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A Public Criminal Trial

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A PUBLIC CRIMINAL TRIAL*

By

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Highly publicized recent cases have highlighted the need for a re-examination of some of the limitations placed on the right to a public trial. Two cases reveal an irreconcilable conflict in philosophy and interpretation. The Cuyahoga County Court of Appeals in Ohio stated in *E. W. Scripps Co. v. Fulton*[1] that newspapers, and the public, have a right to attend a trial which even the accused may not defeat by signing a waiver of that right. In *United Press Ass'n. v. Valente,*[2] newspapermen were excluded during the testimony of witnesses for the prosecution in the trial of Minot Jelke, who was charged with compulsory prostitution, but the Court of Appeals decided that the press associations and the several publishers had no "legal" right or interest in enforcing the right to a public trial as that right was personal to the accused.[3] These two cases with diametrically opposed opinions are the first American decisions on the precise question of the right of the public to attend a criminal trial.[4] The time has come to inquire into the nature of that "right".

HISTORY

The origin of the right to a public trial is shrouded in mystery. It probably evolved at the same time and in much the same way as the jury system and as one of its many aspects. As a matter of fact, eminent authorities have held that it was a natural concomitant of the jury system which required an open accusation. Certainly early commentators mention that public trials were held without attempt-

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1 125 N. E. 2d 896 (Ohio App. 1955). At the trial of one Baker (case unreported) for pandering, the defendant requested exclusion of the public from the courtroom during his cross-examination of the chief witness for the prosecution. Upon his signing a waiver of the right to a public trial the request was granted. The press thereupon brought this suit seeking a writ of prohibition in the Cuyahoga County Court of Appeals (this case). At the time this case, the *Scripps* case, was heard the original trial had been concluded. This decision was therefore in the nature of a declaratory judgment to govern future cases in the trial courts of the county.

2 308 N. Y. 71, 123 N. E. 2d 777 (1954).

3 It is significant that on the same day the court in deciding People v. Jelke, 308 N. Y. 56, 123 N. E. 2d 169 (1954) found it unnecessary to determine whether that exclusion was violative of U. S. constitutional guarantees, since they felt that it was in disregard of applicable New York statutes and thus awarded Jelke a new trial.

4 We will not be concerned with the secrecy provisions applicable to juvenile courts, even though in many cases juvenile proceedings have all the consequences of regular criminal trials. For a revealing glimpse of the true operation of some juvenile courts see the particularly difficult to defend decision of the Pennsylvania Supreme Court, In re Holmes, 379 Pa. 599, 109 A. 2d 523 (1954), comment in 1 How. L. J. 277 (1955). Nor will we consider the secrecy provisions of the sex psychopath statutes, even though these hearings may result in a life sentence for one who has never been charged with any crime. For a perceptive criticism of many such statutes see TAPPAN, THE HABITUAL SEX OFFENDER, Report and Recommendations of the Commission on the Habitual Sex Offender Est. N. S. 1949 under Senate Res. N. 7. Problems of radio and television are also beyond the scope of this paper.

ing to trace that development.[5] Thus Sir Thomas Smith, writing on the laws of England in 1565, spoke about the right to a public trial.[6] Sir Matthew Hale in 1670 wrote about the excellence of trials in England since the courts were open to the public.[7] Jenks states that "All judicial trials are held in open courts to which the public have free access".[8] And Bishop asserted, "By immemorial usage wherever the common law prevails, all trials are in open court to which spectators are admitted".[9] Moreover, in England it has been held that the common law right to a public trial applied to civil as well as criminal cases.[10]

The right to a public or "open" trial first appeared in the "Frame of Government of Pennsylvania" in 1682,[11] and in the Charter of the Fundamental Laws of New Jersey in 1676.[12] Later it appeared in the Constitution of Pennsylvania[13] and North Carolina in 1776,[14] while Vermont adopted a similar provision in 1787.[15] The absence of any such provision in the federal constitution was probably one of the reasons for the clamour for a Bill of Rights, even though there were many who felt that such a provision was unnecessary as being an essential part of the common law and implied.[16]

Following the ratification in 1791 of the Bill of Rights including the sixth amendment, which provides that "The accused shall enjoy the right to a speedy and public trial" most of the states adopted substantially similar provisions. Thus 41 states have such guarantees in their constitutions.[17] Three states, New York,[18]

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5 See Radin, *The Right to a Public Trial,* 6 TEMP. L. Q. 381 (1932) for a concise history of the right to a public trial; also in re Oliver, 333 U. S. 257, 268-70 (1948). The earliest recorded case in which the right is discussed is in John Lilburne's Case 4 How. St. Tr. 1270 where when he protested the guarded gates of the court, stating at 1273, "That by the laws of this land all courts of justice always ought to be free and open for all sort of peaceable people to see, behold, and have free access unto," the gates were thrown open.

6 SMITH, DE REPUBLICA ANGLORUM B. 2, ch. 15, Alston ed., p. 79.

7 HALE, HISTORY OF THE COMMON LAW OF ENGLAND Ch. XII, at 343, (Punnington's ed. 1794).

8 JENKS., THE BOOK OF ENGLISH LAW, at 91 (1st ed. 1928).

9 2 BISHOP, NEW CRIMINAL PROCEDURE, § 957

10 Scott v. Scott, L. R. 1913 A. C. 417.

11 5 THORPE, AMERICAN CHARTERS, CONSTITUTIONS AND ORGANIC LAWS, 1492 - 1908, at 3060.

12 5 THORPE, *op. cit. supra* at 2551.

13 Radin, *supra* note 5, at 381, 383.

14 See note 13 *supra.*

15 5 THORPE, *op. cit. supra* at 3746.

16 See arguments of Massachusetts delegate to the convention debating adoption of the constitution in re need of a Bill of Rights protecting the accused. 1 ELLIOT'S DEBATES 120 (1827).

17 ALA. CONST. art I, § 6; ARIZ. CONST. art. II, § 24; ARK. CONST. art. II, § 10; CAL. CONST. art. I, § 13; COLO. CONST. art. II, § 16; CONN. CONST. art. I, § 9; DEL. CONST. art. I, § 7; FLA. CONST. Declaration of Rights, § 11; GA. CONST. art. I, § 1, par. V; IDAHO CONST. art. I, § 13; ILL. CONST. art. II, § 9; IND. CONST. art. I, § 13; IOWA CONST. art. I, § 10; KAN. CONST. Bill of Rights, § 10; KY. CONST. § 11; LA. CONST. art. I, § 9; ME. CONST. art. I, § 6; MICH. CONST. art. II, § 19; MINN. CONST. art. I, § 6; MISS. CONST. art. III, § 26; MO. CONST. art. I, § 18; MONT. CONST. art. III, § 16; NEB. CONST. art. I, § 11; N. J. CONST. art. I, § 8; N. M. CONST. art. II, § 14; N. C. CONST. art. I, § 13 ("open court"); N. D. CONST. art. I, § 13; OHIO CONST. art. I, § 10; OKLA. CONST. art. II, § 20; ORE. CONST. art. I, § 11; PA. CONST. art. I, § 9; R. I. CONST. art. I, § 10; S. C. CONST. art. I, § 18; S. D. CONST. art. VI, § 7; TENN. CONST. art. I, § 9; TEXAS CONST. art. I, § 10; UTAH CONST. art. I, § 12; VT. CONST. ch. I, art. 10th; WASH. CONST. art. I, § 22; W. VA. CONST. art. III, § 14; WIS. CONST. art. I, § 7.

18 N. Y. CIVIL RIGHTS LAW § 12 (1909).

Nevada[19] and Virginia[20] have provided by statute that criminal trials be open to the public, while Maryland[21] and Wyoming[22] have apparently reached the same result by judicial decision. The Supreme Judicial Court of Massachusetts appears to recognize a limited "bob tailed" right.[22a]

In any event, the presence or absence of constitutional provision, statutes, etc., would seem to be irrelevant since the Supreme Court of the United States in *In re Oliver*[23] employed the traditional language of the English common law decisions and the Federal cases construing the sixth amendment in reversing the defendant's conviction by a Michigan court for contempt because he did not receive a public trial. The Court stated that the requirement of a public trial is a right guaranteed by the due process clause of the fourteenth amendment, and thus the right to a public trial is binding upon the states as well as the federal government. There was no indication that the scope of this common law right under the fourteenth amendment is any more limited than under the sixth amendment. To be sure, the Supreme Court did not grasp the opportunity during the 1954-55 term in *Reeves v. Alabama,*[24] a case in which a Negro had been convicted of rape by an Alabama court, to determine whether the exclusion of the general public from the trial was violative of due process, since it was found that the Alabama authorities had been so brutally zealous in coercing a confession that the conviction must be overturned anyway; and in 1950 in *Commonwealth v. Blondin,*[25] a Massachusetts case, certiorari was denied though some persons had been excluded from the courtroom.[26] Still later on in the *In re Murchison*[27] case in the 1954-55 term, however, the court approved the language of the *Oliver* case, which indicated that public trial is indeed a right guaranteed by the Constitution.

The reasons for the adoption of this right have been variously ascribed to the abuses of the English Court of Star Chamber, the Spanish Inquisition, and the injustices of the French monarchy in the use of the *lettres de cachet.*

Thus in *Davis v. United States*[28] the eighth circuit suggested that the reason for the enactment of the sixth amendment was the historical warning of the evil practice of the Star Chamber in England. However, as Professor Radin points out:[29]

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19 NEV. COMP. LAWS ANN. § 10654 (1929).
20 Va. obliquely see VA. CODE ANN. § 4906 (1942).
21 Dutton v. State, 123 Md. 373, 91 Atl. 417 (1914).
22 State v. Holm, 67 Wyo. 360, 224 P. 2d 500 (1950).
22a Commonwealth v. Blondin, 324 Mass. 564, 87 N. E. 2d 466, (1949) *cert. denied* 339 U. S. 984 (1950); and see MASS. GEN. LAWS c. 278 § 16 A (1932).
23 333 U. S. 257 (1948).
24 348 U. S. 1012 (1954). Note that the Ala. Supreme Court in the case below did not discuss this point, though it had been raised by the briefs. See 260 Ala. 66, 68 So. 2d 14 (1953). The prosecutor's brief in the Supreme Court of the United States did not consider the point either.
25 See note 22 *supra.*
26 Here the general public was excluded in the trial of defendant for rape. The record does not disclose whether the press was also excluded.
27 349 U. S. 133 (1955).
28 247 Fed. 394 (8th Cir. 1917).
29 Radin, *supra* note 5, at 381, 386.

> "As far as the Star Chamber is concerned the Parliamentary opponents of that tribunal never seem to have picked out secrecy as characteristic of it or as a reprehensible practice in it. As a matter of fact, even in the Stuart days, those who were hailed before the Star Chamber were usually men of the upper classes and rarely the ordinary type of person charged with a felony. There was apparently nothing about the action of this court, and the grievance the Parliament had against it was rather its power, than the method in which the power was exercised . . . (N)either the Petition of Right, presented just before the Star Chamber was abolished, nor the Bill of Rights enacted when the dynasty which had abused the Star Chamber was expelled, has a word to say of the safeguard which the Star Chamber allegedly neglected."

It is, therefore, much more likely that the enactment was due to revulsion against the practices of the Spanish Inquisition, which were viewed with horror by the colonists, many of whom were all too familiar with the suffering of heretics, and the evil reputation of the *lettres de cachet* which had been so graphically described by Mirabeau. Certainly Jefferson and Franklin were familiar with the use of these *lettres*. In any event, a familiar theme of Englishmen and Frenchmen everywhere during the eighteenth century was the abuses of the French Monarchy, which has been stated by many commentators to have been a source of smug satisfaction to the English.

LIMITATIONS ON THE RIGHT OF THE ACCUSED

There is a great conflict in the cases with respect to the meaning of the word "public". Some courts, the majority, have held that the requirement of a public trial means that all members of the public must be allowed to attend a trial within the physical limits of the court room.[30] Of course, if attendance will interfere with the administration of justice, such as to result in mob domination or will become inimical of the preservation of order and decorum in the court, all agree it may be limited.[31] Other courts have delimited the right by declaring the "public" merely means that the trial may not be a "secret" one and that a judge may exclude as long as a reasonable group remains.[32] In general, the trial has been held to be public by these courts if the relatives and chosen friends of the accused have been allowed to attend. Some of these cases regard the presence of the press as indispensable. In jurisdictions applying the former rule, the court must justify any exclusion, while in those adopting the latter the accused must affirmatively demonstrate that he has been hurt by the exclusion.[33]

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30 United States v. Kobli, 172 F. 2d 919 (3rd Cir. 1949); Davis v. United States, 247 F. 2d 394 (8th Cir. 1917); Tanksley v. United States, 145 F. 2d 58 (9th Cir. 1944); People v. Yeager, 113 Mich. 228, 71 N. W. 491 (1897); State v. Keller, 52 Mont. 205, 156 Pac. 1080 (1916); State v. Hensley, 75 Ohio St. 255, 79 N. E. 462 (1906); State v. Osborne, 54 Ore. 289, 103 Pac. 62 (1909).

31 Wade v. State, 207 Ala. 1, 92 So. 101 (1921); People v. Hartman, 103 Cal. 242, 37 Pac. 153 (1894). And see State v. Scruggs, 165 La. 842, 116 So. 206 (1928).

32 See State v. Johnson, 26 Idaho 609, 144 Pac. 784 (1915).

33 Benedict v. People, 23 Colo. 126, 46 Pac. 637 (1896); State v. Johnson, 26 Idaho 609, 144 Pac. 784 (1914); State v. Nyhens, 19 N. D. 326, 124 N. W. 71 (1909). Courts adopting this view are quick to find an implied waiver by the accused in his failure to object to exclusion.

The minority view would seem to be patently wrong since in a given situation it may well be impossible to determine just in what way the accused was hurt. One doesn't normally condone a violation of fundamental constitutional rights because the individual cannot show specific damage - - the violation of the right itself constitutes the damage. To compel production of specific damage items in most cases in fact amounts to a total deprivation of the right. The correct view would seem to be that the accused should not be deprived of his right unless it is demonstrated that granting of the right will interfere with the administration of justice.

This is so because the right itself is held to be productive of great benefits to the accused. As Wigmore states:[34]

> "(1) Its operation intending to improve the quality of testimony is twofold. Subjectively, it produces in the witness' mind a disinclination to falsify; first by stimulating the instinctive responsibility to public opinion, symbolized in the audience, and ready to scorn a demonstrated liar; and next, by inducing the fear of exposure of subsequent falsities through disclosure by informed persons who may chance to be present or to fear of the testimony from others present. Objectively, it secures the presence of those who by possibility may be able to furnish testimony in chief or to contradict falsifiers and yet may not have been known beforehand to the parties to possess any information . . . ."

Most of the cases involving exclusion of adults from the court room have been cases involving sex crimes.[35] Many statutes limiting the right are specifically aimed at such exclusion.[36] It is argued in most of these cases that exclusion was necessary to protect the public morals or to protect the witnesses from embarrassment. In few of the cases was there anything said about the necessity for increased protection of the individual facing such a charge. This is surprising since it is clear that it is the sex crime cases in which false charges are more easily and confidentally made than in any other type of crime. Judge Ploscowe states[37] that experience has shown that unfounded charges of rape are brought for a variety of motives. The adage "Hell hath no fury like a woman scorned" is frequently encountered in rape prosecution. Thus rape or other sex charges are sometimes brought for the purpose of blackmail and sometimes they are the products of the psychopathy of the complainant. In many cases the charges rest on pure fantasy. Unfounded accusations of rape or sexual molestation are particularly apt to come from young children. Wigmore amply documents this view and states that the tendency of complainants in rape cases to make false accusations is well known to doctors who have had experience in criminal cases. He quotes Dr. William A. White's statement:[38]

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34 6 WIGMORE, EVIDENCE § 1834 (3rd ed. 1940).
35 All cases seem to agree that minors may be excluded in cases where salacious matters are to be discussed. See United States v. Kobli, 172 F. 2d 919 (3rd Cir. 1949).
36 6 WIGMORE, EVIDENCE § 1835, pp. 338 et. seq. and 1953 pocket supplement.
37 PLOSCOWE, SEX AND THE LAW p. 187 (1951).
38 3 WIGMORE, EVIDENCE § 924a (3rd ed. 1940).

> "Accusations of rape, unless there is perfectly clear evidence of an assault, are open to suspicion. Necessarily they must always be treated as open to suspicion if the accusation is a purely verbal one unsupported by corroborative evidence. Such accusations are doubly difficult to deal with when it is remembered that the medical evidence sustaining or otherwise such accusations is proverbially not dependable and inadequate . . . . Many well known cases which have attracted wide public interest and which have resulted in mob violence have indicated, or should have, the extreme prejudice which may be mobilized against an accused person, often quite without anything that could be properly called adequate evidence of their guilt. These facts make the whole situation one which needs to be surrounded by as many safeguards as possible in order that no outstanding injustice may be committed."

Modern psychiatrists who have studied the behavior of delinquent young girls and women have found that in many cases they are affected with all sorts of complexes which have been caused by disease, derangements, or abnormal instincts, together with environmental factors or temporary physiologic physiological or emotional conditions, and that frequently one form taken by these complexes is that of manufacturing false charges of sexual offenses by men. Many of these complexes, frustrations, etc., find expression in the narration of imaginary sex incidents in which the narrator is the heroine or the victim. Sometimes the story seems to be straightforward and plausible. The real victim, in many cases, however, is the innocent man, for the outrage naturally felt by any tribunal for a wronged female helps to convict him. As Wigmore states, judging merely from the report of cases in the appellate court, many innocent men have gone to prison because of tales and falsities that could not be exposed. A long time ago Sir Matthew Hale wrote:[39]

> "It is true rape is the most detestable crime and therefore ought to be severely and impartially to be punished with death; but it must be remembered that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent".

The same thing would seem to be true with respect to all other types of sexual offenses because judges and juries are inclined to get emotional in sex crime prosecutions and may not give the defendant the benefit of a calm and careful consideration of the evidence. For as Hale further stated,[40]

> "The heinousness of the offense many times transporting the judge and jury with so much indignation that they are overhastily carried to the conviction of the person accused thereof by the confident testimony sometime of malicious and false witnesses."

This matter of the difficulty of proof of innocence was one reason that the American Bar Association Committee on the Improvement of the Law of Evidence in 1937-38 voted 47 to 2 that modern psychiatry unanimously advises that the

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39 Quoted by Ploscowe, note 37 *supra* at 188.
40 *Id.* at 188.

complainant woman in a sex case should always be examined by competent experts to ascertain whether she suffers from such mental or moral delusions or tendencies frequently found in young girls causing distortion of the imagination in sex cases.

Under these circumstances, it seems difficult to understand why the accused should be deprived of any of the safeguards normally thrown about persons before they are found guilty. Rather it would seem that for the reasons enumerated by Wigmore still more protection rather than less should be accorded them.

The help of a public trial may be considerable in providing a fair trial. In many cases the defendant, himself, may not be aware of the benefits that a public trial may offer in this respect. Cross[41] cites the case of *District of Columbia v. Williams, Jr.* before Judge Fennell where the defendant on trial for indecent exposure asked the court to exclude the press as well as the general public. The judge refused to bar the press. The admission of the press, says Cross, proved to be a great and unforeseen advantage to the defendant. The defendant was convicted but later as the result of newspaper reports of the trial another man came forward who said he had read of the case in the newspaper, did not want an innocent man to be punished, and confessed his own guilt. The value of the protection is also illustrated by the *Reeves* case[42] where the exclusion of the public from the trial might have resulted in a grave miscarriage of justice for the foreman of the jury which was to try the case was later shown to have been a chief of a vigilante organization known as the Montgomery Reserve Police Force dedicated to trapping down "rapists and burglars". None of these facts were known to attorneys for the defendant and by exclusion of the public during the trial they were not given the benefit of the publicity as to the makeup of the panel, which would have allowed interested and informed persons to come forward with information which might have allowed the counsel to pick a more representative or fair minded jury.

In many cases the court has stated that it was excluding witnesses from the trial to protect the witnesses from being embarrassed. As a matter of fact, in the *Jelke* case the attorney for one of the prosecuting witnesses asked for this protection.[43] On the other hand, Jelke's attorney stated that the witness had offered to sell her story to the highest bidder.[44] Strikingly enough, the same witness sought night club dates later in both New York and Washington in which she was to take advantage presumably of the publicity engendered by the account of her professional activities aired in the *Jelke* case and her story was later to appear in a so-called confidential magazine of tremendous circulation. So as far as protection to the witness herself was concerned it may have merely protected her right to make money by selling the story she was to tell on the stand.

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41 CROSS, THE PEOPLES RIGHT TO KNOW, 162 (1953).
42 See 260 Ala. 66, 68 So. 2d 14 (1953) where the Ala. Supreme Court rather cavalierly brushed aside that argument.
43 Brief of New York Herald Tribune, p. 4.
44 *Id.* at p. 5.

In many sex cases the exclusion of the entire public for a limited time has been upheld.[45] This usually occurs in rape cases and is designed to encourage an embarrassed and reluctant young prosecutrix to give her sordid but essential testimony.[46] It is, and should be, rarely granted where the prosecutrix is an adult.[46a] Where the prosecutrix is very young no one would object to a very limited exclusion order during such testimony where absolutely necessary to obtain it. In view, however, of psychological findings that stories of such younger persons are more likely to be fantasies than those of older persons, it should be but rarely granted.

The case for censorship, whether by the judiciary or by any other self-appointed guardian of the morals of the community, does not seem to be a good one. Censorship would seem to be abhorrent to the basic tenets of democracy. To find that the witness needs protection is to find that the witness is probably telling the truth, and, therefore, the defendant does not need the value of publicity to disprove the story. This seems to be distinctly contrary from the fundamental thesis of American jurisprudence that the defendant is deemed to be innocent until proved guilty.

The much relied on other argument is that exclusion in such cases helps to preserve the morals of the community. The judge in the *Valente* case put exclusion on that ground.[47] Note, however, that sex practices testified to on the trial were, if Kinsey is to be believed, of the sort indulged in at some time by a large part of the adult population.[48] Ribald speculation, I am sure, overreached the facts. Moreover, there has never been any evidence that ignoring the prevalance of socially deprecated sex practices tends to stamp them out. Most peoples' views with respect to such testimony have in fact changed in the last generation. As the third circuit stated in *U. S. v. Kobli*:[49]

> "Whatever may have been the view in an earlier and more formally modest age, we think that the franker and more realistic attitude of the present day towards the matter of sex precludes a determination that all members of the public, the mature and experience as well as the im-

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45 See 4 STAN. L. R. 101 (1951).

46 Hogan v. State, 191 Ark. 437, 86 S. W. 2d 931 (1935); State v. Damm, 62 S. D. 123, 252 N. W. 7 (1933); and see the cogent observation of the dissenting judge in State v. Callahan, 100 Minn. 63, 70, 110 N. W. 342, 345 (1907). "I do not find anything in the constitution which justifies the Court in holding that the constitutional right to a public trial is to be measured by the degree of nervousness of a susceptible complaining witness."

46a At least one state statute purporting to allow a judge to exclude adults in salacious cases has been held to be unconstitutonal as unreasonable. People v. Yeager, 113 Mich. 228, 71 N. W. 491 (1897).

47 To protect the public from "offensive obscenity" in the interest of "public decency."

48 KINSEY, POMEROY, MARCUS, SEXUAL BEHAVIOR IN THE HUMAN MALE (1948); KINSEY, POMEROY, MARTIN, GEBHARD, SEXUAL BEHAVIOR IN THE HUMAN FEMALE (1953).

49 172 F. 2d 919, 923 (3rd Cir. 1949). In this case the defendant was charged with conspiracy to violate the Mann Act. The court, because of the salacious character of the evidence to be presented, excluded all persons from the courtroom, except those having an interest in the case and the press. The 3rd circuit reversed the conviction on the basis that violated the requirement of a public trial.

mature and impressionable, may reasonably be excluded from the trial of a sexual offense on the ground of public morals."

Certainly no other story told on the witness stand about sex could be more incisive or revealing than the Kinsey reports.

THE RIGHT OF THE GENERAL PUBLIC

The right of the general public to attend a trial has been a matter of some dispute. It has been argued that the only right is a right of the accused and the public attends only as a favor.[49a] The classic statement of this view is found in the *Valente* case in which it was urged:[50]

> "The requirement of a public trial, Cooley has written, is for the benefit of the accused, that the public may see that he is fairly dealt with and not unjustly condemned . . . . A regard, not alone for reason and logic, but for justice and fairness to the defendant, dictates the conclusion that subject to the court's approval and ruling, he be allowed to decide against having a public trial."

It is significant to note that in the *Valente* case, Jelke had not waived.[51] In any event, the court relates the whole question as to whether the public has an enforcable interest to whether the accused may waive his right to a public trial. There is, of course, a significant *non sequitur* in the proposition that if the defendant may waive his right to a public trial, the public has no legal interest. Parenthetically, one may well argue that the right may be so fundamental that even the accused may not waive it - - as he may not waive his right to an unanimous verdict.[52] It may well be true that by waiver the accused may foreclose his right to object to the exclusion of the public.[53] That, however, does not mean that the public might not still be able to enforce its right in an appropriate action. Thus, the Cuyahoga County Court of Appeals could find that the defendant may not have an appealable objection to exclusion while at the same time finding that the public did have a right that the accused could not waive. As the court stated:[54]

> "There are many cases to be found which hold that a defendant is privileged to waive his constitutional right to a public trial, and where he has waived such right, he cannot thereafter complain. The facts in this case show that the defendants waived the right to a public trial in writing. Certainly they cannot now prosecute error where the court excluded the public at their request. But the defendants cannot waive the right of the people to insist that the proceedings of the courts, insofar

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49a See Radin, *supra* note 5.

50 People v. Valente, 308 N. Y. 71, 123 N. E. 2d 777, 780, 781 (1954). The court discusses the problem as one of exclusion of the public — even though brought by the press. We are discussing in this section the press only as a part of that general group.

51 See People v. Jelke 308 N. Y. 56, 123 N. E. 2d 169 (1954).

52 At the very least, waiver should always be express.

53 United States v. Sorrentino, 175 F. 2d 721 (3rd Cir. 1949); Benedict v. People, 23 Colo. 126, 46 Pac. 637 (1896).

54 Scripps v. Fulton, 125 N. E. 2d 896, 903 (Ohio App. 1955).

as practicable and in the interest 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 the public view."[55]

Many cases contrary to the *Scripps* cases may be explained on the basis that the accused was appealing and he had in fact waived his right. Prior to the *Valente* case the press or public had not appealed such an order in a separate proceeding.

The crucial question is whether the right is also a "public right" rather than merely a personal privilege of the accused.

It has been argued by Max Radin[56] that there is no reason the public should have such right; that the presence of the general public at trial may be a very unwholesome thing leading to an atmosphere of the Roman holiday with an undue appeal to otherwise latent histrionic instincts of the prosecutor and the judge:

"That the persons attending the trial are likely to be drawn from the less intelligent, the coarser, the less sensitive elements in the community. The education of the public by courtroom procedure is as idle a fantasy as a solemn repeated reason given in the 18th century for making hanging a public spectacle."

(He would never, however, bar representatives of the press). On the other hand, Professor Wigmore dismisses Radin's argument as far-fetched[57] and cogently sums up the reasons that trials should be open to the press and the general public.[58]

"(2) The other reasons, independent of evidential services, for requiring publicity are of three distinct sorts:

(a) Subjectively, a wholesome effect is produced, analagous to that secured for witnesses, upon all the officers of the court, in particular, upon judge, jury, and counsel. In acting under the public gaze, they are more strongly moved to a strict conscientiousness in the performance of duty. In all experience, secret tribunals have exhibited abuses which have been wanting in courts whose procedure was public.

(b) Persons not called . . . ., may nevertheless be effected . . . .

(c) The educative effect of public attendance is a material advantage . . . . Respect for law increased . . . . Strong confidence in judicial remedies secured . . . ."

A criminal trial is not a secret matter of concern only to the prosecutor, defendant and court officials. The defendant is charged with having offended the "state". The open court room is as vital in the interest of supporting the administration of justice as in the protection of the rights of the accused. The outcome, the

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55 As a note, 14 A. L. R. (2d) 750, 759 states "The individual right of privacy cannot (should not) be maintained to protect from publication matters which are legitimate subjects for public interest and comment.

56 Radin, *supra* note 5.

57 6 WIGMORE, EVIDENCE § 1834, n. 6 (3rd ed. 1940).

58 *Id.*

procedure, is of concern to every citizen. As the court stated in *State v. Keeler*[59] the situation "likewise involves questions of public interest and concern. The people are interested in knowing, and have the right to know, how their servants - - the judge, county attorney, sheriff, and clerk - - conduct the public's business."

It is significant that even in those cases which limit the right it is conceded that the public does have an interest.[60] In the *Valente* case the majority felt that the accused and his friends could protect the public. This seems to miss the point. The accused may well be satisfied with results, or indifferent. He may have no friends. The public should not be forced to put "all its eggs in one basket."

The *Valente* case evoked favorable comments from several law reviews, not on the ground that the public had no right, but because they could find no precedent for granting a right to the press or to persons other than the accused.[61] At the same time, all agree that the general public is interested in seeing that justice is properly administered. The idea that the public has a right but that that right may not be vindicated either by the press or by any other member of the public means, in fact, that in many important cases there would be no right. Certainly a dishonest, negligent or corrupt prosecutor is not going to ask for admission for the public or press to proceedings. Of course, under the *Valente* view the prosecutor has no right to insist. In most of the cases in fact the prosecution asks that the public be excluded. Certainly also if the accused and prosecution have both made a corrupt bargain, etc., the public would be deprived of its "right to know" unless the press or some other public spirited citizens are allowed to intervene. If the accused may waive, a powerful defendant, desirous of concealing facts and testimony or the identity of witnesses, which would otherwise be revealed may accomplish his purpose and succeed in having his trial conducted behind closed doors. The public should have an interest even if the accused is acquitted. It seems the essence of democracy that public affairs should be public. The public itself has a right to know whether the judges, the prosecutors or the jurors are competently performing their obligation. Certainly the Continental experience with secret trials is hardly persuasive.[62]

The practice of some courts in permitting attendance of the press and relatives of the accused does not satisfy reasonable requirements. The press does not try to attend all trials - only the most newsworthy. The accused may have no friends or relatives, and, in any event, they may be biased. It is precisely the casual observer who may be in fact the public's only real protector in many situations.

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59 52 Mont. 205, 156 Pac. 1080 (1916); and see State v. Copp, 15 N. H. 212, 215 (1851) stating "the right to have the court open is the right of the public and not the individual"; State v. Hensley, 75 Ohio St. 355, 266, 79 N. E. 462, 463 (1906). "The people have the right to know what is being done in their courts, and free observation and the utmost freedom of discussion of the proceedings . . . tends to the public welfare." Also People v. Hartman, 103 Cal. 242, 37 Pac. 153 (1894).

60 In the *Valente* case the court stated, "The public does unquestionably have an interest in seeing that every person accused of crime shall have a fair trial."

61 Typical was the note in 33 TEX. L. REV. 247, 248 (1955) approving exclusion.

62 6 WIGMORE, EVIDENCE § 1834 (3rd ed. 1940).

The most compelling argument for the right of the public is found in the brief of the New York Civil Liberties Union in the *Valente* case:[63]

> "All the evils which the requirement of a public trial was designed to avert are invited by granting to the defendant the power, by waiver, to permit the trial to be conducted in camera. It is precisely these evils, necessarily flowing from secret trials, which historically led to the development of the public trial concept . . . . The public policy supporting this constitutional interest - - the check against abuses by government officials, the deterrence of mal-administration of the judicial system, the education of the public - - all emphasize that the predominant interest is the public interest. Of course, the accused has an interest, but his is not the sole interest involved. His waiver should not be permitted to bind the general public since the interests of the public and of the accused are different and in some cases, may be in conflict."

England recognizes this right of the public. Thus, in *Daubney v. Cooper*[64] the court stated:

> "One of the essential qualities of a Court of Justice (is) that its proceedings should be public, and that all parties . . . . desirous of hearing . . . have a right to be present for the purpose of hearing what is going on."

And the House of Lord in *Scott v. Scott*[65] has in fact gone one step further and held that not even in a civil case may there be a secret trial. (Plaintiff asked for a secret trial in her action to dissolve her marriage). In that case the plaintiff, in violation of a secrecy order sent copies of the minutes of the trial to several interested persons. The House of Lords held that the Trial Court had no common law right to hold the trial in camera even though both parties had consented and thus waived the right to a public trial stating:[66]

> "Some passages in various judgments in this and other cases indicate that the court has a right to close its doors in the interest of public decency. Apart from some Act of Parliament authorizing such a course in particular cases, I regret that I cannot find warrant for this opinion. * * * However true it may be that the publicity given to obscene or bestial matter by trial in open court stimulates and suggests imitations * * * the remedy must be found by the Legislature or not at all."

Historically, of course, the English courts have always recognized that the public is one of the prime beneficiaries of the right. As Bentham stated:[67]

> "If guarding the parties against injustice in the individual cause before the court were the only reason pleading in favour of unrestrained publicity, this reason would cease in every case in which * * * all the parties interested joined in an application for privacy. * * * But (not) by any such joint application would more than a part (and that scarcely

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63 Brief for the New York Civil Liberties Union as Amicus Curiae, p. 30, United Press Ass'n v. Valente, 308 N. Y. 71, 123 N. E. 2d 777 (1954).
64 10 B. & C. 237, 240, 109 Eng. Rep. 438 (K. B. 1829).
65 L. R. (1913) App. Cas. 417.
66 *Id.* at p. 446.
67 6 BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, (Bowring's ed. 1843).

a principal part) of the demand for publicity, unrestrained publicity be removed."

EXCLUSION OF THE PRESS

The courts have in all cases been reluctant to exclude representatives of the press even where members of the public were excluded. In many cases the presence of newspapermen has been held to make the trial "public", probably on the ground that the press is an agent of the public.[68]

These cases seem to suggest that the press has superior rights to the rights of the general public.[69] To the same effect Max Radin, though sanctioning the exclusion of the general public, states flatly that the press should never be excluded. This judicial attitude may be responsible for the fact that there are no cases in which the press was excluded while other members of the public were permitted to attend. The same attitude seems to have motivated Judge Fennell in the case of *District of Columbia v. Williams, Jr.*,[70] when he stated that where there has been a waiver by the defendant of the right to require an open hearing though the general public may be excluded the representatives of the press may not be. On the other hand, the court in the *Kobli* case stated:[71]

> "It has been suggested that the end of publicity sought to be achieved will be accomplished by permitting newspaper reporters to be present. It may well be that in most cases this would be sufficient to insure that the acts of judicial misconduct would receive public attention. The law, however, is chary in putting all its eggs in one basket. The apparently idle spectator may turn out to be the one who directs public attention to acts of judicial oppression which are overlooked by the more seasoned but sometimes blase professional gather of news."

The court in the *Scripps* case is somewhat ambiguous with respect to whether the press has a superior right. The court at first states unequivocally that:[72] "The rights of representatives of the press can, however, rise no higher and by the same token, can be no less than the rights of any other member of the public;" yet in the same paragraph the court states that favorable consideration should be given to preference for the press since,

> ". . . a great majority of the public, either because of lack of time or space limitation of the court room, or for lack of direct interest, are prevented or unable to attend judicial proceedings whereby their knowledge about such proceedings can be gained only through the work of news gathering and disseminating agencies, and therefore, when judicious limitations of those attending a public trial is necessary, such fact should be considered in favor of allowing members of the press to attend."

Nevertheless, the principal that both public and press have equal standing

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68 See Radin, *supra* note 5.

69 We are not concerned with whether the first amendment offers a peculiar protection to the press in this regard. See Forer, *A Free Press and a Fair Trial,* 39 A. B. A. S. 800 (1943).

70 See CROSS, note 69 *supra* at 162.

71 United States v. Kobli, 172 F. 2d 919, 923 (3rd Cir. 1949).

72 Scripps v. Fulton, 125 N. E. 2d 896, 904 (Ohio App. 1955).

but that in cases of over-crowding the press should be given some special consideration seems to be a wise observation.

It is to be noted that in the *Valente* case the press was excluded because of the judge's belief that "the testimony in this case will be steeped in filth." The judge thus ruled on the basis that he was designated as a protector of the public morals.

Since the judge could hardly have been concerned with the question of whether the testimony would be unfit for the ears of hardened newspapermen, his real concern was that newspapers would print obscene material in violation of the criminal law. (Among the newspapers barred was the New York Times, which in accordance with its circumspect tradition refrained from discussing any of the testimony). It is, therefore, based on the individual judge's belief in his ability to determine what is good for the public to hear. The case against censorship has been too ably stated elsewhere to repeat here.[73] Suffice is it to repeat the sage counsel of the Cuyahoga County Court of Appeals:[74]

> "We are not here concerned with freedom of speech or of the press, or what should be reported through or by the press or news-gathering agencies. The criminal law must of necessity deal with matters not generally the subject of parlor conversation. We are not called upon to consider the propriety of publishing the sordid details of a criminal trial. It must be recognized that in such a trial, the trial judge not only has the right but is duty bound to exclude from a trial involving a morals offense those, who by reason of immaturity or otherwise, would be harmfully affected in attending such a proceeding.
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> "This does not mean that such a proceeding should be conducted in secret. The public morals are not protected by trying to hide its sins behind closed doors. Better that we know our faults that we may ever increase our efforts to live in social rectitude."

CONCLUSION

An unfortunately large number of cases represent an unfortunate lack of faith of the judiciary in the tenets of democratic institutions; lack of faith in either the good taste of newspapers or in the effectiveness of the criminal law as to obscenity. It may represent a failure to recognize that the people are entitled to know how their institutions operate; a bow to a Victorian concept of sex, calling for concealment rather than honesty and frankness. These courts would limit constitutional rights at the very point when full publicity is most warranted. The logical extensions of this view as represented by some of these courts in

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73 As the Supreme Court has stated "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." Craig v. Horney, 331 U. S. 367, 374 (1947). And see CROSS *supra* note 69.

74 Scripps v. Fulton, *supra* note 72 at 904.

protecting morals may allow the gross prostitution of justice.[75] The very act of secrecy itself contributes to distrust — the courts can little afford to do anything to lessen respect.

It is heartening that the Cuyahoga County Court of Appeals has determined that the citizens in that Ohio County are mature enough to be informed as to proceedings in their courts — to reinforce the belief of its citizens that at least there is nothing its officials have to hide. It is heartening also that the New York Court of Appeals recognized the force of these considerations in the *Jelke* case, but unfortunate that in the *Valente* case they deprived the public and press of the means of vindicating them.

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[75] Under this view most of the proceedings of the infamous *Scottsboro* cases would have been secret.