructive contempt by publications, yet none dealt with the subject, except incidentally, as applied to jury trials or the prejudicing of prospective or existant jurors.

Perhaps this is a tempest in a teapot—a relatively unimportant aspect of procedural due process. Nelles and King, foes of punishment by contempt of newspapers stated in their classic article, that, "The elimination of outside influence by publication seems impracticable where it would be most desirable, and undesirable in many cases where it would be practicable. It would be most desirable to eliminate it where it is most rampant—in sensational jury trials involving crime or sex. Obviously, however, efforts to eliminate it in such cases bulk almost negligibly."*31*

In view particularly of the twenty years that have elapsed and the tremendous growth of radio and newspapers, since Nelles and King wrote, it might not be unwise to suggest that they underemphasized the effect of the tabloid, and radio treatment of crime trials. If we pick up a copy of a tabloid or other large city newspaper, the headlines often speak the facts of "trial by newspaper," particularly in the easily sensationalized sex or murder cases. Within a half hour after a criminal apparently confesses to a brutal sex murder the vast radio audiences hears a somewhat hashed up version of the facts of the case.*32*

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26. Wimberly v. U.S., 119 F. (2d) 713 (CCA 5th 1941).
27. New York Times, Mar. 26, 1949, P. 3, Col. 1.
28. Rex v. Clarke, 1910, KBD, 103 L.T.R. 636, 639-640, as in Baltimore Radio Show v. State, note 12 supra.
29. Hunt v. Clarke, 58 L.G.O.B. 490, 61 LT. 343, 37 W.R. 724, R.C. Vol. XIX P. 238 (1889).
30. Tichbone v. Tichbone, 39 LJ, Ch. 398; 22 LT. 55; 18 W.R. 621; as in 5 Mews Digest of English Cases, 581, accord, Rev. v Daily Mirror, 96 L.G.K.B. 352, (1927) 1 K.B. 845; 136 LT. 539; 43 TLR 254.
31. Note 20 supra at 525, 548.
32. See facts in Baltimore Radio Show v. State, note 12 supra.

Whether the lead taken by the Maryland Court of Appeals will be followed remains to be seen. There seems to be no binding legal necessity for state courts to go as far as the Maryland court did to provide protection for freedom of speech. There can be little question that the "clear and present danger" rule is the law. It should be remembered that juries, being composed of human beings, are just as susceptable to such influences as any member of the "great unseen radio audiences" or the avid newspaper reader. Perhaps in protecting freedom of speech, greater damage is being done to the right of a fair trial with an impartial jury.

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