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## THE ACCUSED'S RIGHT TO A PUBLIC TRIAL

### I. Introduction

A young man stands in the courtroom facing life imprisonment or perhaps death. He is accused of the brutal rape of a twenty-one-year-old girl. Prior to the complainant's testimony the state moves to exclude all spectators from the courtroom. The prosecutor argues that to force this innocent victim to testify to the lurid details of this outrageous crime in an open court would cause her needless shame and embarrassment. The defendant, noting his presumption of innocence and his constitutional right to a public trial, immediately objects. A discretionary ruling by the trial judge is called for. Should he exclude the public from the courtroom? He has ample authority available for either position.<sup>1</sup>

It is the purpose of this article, through the study of the past, present, and future of the constitutional right to a public trial, to analyze this problem and to survey the reasons why this right was written into our Constitution. While many of us may express disgust and anger towards this defendant, we must not lose sight of the fact that our legal order was born on fundamental principles that still thrive today. No matter how vicious or cruel we think he is, this defendant, like any other, should have the benefit of the procedural safeguards established by our law. He should not be prejudiced<sup>2</sup> by the exclusion of those whose opinion may act as a restraint on judicial shortcuts.<sup>3</sup> This is the system we have accepted, and we must not erode these rights established for our own protection by denying them indiscriminately.

### II. Background and Meaning of a Public Trial

The origin of the accused's right to a public trial is rooted in our English common law heritage.<sup>4</sup> While the exact date of its recognition is a mystery, early commentators acknowledged its existence as a counterpart of the ancient

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1 Compare *Harris v. Stephens*, 361 F.2d 888 (8th Cir. 1966), with *Tanksley v. United States*, 145 F.2d 58 (9th Cir. 1944). In *Harris* the complainant was twenty-three years old. The defendants were found guilty and sentenced to death. On appeal from a denial of a writ of habeas corpus the defendants argued error in the exclusion of the public during the complainant's testimony. The court rejected this plea stating, "This is a frequent and accepted practice when the lurid details of such a crime must be related by a young lady." *Harris v. Stephens*, *supra* at 891.

*Tanksley* involved the prosecution for the rape of a nineteen-year-old married woman. The trial judge ordered the general public excluded during her testimony. The Ninth Circuit reversed:

It would be denying the defendant his presumption of innocence and a predecision by the court of his guilt to hold that such a married woman must be relieved of that embarrassment because she is "called upon to testify to the story of the defendant's crime and her shame." *Tanksley v. United States*, *supra* at 59.

2 See *ibid.*

3 See *People v. Jelke*, 308 N.Y. 56, 123 N.E.2d 769 (1954).

4 *In re Oliver*, 333 U.S. 257, 266 (1948). "By immemorial usage, whenever the common law prevails, all trials are in open court, to which spectators are admitted." 2 BISHOP, *NEW CRIMINAL PROCEDURE* § 957 (2d ed. 1913).

institution of jury trial.<sup>5</sup> The acceptance of this right was based on the public's distrust of secret inquisitions and trials, which had become instruments of suppression that completely disregarded an accused's right to a fair trial.<sup>6</sup> Thus, this guarantee to a public trial has always been recognized as a protection against the use of our courts as an outlet for despotic government.<sup>7</sup>

This right was recognized in the United States as part of the adopted common law. As early as 1682 it was formally recognized in *William Penn's Code of Laws*.<sup>8</sup> It first appeared in a state constitution in 1776<sup>9</sup> and was included and ratified in the federal constitution in 1791.<sup>10</sup> Subsequently, the right to a public trial was recognized in nearly every state constitution.<sup>11</sup>

A primary function of a public trial is to assure the accused a fair trial, "that the public may see he is fairly dealt with and not unjustly condemned."<sup>12</sup> Our legal order has always looked suspiciously on secret proceedings.<sup>13</sup> The presence of spectators serves to keep the accused's triers aware of the important responsibilities they must discharge.<sup>14</sup> The Supreme Court has noted that public opinion "is an effective restraint on possible abuse of judicial power."<sup>15</sup> Shortcuts in procedure do not preserve the rights of those entitled to them. We should not conclude too quickly that all courts are impartial. It must be remem-

5 Radin, *The Right to a Public Trial*, 6 TEMP. L.Q. 381 (1932). As early as 1565 Sir Thomas Smith wrote of the public character of English trials. *Id.* at 382. Hale and Blackstone also stressed the open examination of witnesses and the publicity of trials as more conducive to attaining truth than secret inquisitorial examinations. *Id.* at 382-83. Hale and Blackstone were among the accepted books used by lawyers who participated in the constitutional convention. Tanksley v. United States, 145 F.2d 58, 60 (9th Cir. 1944). Thus, they surely influenced these attorneys in the adoption of rights to be protected.

6 *In re Oliver*, 333 U.S. 257, 269-70 (1948). *Accord*, *Estes v. Texas*, 381 U.S. 532, 539 (1965).

7 *In re Oliver*, *supra* note 6, at 270.

8 Commonwealth *ex rel.* Paylor v. Cavell, 185 Pa. Super. 176, 138 A.2d 246, *cert. denied*, 358 U.S. 854 (1958).

9 *In re Oliver*, 333 U.S. 257, 266-67 (1948); Commonwealth *ex rel.* Paylor v. Cavell, *supra* note 8.

10 *In re Oliver*, *supra* note 9, at 267.

11 Currently forty-four states specifically provide the right to a public trial in their constitutions: ALA. CONST. art. I, § 6; ALASKA CONST. art. 1, § 11; ARIZ. CONST. art. 2, § 24; ARK. CONST. art. 2, § 10; CAL. CONST. art. 1, § 13; COLO. CONST. art. II, § 16; CONN. CONST. art. 1, § 9; DEL. CONST. art. 1, § 7; FLA. CONST. DECLARATION OF RIGHTS § 11; GA. CONST. art. 1, § 1, ch. 2-105; HAWAII CONST. art. 1, § 11; IDAHO CONST. art. 1, § 13; ILL. CONST. art. 2, § 9; IND. CONST. art. 1, § 13; IOWA CONST. art. 1, § 10; KAN. CONST. BILL OF RIGHTS § 10; KY. CONST. BILL OF RIGHTS § 11; LA. CONST. art. 1, § 9; ME. CONST. art. 1, § 6; MD. CONST. DECLARATION OF RIGHTS § 21. See *Dutton v. State*, 123 Md. 373, 91 Atl. 417 (1914). MICH. CONST. art. I, § 20; MINN. CONST. art. I, § 6; MISS. CONST. art. 3, § 26; MO. CONST. art. 1, § 18(a); MONT. CONST. art. III, § 16; NEB. CONST. art. I, § 11; N.J. CONST. art. I, ¶ 10; N.M. CONST. art. II, § 14; N.C. CONST. art. I, § 13; N.D. CONST. art. I, § 13; OHIO CONST. art. I § 10; OKLA. CONST. art. 2, § 20; ORE. CONST. art. I, § 11; PA. CONST. art. I, § 9; R.I. CONST. art. I, § 10; S.C. CONST. art. I, § 15; S.D. CONST. art. VI, § 7; TENN. CONST. art. I, § 9; TEX. CONST. art. I, § 10; UTAH CONST. art. I, § 11; VT. CONST. ch. I, art. 10; WASH. CONST. art. I, § 10; W.VA. CONST. art. III, § 14; WIS. CONST. art. I, § 7.

Four states specifically provide for this right by statute: MASS. ANN. LAWS ch. 220, § 13A (1955); NEV. REV. STAT. 169.160 (1965); N.Y. JUDICIARY LAW § 4; VA. CODE ANN. 19.1-246 (1960). Wyoming recognizes the right through decision. *State v. Holm*, 67 Wyo. 360, 224 P.2d 500 (1950).

12 1 COOLEY, CONSTITUTIONAL LIMITATIONS 647 (8th ed. 1927). *Accord*, *Estes v. Texas*, 381 U.S. 532 (1965); *People v. Jelke*, 308 N.Y. 56, 123 N.E.2d 769 (1954); *United Press Assn's v. Valente*, 308 N.Y. 71, 123 N.E.2d 777 (1954).

13 *United States v. Consol. Laundries Corp.*, 266 F.2d 941, 942 (2d Cir. 1959).

14 1 COOLEY, *op. cit.* *supra* note 12, at 647.

15 *In re Oliver*, 333 U.S. 257, 270 (1948).

bered that our courts are human institutions, and men, though trained in the profession, commit errors. Therefore, a public trial by an impartial jury is a safeguard against error in criminal cases and must be defended against unwarranted inroads. It is more important to enforce such a right erected by law for the protection of the innocent than to twist and distort it in order to prevent the escape of an apparently guilty person from punishment.<sup>16</sup>

A second function served by the right to a public trial is its aid in assuring trustworthy testimony. An audience always stands ready to hold in contempt a demonstrated liar. The fear of exposure as such, through the testimony of informed witnesses who may hear the erring testimony or learn of it through others who have heard it, fosters trustworthiness.<sup>17</sup>

Another important purpose furthered by this right may be labeled the unknown witness rationale. A witness holding valuable information with respect to the issue at hand, but unknown to either party, may be drawn to a public trial.<sup>18</sup> A good example is given in *Tanksley v. United States*.<sup>19</sup> The defendant was accused of rape. His defense was that the prosecutrix willingly joined in the admitted sexual intercourse but afterwards sought one-hundred dollars compensation. He refused to pay, and she in anger brought suit.

If [she is] such a woman [one who desires to be paid for her sexual intercourse], another man who had had such paid intercourse might be in attendance. Realizing the danger to the defendant of the heavy penalty for the serious crime charged, he well might advise defendant's counsel of his experience with the accusing witness. Even without this his very presence in the courtroom might arouse in her a fear or sense of shame that would alter or weaken her testimony against the accused.<sup>20</sup>

Defining the term "public trial" positively is a difficult task. It is often easier for the court to explain its meaning in a negative way. Nevertheless, opposing positions exist as to its proper definition. The minority defines a public trial less rigorously as one that is not secret.<sup>21</sup> Other courts construe "public trial" broadly as "a trial at which the public is free to attend."<sup>22</sup> It is not restricted to any particular class of the community but is freely open to all.<sup>23</sup> However, the term "public" is a relative one and various circumstances control its construction.<sup>24</sup> Under either view the right is not absolute but is subject to the inherent power of the court to preserve order in the courtroom,

16 *State v. Cullum*, 23 Conn. Supp. 20, 176 A.2d 583 (App. Div.), *certification denied*, 149 Conn. 728, 176 A.2d 587 (1961).

17 6 WIGMORE, EVIDENCE § 1834 (3d ed. 1940). *Accord*, *State v. Schmit*, 139 N.W.2d 800, 806 (Minn. 1966); *People v. Jelke*, 308 N.Y. 56, 123 N.E.2d 769 (1954).

18 *Tanksley v. United States*, 145 F.2d 58 (9th Cir. 1944); *State v. Schmit*, *supra* note 17; *People v. Jelke*, *supra* note 17; 6 WIGMORE, *op. cit. supra* note 17, § 1834.

19 *Tanksley v. United States*, *supra* note 18.

20 *Id.* at 59.

21 See *Reagan v. United States*, 202 Fed. 488 (9th Cir. 1913).

22 *Davis v. United States*, 247 Fed. 394, 395 (8th Cir. 1917); *State v. Schmit*, 139 N.W.2d 800, 804-05 (Minn. 1966).

23 *People v. Byrnes*, 84 Cal. App. 2d 72, 190 P.2d 290, *cert. denied*, 335 U.S. 847 (1948); *State v. Schmit*, *supra* note 22, at 805; *State ex rel. Varney v. Ellis*, 149 W. Va. 522, 142 S.E.2d 63 (1965).

24 *Geise v. United States*, 262 F.2d 151, 157 (9th Cir. 1958), *cert. denied*, 361 U.S. 842 (1959).

to protect rights of parties, and to further the administration of justice.<sup>25</sup> Thus, the trial judge has discretion in appraising the significance of surrounding circumstances to determine if an exclusionary order might be proper.<sup>26</sup> In making his determination, however, the judge must not lose sight of the three major purposes of the right to a public trial discussed above. He must be careful not to undermine the right by underestimating the possible value of a public trial. Certainly, if a trial was overshadowed by local excitement and prejudice and the judge admitted into the courtroom only men opposed to the defendant, the trial could hardly be called a fair public trial. Thus, even though every seat might be occupied, the defendant still would be denied a constitutional right.<sup>27</sup>

No accused can be tried, convicted, and sentenced after a sweeping order excluding all persons except the judge and his attaches has been issued.<sup>28</sup> Furthermore, to allow the judge to exclude all persons except those connected with the trial — the defendant, his attorney, the witnesses, and the officers of the court — would make the constitutional guarantee of a public trial an empty promise.<sup>29</sup> Each of the above persons' presence has already been guaranteed by other provisions of the Constitution: the right to counsel, the right to be confronted by the witnesses against him, and the right to trial by jury.<sup>30</sup> Thus, at the very minimum, friends and relatives must also be admitted.<sup>31</sup> Using the broader definition of a public trial — one at which the public is free to attend — these above-mentioned classes cannot be taken as the exclusive representatives of the public.<sup>32</sup> Even if the presence of the press and members of the bar is allowed, it is questionable whether such representation could fulfill a defendant's right to a public trial. The press will only report that which it feels is newsworthy, and even so, we have no guarantee of an adequate and impartial report.<sup>33</sup> Furthermore, members of the bar and the accused's friends and relatives are not representative of the public.<sup>34</sup> Viewing these circumstances in light of the purposes of a public trial, if we are to guard adequately against judicial oppression or partiality and promote testimonial trustworthiness, this right must be broadly interpreted. Furthermore, since our legal system honors the defendant's presumption of innocence, the exclusion of the public from his trial might easily leave a prejudicial impression on the minds of the jury. Therefore, in order to afford the accused all the possible benefits of an open trial, unrestricted public scrutiny must be preserved as a meaningful assurance to an accused that he will not be unjustly condemned.<sup>35</sup>

25 *People v. Jelke*, 308 N.Y. 56, 123 N.E.2d 769 (1954).

26 *Davis v. United States*, 247 Fed. 394, 395 (8th Cir. 1917).

27 *People v. Hall*, 51 App. Div. 57, 64 N.Y. Supp. 433 (1900).

28 *In re Oliver*, 333 U.S. 257, 271 (1948); *People v. Hartman*, 103 Cal. 242, 244, 37 Pac. 153, 154 (1894); *Tilton v. State*, 5 Ga. App. 59, 62 S.E. 651 (1908).

29 *Tilton v. State*, *supra* note 28; Note, 49 COLUM. L. REV. 110, 115 (1949).

30 *Tilton v. State*, *supra* note 28.

31 *In re Oliver*, 333 U.S. 257, 272 (1948).

32 *Davis v. United States*, 247 Fed. 394, 395 (8th Cir. 1917).

33 *State v. Schmit*, 139 N.W.2d 800, 806 (Minn. 1966); Note, *supra* note 29, at 116.

34 *State v. Schmit*, *supra* note 33, at 806; Note, *supra* note 29, at 116-17.

35 *State v. Schmit*, *supra* note 33, at 806. *Accord*, *United States v. Kobli*, 172 F.2d 919, 921 (3d Cir. 1949).

### III. Public Trial—Present Interpretation

Courts universally recognize the accused's right to a public trial as being mandatory and substantial. As previously noted, however,<sup>36</sup> the right is not absolute and exceptions exist to aid in the administration of justice. Thus, in this discretionary area discrepancies appear in interpreting the extent to which a court may exclude spectators without impinging upon a defendant's right to a public trial.<sup>37</sup>

#### A. Possible Valid Exclusions of the Public

There is general agreement among the courts that spectators having no immediate concern with the trial need not be admitted to an already overcrowded courtroom.<sup>38</sup> Likewise, courts recognize their inherent authority to maintain order and decorum in the courtroom.<sup>39</sup> Under certain circumstances the court may require that all spectators be searched and that they even receive written permission from the judge in order to enter.<sup>40</sup> A mere altercation outside the courtroom, however, is no reason to clear the courtroom despite the fact that defense counsel is allowed to designate those persons whom he wishes to remain.<sup>41</sup> The fact that the facilities of the court are inadequate will not prevent a public trial.<sup>42</sup> For example, in *Gillars v. United States*<sup>43</sup> the defendant was on trial for treason. The government offered into evidence a recording of a radio program in which the defendant participated. While earphones were necessary to hear the evidence, only the members of the press and a few spectators were furnished with such because of a limited supply. The court held the defendant was not deprived of her right to a public trial.<sup>44</sup>

The most difficult areas today involving the discretionary exclusion of the general public are exclusions in the interest of morality and for the protection of witnesses. While preserving public morals is an exceptional goal, the demands of public morality do not warrant stifling the defendant's right to a public trial.<sup>45</sup> Some states have sustained an order excluding everyone but the accused's friends and relatives on grounds of public morality and decency.<sup>46</sup> These cases, however, take an extremely narrow view of the right to a public trial.<sup>47</sup> The exclusion of all spectators, even if the order excepts members of the bar and press, on the sole ground that the anticipated testimony concerns the obscene nature of the offense charged is violative of the defendant's right.<sup>48</sup> Furthermore, "ex-

36 See note 25 *supra* and accompanying text.

37 See *In re Oliver*, 333 U.S. 257, 271 (1948).

38 *United States v. Kobli*, 172 F.2d 919 (3d Cir. 1949); *State v. Schmit*, 139 N.W.2d 800 (Minn. 1966); *People v. Jelke*, 308 N.Y. 56, 123 N.E.2d 769 (1954).

39 *Ibid.*

40 *Pierpont v. State*, 49 Ohio App. 77, 195 N.E. 264, *petition in error dismissed*, 128 Ohio St. 572, 192 N.E. 740 (1934).

41 *Sirratt v. State*, 240 Ark. 47, 398 S.W.2d 63 (1966).

42 The trial need not be held in a place large enough to accommodate all who wish to attend. *United States v. Kobli*, 172 F.2d 919, 923 (3d Cir. 1949).

43 182 F.2d 962 (D.C. Cir. 1950).

44 *Id.* at 978. *Accord*, *D'Aquino v. United States*, 192 F.2d 338 (9th Cir. 1951), *cert. denied*, 343 U.S. 935 (1952).

45 *People v. Jelke*, 308 N.Y. 56, 123 N.E.2d 769 (1954).

46 *State v. Johnson*, 26 Idaho 609, 144 Pac. 784 (1914); *State v. Croak*, 167 La. 92, 118 So. 703 (1928); *State v. Nyhus*, 19 N.D. 326, 124 N.W. 71 (1909).

47 *People v. Jelke*, 308 N.Y. 56, 123 N.E.2d 769 (1954).

48 *State v. Schmit*, 139 N.W.2d 800 (Minn. 1966).

cluding adult spectators is a dubious protection of public morality.<sup>49</sup> A possible exception would be the exclusion of youthful spectators when the evidence is likely to involve scandalous or indecent matters which would have a demoralizing effect on immature minds.<sup>50</sup>

Another exception causing difficulty is the exclusion of spectators from the courtroom to prevent emotional disturbance or embarrassment of the witness. Some courts have extended this exception to a woman's testimony as to the lurid details of a rape in order to protect her from unnecessary embarrassment and shame.<sup>51</sup> Others emphasize the age of the witness and that forcing one of tender years to testify to delicate and revolting facts before a large audience is quite difficult.<sup>52</sup> Without showing inability to testify, however, the mere embarrassment of an adult witness is not a sufficient reason to frustrate a defendant's right to a public trial.<sup>53</sup> Before a judge excludes the general public from the courtroom, he should be quite positive of the witness' inability to testify with such an audience present. No court should exclude the public during the entire trial or for any part other than the testimony of that witness.<sup>54</sup> While some courts stress the difficulty in testifying to the lurid details of a crime, it must be remembered that a defendant is presumed to be innocent until convicted in a court of law. Certainly, we feel compassion for a woman who must testify about her unpleasant experience and a sense of disgust toward the defendant; we may even desire a harsh penalty to be imposed upon him. Do not forget, however, that this defendant has not yet been convicted and may be innocent. The exclusion of the general public at any time during the trial might easily prejudice the jury against the defendant and might sway the jury to convict an innocent man. Surely such a result is not sought. Since our system presumes the innocence of the defendant and guarantees certain safeguarding rights, no one can be allowed to prejudge the guilt of a party. Thus, unless excluding the public is absolutely necessary to accomplish the administration of justice, such exclusion is not warranted because of its tendency to deny the defendant his presumption of innocence.<sup>55</sup>

49 *Id.* at 805.

50 *United States v. Kobli*, 172 F.2d 919 (3d Cir. 1949). However, even this exception is narrowly construed. Where an order excluded from the courtroom all children under eighteen during a prosecution for molesting a child under sixteen, the Alabama Court of Appeals held that the order went beyond excluding merely children of tender years and thus violated the defendant's constitutional right to a public trial. *Reynolds v. State*, 41 Ala. App. 202, 126 So. 2d 497 (1961).

51 *Harris v. Stephens*, 361 F.2d 888 (8th Cir. 1966).

52 *Geise v. United States*, 262 F.2d 151, 157 (9th Cir. 1958), *cert. denied*, 361 U.S. 842 (1959); *Reagan v. United States*, 202 Fed. 488 (9th Cir. 1913); *State v. Gionfriddo*, 221A.2d 851 (Conn. 1966).

53 *State v. Schmit*, 139 N.W.2d 800, 806 (Minn. 1966).

54 *Kirstowsky v. Superior Ct.*, 143 Cal. App. 745, 300 P.2d 163 (1956).

55 *Tanksley v. United States*, 145 F.2d 58, 59 (9th Cir. 1944). The courts have not restricted themselves to cases of embarrassed witnesses in excluding the public for the witness' protection. For example, where the court has reason to believe that admission of defendant's sympathizers might make it possible for them to see the witnesses and later threaten and intimidate them, the trial judge may exclude these persons. *United States ex rel. Orlando v. Fay*, 350 F.2d 967 (2d Cir. 1965). *Accord*, *State v. Poindexter*, 231 La. 630, 92 So. 2d 390 (1957). Spectators were also excluded where a police witness' identity was sought to be concealed to safeguard her life and to use her in future police work. *People v. Pacuicca*, 134 N.Y.S.2d 381 (Bronx County Ct. 1954), *aff'd*, 144 N.Y.S.2d 711 (1955). The same judicial scrutiny expressed above must be exerted in these related cases to secure not only the witness' protection but also to prevent inroads on the defendant's right to a public trial.

### B. A Personal Right — Denial Implies Prejudice

While the above exceptions are the sources of most of the litigation over the right to a public trial, various other interpretations revolving around the right occasionally raise problems which must be solved. One such question is who possesses the right, the public or the accused. Some courts have not restricted the right to the accused but have extended it to the general public.<sup>56</sup> They reason that this safeguard was meant not only to protect an accused but also to protect the public's right to know what transpires when life and liberty are at stake, "for a secret trial can result in favor to as well as unjust prosecution of a defendant."<sup>57</sup> Other authorities take a contrary view and state the right is that of the accused only.<sup>58</sup> A third and middle view is that while the right is in a broad sense for the public's protection, it is primarily a privilege for the accused.<sup>59</sup> Under this interpretation, outsiders cannot enforce the right and prevent exclusion, but rather the defendant alone can determine the extent to which he shall avail himself of this right. This seems to be the proper interpretation since this right is usually given in conjunction with the trial of an accused, and is often associated with other individual safeguards within a constitution.<sup>60</sup> If outsiders were allowed to interfere with an accused's defensive plan, not only would the orderly workings of the judicial process be upset, but this could seriously prejudice the defendant.<sup>61</sup>

Whatever concern the public may have for a defendant's right to a fair trial, it can seldom match that of the person whose life or liberty is at stake. . . . As long as the defendant is assured the right to invoke the guarantees provided for his protection, the public interest is safe and secure, and there is neither need nor reason for outsiders to interject themselves into the conduct of the trial.<sup>62</sup>

In order to prevent the right from becoming illusory it should not be necessary for the defendant to show that he has been prejudiced by the improper exclusion of the general public.<sup>63</sup> A few courts, however, hold that no reversible error is committed by the exclusion unless the defendant does prove prejudice or shows that he has been "deprived of the presence, aid, or counsel of any person whose presence might have been of advantage to him."<sup>64</sup> Imposing this

56 *Lewis v. Peyton*, 352 F.2d 791 (4th Cir. 1965); *United States v. Kobli*, 172 F.2d 919 (3d Cir. 1949).

57 *Lewis v. Peyton*, *supra* note 56, at 792.

58 *Estes v. Texas*, 381 U.S. 532, 588 (1965) (J. Harlan concurring); *Geise v. United States*, 265 F.2d 659 (9th Cir. 1959) (per curiam); 1 *GOOLEY*, *op. cit. supra* note 12, at 647.

59 *United States v. Sorrentino*, 175 F.2d 721, 722-23 (3d Cir.), *cert. denied*, 338 U.S. 868 (1949); *United Press Ass'ns v. Valente*, 308 N.Y. 71, 123 N.E.2d 777 (1954).

60 *E.g.*, U.S. CONST. amend. VI.

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

62 *Id.* at 81, 123 N.E.2d at 781. This limitation permitting enforcement by the accused and not by the public holds true for the press also. No special privilege is granted to the press to be present at a criminal trial for the press stands in no greater position than any other member of the general public. *Tribune Review Publishing Co. v. Thomas*, 153 F. Supp. 486 (W.D. Pa. 1957), *aff'd*; 254 F.2d 883 (3d Cir. 1958); *Kirstowsky v. Superior Ct.*, 143 Cal. App. 745, 300 P.2d 163 (1956); *United Press Ass'n's v. Valente*, *supra* note 61.

63 *United States v. Kobli*, 172 F.2d 919 (3d Cir. 1949); *Tanksley v. United States*, 145 F.2d 58 (9th Cir. 1944); *State v. Beckstead*, 96 Utah 528, 88 P.2d 461 (1939); Note, *supra* note 29, at 118.

64 *Reagan v. United States*, 202 Fed. 488, 490 (9th Cir. 1913); *People v. Byrnes*, 84 Cal. App. 72, 190 P.2d 290, 293, *cert. denied*, 335 U.S. 847 (1948).

restriction on the right could render its value nugatory. It would be most difficult, if not impossible, for a defendant to point to any definite injury.<sup>65</sup> If this constitutional right was adopted for the protection of a criminal suspect, its safeguarding effect in preventing unjust condemnation of the defendant should not be burdened by the imposition of this stipulation. "A violation of the constitutional right necessarily implies prejudice and more than that need not appear."<sup>66</sup>

### C. Waiver

Similarly, though a defendant has no absolute right to compel a private trial<sup>67</sup> and no absolute right to demand the exclusion of certain persons,<sup>68</sup> he must possess the power to waive his right if he so chooses. "To deny the right of waiver in such a situation would be 'to convert a privilege into an imperative requirement' to the disadvantage of the accused."<sup>69</sup> Not every court, however, entertains this view.<sup>70</sup> Such a holding that a defendant cannot waive his right to a public trial must be considered dubious authority. A constitutional right of an accused should not be forced upon him to his possible detriment. Since other related individual rights, such as the right to counsel and the right to trial by jury, are subject to waiver,<sup>71</sup> if a defendant feels it is to his advantage, he should be able to agree to an exclusionary order.

Many difficult issues arise over determining when the right has actually been waived. The federal courts require that the defendant himself must waive a constitutional right, and such waiver is valid only if it is done voluntarily, knowingly, and intelligently.<sup>72</sup> The federal rule requires direct communication between the court and the defendant so that there can be no question of the defendant's intentional relinquishment or abandonment of a known right.<sup>73</sup> Emphasis is put on the fact that it is a constitutional right for the individual's protection, and, therefore, it is he who must actually waive it. Some state courts, however, hold that an attorney can waive the defendant's right to a public trial since he presumptively has authority to act on behalf of his client in all matters connected with the trial.<sup>74</sup> Waiver may also be implied from the accused's

65 *Tanksley v. United States*, 145 F.2d 58, 59 (9th Cir. 1944).

66 *Ibid.*

67 *Singer v. United States*, 380 U.S. 24, 35 (1965); *State v. White*, 97 Ariz. 196, 398 P.2d 903 (1965). See also *State v. Velasquez*, 76 N.M. 49, 412 P.2d 4 (1966), where the court held there was no abuse of the trial judge's discretion in refusing a private trial where the defendant claimed serious physical injury would beset him if the hearing were public. However, the California Penal Code provides that at the request of the defendant the magistrate examining the case prior to trial *must* exclude all unnecessary parties. CAL. PENAL CODE § 868.

68 *State v. Hashimoto*, 47 Hawaii 185, 389 P.2d 146 (1963); *Edmonds v. State*, 215 N.E.2d 547 (Ind. 1966).

69 *United States v. Sorrentino*, 175 F.2d 721, 723 (3d Cir.), *cert. denied*, 338 U.S. 868 (1949).

70 *Lewis v. Peyton*, 352 F.2d 791 (4th Cir. 1965).

71 *Yates v. United States*, 316 F.2d 718 (10th Cir. 1963).

72 *Miranda v. Arizona*, 384 U.S. 436 (1966).

73 *Hatcher v. United States*, 352 F.2d 364 (D.C. Cir. 1965) (*per curiam*), *cert. denied*, 382 U.S. 1030 (1966). See *Miranda v. Arizona*, *supra* note 72.

74 *Commonwealth ex rel. Paylor v. Cavell*, 185 Pa. Super. 176, 138 A.2d 246, *cert. denied*, 358 U.S. 854 (1958). *Accord*, *People v. Cash*, 52 Cal. 2d 841, 345 P.2d 462 (1959). *Contra*, *State v. Delzoppo*, 86 Ohio App. 381, 92 N.E.2d 410 (1949). In the *Delzoppo* case the judge, while outside the courtroom, prepared and sent to the jury a written instruction. This instruction was prepared in the defense counsel's presence, but without the defendant, who

actions. For example, where the defendant requests that he be heard in chambers because of the confidential nature of his testimony, he cannot later complain at the hearing on whether judgment should be pronounced against him that the court did not sit publicly.<sup>75</sup> It has also been held that a defendant's failure to object to an exclusionary order is a sufficient waiver of his right to a public trial.<sup>76</sup>

For adequate protection of his constitutional right it seems imperative that the defendant have knowledge of the fact that he is actually waiving his right to a public trial. Courts should not meticulously search for actions on the defendant's part which could be interpreted as a waiver of this protection. Since it is an individual right, the defendant himself should be the one to waive it knowingly. He may do this with the advice of counsel, but he alone should make the final decision.

#### D. Public Access to the Trial

Another area of dispute concerns the holding of a criminal trial or part thereof other than at the usual place. Whether an accused has been deprived of his right to a public trial depends primarily upon whether the public had free access to the proceedings.<sup>77</sup> A good example is the Supreme Court's invalidation of Michigan's one-man grand jury, which possessed contempt power to summarily punish.<sup>78</sup> The holding of a trial in the office of a jailer also does not afford an opportunity for a public trial.<sup>79</sup> These decisions are consistent with the purposes of the right since they remove the opportunity to arbitrarily condemn the accused.

The right to an open court applies to the entire trial of the defendant.<sup>80</sup> However, a determination must be made as to what proceedings actually compose a criminal prosecution. A public trial, it has been held, is not required in a juvenile court proceeding<sup>81</sup> or in a hearing concerned with a probation violation<sup>82</sup> because these are not criminal prosecutions. The appearance before a grand jury is not a "trial" in terms of the sixth amendment's protection.<sup>83</sup> Thus, while the sentencing for grand jury contempt must be public,<sup>84</sup> the actual offering of evidence of contempt need not be public because of the traditional preservation of secrecy in grand jury proceedings.<sup>85</sup> The determination of what constitutes a criminal trial opens still another area for determination by each jurisdiction.

was waiting in the courtroom, having any knowledge of the court's action. On appeal it was held that this procedure deprived the defendant of his right to a public trial.

75 *People v. Mangan*, 16 App. Div. 2d 986, 229 N.Y.S.2d 107 (1962).

76 *People v. Cash*, 52 Cal. 2d 841, 345 P.2d 462 (1959).

77 *People v. Simmons*, 285 App. Div. 470, 138 N.Y.S.2d 97, *cert. denied*, 350 U.S. 866 (1955); *Cody v. State*, 361 P.2d 307 (Okla. Crim. 1961).

78 *In re Oliver*, 333 U.S. 257 (1948).

79 *State ex rel. Varney v. Ellis*, 149 W. Va. 522, 142 S.E.2d 63 (1965). Where the trial court went to the home of the eighty-seven-year-old, bedridden prosecutrix and neighbors were excluded from the bedroom during the taking of her testimony, defendant's right to a public trial was violated. *Lewis v. Peyton*, 352 F.2d 791 (4th Cir. 1965).

80 *United States v. Sorrentino*, 175 F.2d 721 (3d Cir.), *cert. denied*, 338 U.S. 868 (1949).

81 *In re Lewis*, 51 Wash. 2d 193, 316 P.2d 907 (1957).

82 *United States v. Hollien*, 105 F. Supp. 987 (W.D. Mich. 1952).

83 *In re Oliver*, 333 U.S. 257 (1948).

84 *Ibid.*

85 *Levine v. United States*, 362 U.S. 610 (1960).

From the analysis of the present law it can readily be determined that a number of variations are prevalent among our country's jurisdictions. With its source in our common law heritage one would expect this basic right to be more consistently applied. There is a definite need for basic uniformity if this right is to be adequately protected.

#### IV. Outlook for the Future

Some uniformity in the recognition of the right to a public trial would be gained if the Supreme Court adopted the right as one fundamental in our legal order. A foundation would then be laid for the solution of the many problems currently attending the right. Also a basic, uniform equality of treatment for all those subject to criminal prosecution within the United States would be established. In 1928, however, the Supreme Court refused to require the states to adopt the protecting provisions of the right to a public trial as contained in the sixth amendment.<sup>86</sup> Other courts also have since refused to extend this right to the states.<sup>87</sup> By its decision in *Gaines v. Washington*,<sup>88</sup> however, the Supreme Court did not completely close the door in this area. In *In re Oliver*<sup>89</sup> the Court interpreted *Gaines v. Washington* to allow the procedural requirements of the fourteenth amendment's due process clause to invalidate certain secret proceedings.<sup>90</sup> Yet, an exclusion of the public that violates the fourteenth amendment's more general guarantee of due process may still not violate the specific guarantee of a public trial contained in the sixth amendment.<sup>91</sup> Thus, as yet, the vitality of the sixth amendment's protection is still restricted to the federal courts. Recent decisions, however, have displayed a more liberal attitude toward the expansion of this constitutional safeguard.<sup>92</sup>

Despite the absence of a specific holding, recent decisions of the United States Supreme Court tend to erase any lingering doubts that the right to a public trial, no less than the right to counsel, is entitled to protection from state invasion by the due process clause of the Fourteenth Amendment.<sup>93</sup>

This viewpoint seems entirely correct in light of the recent extensions to the states of the sixth amendment right to counsel<sup>94</sup> and the right of confrontation.<sup>95</sup> Other

86 *Gaines v. Washington*, 277 U.S. 81 (1928).

87 *E.g.*, *Falkowski v. Mayo*, 173 F.2d 742 (5th Cir. 1949) (per curiam); *Baker v. Utecht*, 161 F.2d 304 (8th Cir.), cert. denied, 332 U.S. 831 (1947); *Sawyer v. Duffy*, 60 F. Supp. 852 (N.D. Cal. 1945).

88 277 U.S. 81 (1928).

89 333 U.S. 257 (1948).

90 *Id.* at 273. *Accord*, *Levine v. United States*, 362 U.S. 610 (1960); *Commonwealth ex rel. Paylor v. Cavell*, 185 Pa. Super 176, 138 A.2d 246, cert. denied, 358 U.S. 854 (1958).

91 *Melanson v. O'Brien*, 191 F.2d 963 (1st Cir. 1951).

92 *Lewis v. Peyton*, 352 F.2d 791 (4th Cir. 1965); *State v. Schmit*, 139 N.W.2d 800 (Minn. 1966). See *People v. Wilson*, 60 Cal. 2d 139, 383 P.2d 452, 32 Cal. Rptr. 44 (1963).

93 *State v. Schmit*, *supra* note 92, at 803. The sixth amendment's right to a public trial was extended to the states by a federal district court, *United States ex rel. Bruno v. Herold*, 246 F. Supp. 363 (N.D.N.Y. 1965).

94 *Gideon v. Wainwright*, 372 U.S. 335 (1963).

95 *Pointer v. Texas*, 380 U.S. 400 (1965).

related decisions emphasizing the necessity of safeguarding individual rights lend support to this observation.<sup>96</sup> Thus, considering these developments, the Supreme Court in the near future is likely to extend the sixth amendment right to a public trial to the states. When this occurs, the Supreme Court will then be in a position to set the standards for a uniform application of this right and finally solve many of the inconsistencies now existing among the different jurisdictions.

If the sixth amendment right to a public trial were prescribed for all jurisdictions, the validity of statutory provisions requiring mandatory exclusion would be suspect. Massachusetts presently has a statute requiring that in the trial of certain sex crimes where the victim is under eighteen years of age the judge must exclude from the courtroom the general public and admit only those who have a direct interest in the case.<sup>97</sup> This provision has been held valid under the Massachusetts constitution<sup>98</sup> and a fourteenth amendment due process attack against it was also rejected by the First Circuit.<sup>99</sup> Supporters of these provisions justify such exclusions by citing the undesirable effect on public morals, the unnecessary embarrassment of witnesses, and the influence of the public on attorneys and the jury.<sup>100</sup> Having considered these arguments earlier, it suffices here to quote the Minnesota Supreme Court:

In our opinion, these arguments tend to dilute the force of the plain meaning of the words "public trial." It must be acknowledged that there is a vast difference between a trial from which everyone but a special class of persons is excluded and one which everyone except a designated few is free to attend.<sup>101</sup>

## V. Conclusion

In the determination of the right to a public trial a value judgment must be made to establish who it is we seek to primarily protect — the accused, the public, or the witness. Since the right is contained among the constitutional safeguards founded for an individual's protection against criminal prosecution, it must be the accused who is to be the primary beneficiary of this right's assurances. Since an accused is guaranteed the presence of his counsel, the witness, the jury, and the officers of the court by other provisions of the Constitution, the right must provide for the presence of others representing the general public in order to avoid an illusory interpretation. While under certain circumstances

<sup>96</sup> *Estes v. Texas*, 381 U.S. 532 (1965); *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>97</sup> MASS. ANN. LAWS ch. 278, § 16A (1956) provides:

At the trial of a complaint or indictment for rape, incest, carnal abuse or other crime involving sex, where a minor under eighteen years of age is the person upon, with or against whom the crime is alleged to have been committed, or at the trial of a complaint or indictment for getting a woman with child out of wedlock, or for the non-support of an illegitimate child, the presiding justices shall exclude the general public from the courtroom, admitting only such persons as may have a direct interest in the case.

<sup>98</sup> *Commonwealth v. Blondin*, 324 Mass. 564, 87 N.E.2d 455 (1949), *cert. denied*, 339 U.S. 984 (1950).

<sup>99</sup> *Melanson v. O'Brien*, 191 F.2d 963 (1st Cir. 1951).

<sup>100</sup> *State v. Schmit*, 139 N.W.2d 800 (Minn. 1966).

<sup>101</sup> *Id.* at 805. *Accord*, *People v. Jelke*, 308 N.Y. 56, 66, 123 N.E.2d 769, 774 (1954).

a court may be justified in excluding the public, such as a witness' inability to otherwise testify, a court must not interject unnecessary inroads into this right. This stringent protection of the right to a public trial is wholly consistent with the defendant's presumption of innocence. We must not now lose sight of the individual. To chip away at his fundamental rights will seed the undermining of our criminal justice.

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