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Constitutional Law - Public Trial in Criminal Cases

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CONSTITUTIONAL LAW — PUBLIC TRIAL IN CRIMINAL CASES —

The criminal trial has been traditionally open to the public in Anglo-Saxon procedure,¹ as it was in Roman and other civilized societies of an earlier time.² The public trial of today, however, has been subjected to considerable criticism on the ground that there is a tendency for criminal trials to degenerate into public spectacles, frequently interrupting the orderly procedure of justice, and not infrequently actually prejudicing the accused.³ If no useful purpose is served by the pres-

²⁰ Hope, "Officiousness," 15 CORN. L.Q. 205 at 239 (1930).

²¹ 2 JONES, MORTGAGES 572 (1928).

²² *Bartels v. Seefus*, 132 Neb. 841, 273 N.W. 485 (1937); *Snow v. Arnold*, 132 Fla. 435, 181 S. 7 (1938).

²³ Other cases involving the self-interest justification include the discharge of tax liens by mortgagees, *De Haven v. Roscon Building & Loan Assn.*, 107 Pa. Super. 459, 164 A. 69 (1933), and cases collected in 61 A.L.R. 587 at 601 (1929) and 106 A.L.R. 1212 at 1217 (1937); and the discharge by a wife of liens on her husband's property, *Elmora & West End Building & Loan Assn. v. Dancy*, 108 N.J. Eq. 542, 155 A. 796 (1931); *Moody v. Isselstein*, 106 Wash. 294, 179 P. 855 (1919).

¹ *In re Oliver*, 333 U.S. 257, 68 S.Ct. 499 (1948); Radin, "The Right to a Public Trial," 6 TEMP. L.Q. 381 (1932).

² JOLOWICZ, HISTORICAL INTRODUCTION TO ROMAN LAW 318-327, 407-409 (1932).

³ Radin, "The Right to a Public Trial," 6 TEMP. L.Q. 381 (1932).

ence of the idle public during the deadly serious determination of guilt or innocence, should not the judge, subject to the right of admittance of any whom the accused desires in attendance, be allowed to exclude all who have no special interest in the proceeding?⁴ This comment will consider that question.

I. *Right of the General Public to Attend Criminal Trials*

Although historically the public trial did not seem to develop out of any particular solicitude for the person on trial,⁵ the popular conception today is that the right of a public trial exists primarily for the benefit of the accused, and that the incidental observer attends not as a matter of right but as a matter of courtesy.⁶ Some extremists have gone so far as to urge that the judge, with the consent of the accused and the prosecutor, may arbitrarily exclude spectators from the entire proceedings.⁷ While there certainly are cases supporting the premise that incidental attendance may be barred if the accused waives his right to a public trial,⁸ the same courts recognize that the people do have an interest in seeing that such proceedings are kept public.⁹ It does not appear that any courts have granted requests to exclude the public unless such exclusion was felt necessary in the interest of justice.¹⁰ Though there is no specific constitutional safeguard protecting the public from arbitrary exclusion,¹¹ ordinarily all who desire to attend a criminal trial are entitled to be admitted as long as there are facilities available,¹² and, despite a few indiscreet statements to the

⁴ In exclusion orders it is usual practice to except persons the accused requests to have in attendance, and persons having a legitimate interest in the proceedings are entitled to remain as a matter of right. *Beauchamp v. Cahill*, 297 Ky. 505, 180 S.W. (2d) 423 (1944).

⁵ 43 CASE AND COMMENT No. 3, p. 8 (1937).

⁶ The view seems to stem primarily from a statement by Cooley referring only to constitutional provisions and not considering common law custom. COOLEY, *CONSTITUTIONAL LIMITATIONS*, 8th ed., 647 (1927). It does not follow, as some have assumed, that there is no public interest worthy of protection.

⁷ *LeViness*, "Crime News," 66 U.S. L. REV. 370 at 371 (1932).

⁸ *United States v. Sorrentino*, (3d Cir. 1949) 175 F. (2d) 721. Failure to object to an exclusion order has been held to constitute a waiver. *Keddington v. State*, 19 Ariz. 457, 172 P. 273 (1918). *Contra*: *State v. Hensley*, 75 Ohio St. 255, 79 N.E. 462 (1906).

⁹ *United States v. Kobli*, (3d Cir. 1949) 172 F. (2d) 919.

¹⁰ *Green v. State*, 135 Fla. 17, 184 S. 504 (1938).

¹¹ One court has indicated that the state constitutional provision guaranteeing public trial is a safeguard meant to protect the public as well as the accused. *State v. Keeler*, 52 Mont. 205, 156 P. 1080 (1916).

¹² *Daubney v. Cooper*, 5 Man. & Ry. 314, 10 B. & C. 237, 109 Eng. Rep. 438 (1829). Recovery allowed in assault action against defendants who ejected plaintiff pursuant to court order.

contrary, most jurisdictions recognize that a judge has no authority to bar citizens indiscriminately from the courts.¹³ In a number of states legislative enactments require all judicial proceedings to be public, with the exception of certain enumerated classes of cases.¹⁴

The basis of such a right in the public is a recognition of the fact that the people have an interest in knowing how the judicial system is functioning,¹⁵ and in seeing that the accused is given a fair and impartial trial and that the prosecution is accorded a proper opportunity to present its case.¹⁶ Publicity in criminal proceedings constitutes an ever present check on the judge, stimulating his sense of responsibility and curbing his prejudices.¹⁷ Furthermore, it provides a security for the conscientious jurist who has no reason to conceal his activity, thwarting attempts to discredit him by false accusations concerning his impartiality or competence. As continental experience has demonstrated, judicial laxity and venality increase in the absence of critical scrutiny.¹⁸ Unless the necessity of excluding the public in the interest of a fair trial outweighs the advantages to be gained from publicity, the judge is not entitled to the prerogative either by his own motion or in concurrence with the desires of the parties.

II. *Right of the Press to Attend Criminal Trials*

In America the fourth estate is an institution of special privilege; it has been accorded the most solicitous treatment in the courtrooms of the land, securing admittance in numerous instances when the doors have been closed in the face of the masses.¹⁹ In general it has been

¹³ *Williamson v. Lacy*, 86 Me. 80, 29 A. 943 (1893). In action against judge by persons excluded from a trial, recovery was denied solely on the ground that a judge is not answerable in damages when acting in a judicial capacity. *Accord: Crisfield v. Perine*, 15 Hun. (N.Y.) 200 (1878), *affd.* 81 N.Y. 622 (1880).

¹⁴ Juvenile court cases are regularly conducted in privacy. In civil litigation divorce cases and cases involving trade secrets are frequently heard *absentia* the public. Statutes are collected in 6 WIGMORE, EVIDENCE, 3d ed., §1834 (1940).

¹⁵ *State v. Hensley*, 75 Ohio St. 255, 79 N.E. 462 (1906), noted 20 HARV. L. REV. 489 (1907).

¹⁶ *State v. Beckstead*, 96 Utah 528 at 534, 88 P. (2d) 461 (1939).

¹⁷ 1 BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 522, 523, 568-572 (1827).

¹⁸ ESMEIN, HISTORY OF CONTINENTAL CRIMINAL PROCEDURE 3, 145-164, 165-172, 397, 439, 442 (1913). It was not the secret procedure that was so objectionable; it was the practices accompanying it.

¹⁹ Instances in which the press has been excluded from criminal trials are exceedingly rare. *People v. Hall*, 51 App. Div. 57, 64 N.Y.S. 433 (1900) (order loosely enforced). In determining whether the accused has been denied a public trial emphasis is frequently placed on the fact that the press is not excluded. *People v. Byrnes*, 84 Cal. App. (2d) 72

recognized that the press, as the representative of the people, is entitled to discuss trial proceedings freely²⁰ and can, if necessary, compel officials to make judicial records available for that purpose.²¹ However, a review of its conduct has led serious thinkers to conclude that the press is motivated only by a desire to increase circulation, and the ill-effects of such a policy outweigh any possible services which might result from complete coverage of criminal trials.²² In support of this premise the picture painted is indeed black. Sensational cases are tried in the press before reaching the courtroom. During the trial news services invade the premises with such disconcerting paraphernalia as telegraph and recording apparatus, flash cameras, microphones and, recently, television equipment.²³ In this turbulent atmosphere twelve forgotten men try to do justice while a disgusted citizenry concludes that criminal trials are a farce.²⁴ It is apparent that such situations call for effective sanctions, but does exclusion of the press constitute the proper remedy?

Unlike British courts, which freely inflict contempt penalties on newssheets jeopardizing impartial determination of litigation,²⁵ the American bench has seldom invoked the contempt process in similar

at 76, 190 P. (2d) 290 (1948), noted 22 *TEMP. L.Q.* 232 (1948). A court may be entitled to exclude newsmen from a courtroom in order to prevent publication of salacious details. See *Bloomer v. Bloomer*, 197 Wis. 140, 221 N.W. 734 (1928) (divorce proceeding). It is doubtful that a court can effectively enforce the order by forbidding publication of the testimony, at least in the absence of a statute. In *re Shortridge*, 99 Cal. 526, 34 P. 227 (1893).

²⁰ "A trial is a public event. What transpires in the court room is public property." *Craig v. Harney*, 331 U.S. 367 at 374, 67 S.Ct. 1249 (1947).

²¹ *Bend Publishing Co. v. Haner*, 118 Ore. 105, 244 P. 868 (1926). In the absence of a statute, the right of private persons to have access to public records is more doubtful.

²² See White, "Newspaper and Radio Coverage of Criminal Trials: A Modern Dilemma," 41 *J. CRIM. L.* 306 (1950).

²³ Televising of courtroom scenes during a murder trial has been held to be improper, but not reversible error. *People v. Stroble*, 36 Cal. (2d) 615, 226 P. (2d) 330 (1951), noted in 25 *TEMP. L.Q.* 91 (1951). Courts have acted to exclude cameras and radio equipment from courtrooms; there has also been legislative activity in this respect. Yesawich, "Televising and Broadcasting Trials," 37 *CORN. L.Q.* 701 at 712-717 (1952). Taking a photograph in the courtroom in violation of court order has been cited in contempt. *Ex parte Sturm*, 152 Md. 114, 136 A. 312 (1927).

²⁴ It is argued that in sensational criminal trials in which there is a large attendance, counsel are likely to address their arguments to the audience and the press rather than to the jury. While this is a valid criticism, is it proper to treat such practice as a defect in the system of public trial when the real fault lies in the individuals involved and can be remedied in most instances by a word from the bench instead of excluding the public before trial begins?

²⁵ Goodhart, "Newspapers and Contempt of Court in English Law," 48 *HARV. L. REV.* 885 (1935).

situations.²⁶ It is not because our courts lack authority to punish abuses of the press which have the effect of preventing a fair trial.²⁷ Hesitancy seems to stem primarily from the political processes by which judges are selected.²⁸ Perhaps for the same reason the courts have been even less inclined to exclude the press from criminal proceedings.²⁹ Although courtrooms occasionally have been temporarily cleared,³⁰ there is little precedent for a sweeping order of exclusion barring the press throughout the trial.³¹ Since freedom of the press is not an unbridged license, the press, like the public, should be subject to temporary orders of exclusion. Furthermore, a judge should have authority to admit members of the press conditionally, subject to prior promises not to publish specified matters if the judge considers them prejudicial. It has been suggested that such power might be unconstitutional³² as it is in the nature of a prior restraint on publication.³³ Although permanent restraints of such a nature may be objectionable, there is authority for conditional admission of press representatives upon agreement not to comment on the trial until the jury has rendered a verdict.³⁴ Permanent exclusion from a trial, on the other hand, is an extreme measure which penalizes the responsible press for the misconduct of an irresponsible minority. Such action is not necessary to secure a fair trial for the accused, since prejudice usually results not from a truthful report of the trial proceedings which the jury hears and evaluates for itself, but from pre-trial accounts which render it impossible to select impartial jurors and from statements circulated during the trial which are not traceable to anything stated on the witness stand. The only remaining reasons for excluding the press would be to protect the

²⁶ Nelles and King, "Contempt by Publication in the United States," 28 COL. L. REV. 525-562 (1928).

²⁷ Tate v. State ex rel. Raine, 132 Tenn. 131, 177 S.W. 69 (1915).

²⁸ If a publication interferes with the due administration of justice, contempt proceedings are probably still available despite the doctrine of the Bridges case which limits the power of summary contempt where criticism is directed against the bench to instances constituting a clear and present danger to impartial determination of litigation. Bridges v. California, 314 U.S. 252, 62 S.Ct. 190 (1941). The question appears to be still open if the publication is of a nature tending to influence the jury. Baltimore Radio Show v. State, 193 Md. 300, 67 A. (2d) 497 (1949), cert. den. 338 U.S. 912, 70 S.Ct. 252 (1950).

²⁹ Perry, "The Courts, the Press, and the Public," 30 MICH. L. REV. 228 (1931).

³⁰ People v. Hall, 50 App. Div. 57, 64 N.Y.S. 433 (1900); Hogan v. State, 191 Ark. 437, 86 S.W. (2d) 931 (1935).

³¹ Occasionally, in the interest of a fair trial, even an accurate account of proceedings should not be published. 2 BISHOP, CRIMINAL LAW §259 (1923).

³² Comment, 63 HARV. L. REV. 840 (1950).

³³ Near v. Minnesota, 283 U.S. 697, 51 S.Ct. 625 (1931).

³⁴ United States v. Holmes, (C.C. Pa. 1842) 26 Fed. Cas. 360, No. 15,383.

judge from press retaliation for his handling of a case, a protection to which, apparently, he is not entitled;³⁵ to protect innocent witnesses from being exploited in the press, a protection not generally accorded; or to protect the public itself from salacious details of sensational cases, a protection which a New York trial court recently deemed more important than the accused's right to a public trial.³⁶

III. *Accused's Right to a Public Trial*

While the casual observer has seldom contested the authority of a judge to exclude him, the accused has frequently asserted that such exclusion is a violation of his right to a public trial, a right guaranteed by the Sixth Amendment in federal cases and also by most state constitutions.³⁷ In some courts the phrase "public trial" has come to mean a trial which is not a secret trial. The constitutional right is satisfied if court officers, witnesses, persons otherwise connected with the proceedings and personal friends of the accused are permitted to attend.³⁸ This is considered sufficient to avert the abuses of earlier secret proceedings which the constitutional provisions were designed to prevent, and the accused is entitled to no more. Other courts construe the phrase to mean a trial open to the general public, recognizing, however, that the right of the accused to a public trial is a relative, not an absolute right and may be abridged if it becomes necessary to do so in order to administer justice. A public trial, they premise, means something more than a fair trial and therefore is not to be strictly limited to classes of persons necessary to insure a fair trial.³⁹ In a few courts it has also been suggested that the accused must demonstrate that the exclusion order is in fact prejudicial,⁴⁰ but the majority of courts hold that denial of the constitutional right is prejudicial in itself.⁴¹ In support of the majority position it can be argued that prejudice is likely to occur

³⁵ See note 28 *supra*.

³⁶ N.Y. TIMES, Feb. 10, 1953, p. 1:1. Several newspapers appealed from the order excluding the press. Justice Schreiber of the New York Supreme Court ruled the newspapers had no constitutional right to attend all criminal trials and report all proceedings therein. *United Press Assns. v. Valente*, 120 N.Y.S. (2d) 642 (1953). On appeal to the appellate division the ruling was upheld (3-2 decision) on the ground that the petitioners had no standing in court to protest the exclusion order. 120 N.Y.S. (2d) 174 (1953).

³⁷ Comment, 49 *COL. L. REV.* 110 (1949).

³⁸ *State v. Nyhus*, 19 N.D. 326, 124 N.W. 71 (1909).

³⁹ *People v. Murray*, 89 Mich. 276, 50 N.W. 995 (1891); *People v. Greeson*, 230 Mich. 124, 203 N.W. 141 (1925).

⁴⁰ *Benedict v. People*, 23 Colo. 126, 46 P. 637 (1896).

⁴¹ *People v. Hartman*, 103 Cal. 242, 37 P. 153 (1894).

which may never be exposed.⁴² Possibilities of prejudice are varied. If the accused is innocent, it is important to him that he be exonerated not only in the eyes of the jury but likewise in the eyes of the community where he is known. Loose-mouthed assertions published for all the world to read cast a pall of guilt on a person which lingers even after he is found innocent; to deny a public trial is to deny an opportunity to raise the pall.⁴³ While courts recognize that an exclusion order should not reflect prejudicially on the accused or tend to discredit him in the eyes of the jury,⁴⁴ little consideration has been given to the fact that in certain instances the very act of excluding the public will adversely influence the jury as to the enormity of the crime or unduly impress them as to the importance of the evidence.⁴⁵ Wigmore points out two further benefits of publicity: (1) The presence of an audience will tend to prevent misstatements on the part of witnesses who have greater reason to believe that a falsehood will be exposed if informed observers are apprised of their testimony;⁴⁶ and (2) publicity may secure useful testimony previously unknown to the accused, particularly when the statements are made available to a wide audience through the press.⁴⁷ One further argument advanced in support of a public trial is that the accused may be unable to prove unfair treatment at the hands of the court unless the proceeding is public,⁴⁸ but in this respect the presence of his friends would assure witnesses available to testify in his behalf.

Recently, in *In re Oliver*,⁴⁹ the United States Supreme Court ruled that the due process clause of the Fourteenth Amendment required a

⁴² *Davis v. United States*, (8th Cir. 1917) 247 F. 394.

⁴³ See TAFT, *LAW REFORM* 142-148 (1926).

⁴⁴ *Dutton v. State*, 123 Md. 373 at 387, 91 A. 417 (1914). Examining Italians for weapons as they entered courtroom held not prejudicial when jury was not aware of that fact. *People v. Mangiapane*, 219 Mich. 62 at 68, 188 N.W. 401 (1922). But moving trial to a theater to accommodate spectators was cause for reversal as jury could infer therefrom the court felt it immaterial how accused was tried. *Roberts v. State*, 100 Neb. 199, 158 N.W. 930 (1916).

⁴⁵ *State v. Osborne*, 54 Ore. 289, 103 P. 62 (1909). It would seem that if the public is ordered excluded the jury should be instructed that the exclusion should not be construed as an indication of guilt on the part of the accused or of truthfulness of the witnesses about to testify, yet such instructions do not seem to be requested or given. Compare the instructions given when accused is brought into court manacled. *Makley v. State*, 49 Ohio App. 359 at 376, 197 N.E. 339 (1934).

⁴⁶ This premise appears in the works of Blackstone and other early writers, 3 BLACKST., *COMM.*, Wendell ed., 372-373 (1854). See also 1 BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 522, 523, 568-572 (1827).

⁴⁷ 6 WIGMORE, *EVIDENCE*, 3d ed., §1834 (1940).

⁴⁸ *Tilton v. State*, 5 Ga. App. 59, 62 S.E. 651 (1908).

⁴⁹ 333 U.S. 257, 68 S.Ct. 499 (1948), noted 39 J. CRIM. L. 359 (1948).

public trial in state criminal proceedings. As the case was an extreme one involving summary contempt punishment of a witness in a secret one-judge grand jury inquiry, it was not necessary to define sharply the scope of the newly recognized right. In interpreting the Sixth Amendment, the lower federal courts have imposed severe restrictions on the discretion of the trial judge to exclude the public in federal criminal cases.⁵⁰ Although early cases supported broad discretionary exclusion power in the judges,⁵¹ the later cases are of the view that except in extraordinary instances exclusion of the general public over the accused's objection constitutes a denial of a public trial.⁵² While it might be argued that the Fourteenth Amendment entitles the accused to similar treatment in state proceedings, the law has not tended to impart the same strict construction to the fundamental concepts constituting due process under the Fourteenth Amendment as has been imparted to the correlativè rights specifically enumerated in the first ten amendments.⁵³ The refusal of the Supreme Court on several occasions to review cases in which it was alleged that the accused had been denied due process under the Fourteenth Amendment is perhaps indicative of a reluctance to interfere with local discretion in interpreting the nature of a public trial so long as the determination does not deprive the accused of a fair trial.⁵⁴ So far the lower federal courts have not carried over the interpretation of "public trial" under the Sixth Amendment to the Fourteenth.⁵⁵

IV. *Discretionary Authority of a Judge to Exclude the Public and Press from a Criminal Trial*

Circumstances may arise, it is universally conceded, in which it becomes necessary for the judge to exclude a part or all of the public and in such instances neither the public nor the accused has cause for objection. While there is general agreement recognizing authority to exclude in a number of situations, there is complete disagreement in

⁵⁰ *Davis v. United States*, (8th Cir. 1917) 247 F. 394.

⁵¹ *Reagan v. United States*, (9th Cir. 1913) 202 F. 488; *Callahan v. United States*, (9th Cir. 1917) 240 F. 683.

⁵² *United States v. Kobli*, (3d Cir. 1949) 172 F. (2d) 919, noted with approval 28 *TEX. L. REV.* 265 (1949).

⁵³ *Betts v. Brady*, 316 U.S. 455 at 462, 62 S.Ct. 1252 (1942).

⁵⁴ *Commonwealth v. Blondin*, 324 Mass. 564, 87 N.E. (2d) 455 (1949), cert. den. 339 U.S. 984, 70 S.Ct. 1004 (1950), reviewed on writ of habeas corpus in *Melanson v. O'Brien*, (1st Cir. 1951) 191 F. (2d) 963 at 965. See also *Moore v. State*, 151 Ga. 648, 108 S.E. 47 (1921), writ of error dismissed 260 U.S. 702, 43 S.Ct. 98 (1922).

⁵⁵ *Melanson v. O'Brien*, (1st Cir. 1951) 191 F. (2d) 963.

others. Ordinarily, a public trial entitles the general public and the press to free access at all times,⁵⁶ but occasional sanction has been given to temporary barring of doors when the continuous passage of people proves to be disruptive of proceedings.⁵⁷ Particular individuals may be ejected if they prove to be disorderly.⁵⁸ If it becomes necessary to clear the courtroom in order to maintain decorum, the judge has power to do so.⁵⁹ He may also impose restrictions on attendance in the interest of public health.⁶⁰ Ordinarily the trial must be conducted in a manner enabling all present to understand what is taking place,⁶¹ but in exceptional circumstances, as in instances requiring earphones to hear transcribed or recorded broadcasts, practical considerations will govern.⁶²

Out of special regard for the interest of a witness, the courts have sometimes felt it necessary to exclude the general public. If a witness justifiably fears that circulation of his testimony will subject him to physical violence in retaliation, the public may be excluded to assure his safety.⁶³ However, if the anticipated testimony is merely personally embarrassing to the witness, some courts will not exclude the public, at least in cases where the witness is an adult.⁶⁴ The possible embarrassment is considered temporary only, whereas the accused may be irreparably injured. Other courts feel that innocent witnesses should not be degraded or subjected to humiliation, particularly when the

⁵⁶ *People v. Murray*, 89 Mich. 276, 50 N.W. 995 (1891). However, witnesses may be excluded from the courtroom and kept apart from each other. *State v. Worthen*, 124 Iowa 408, 100 N.W. 330 (1904). While jury deliberations are secret, the jury must be recalled into open court for further instructions. *Arrington v. Robertson*, (3d Cir. 1940) 114 F. (2d) 821. A grand jury indictment must be returned in open court. *Zugar v. State*, 194 Ga. 285, 21 S.E. (2d) 647 (1942).

⁵⁷ *People v. Buck*, 46 Cal. App. (2d) 558, 116 P. (2d) 160 (1941) (doors locked to obviate disturbance while instructions were being given to the jury).

⁵⁸ *State v. Copp*, 15 N.H. 212 (1844).

⁵⁹ *Lide v. State*, 133 Ala. 43, 31 S. 953 (1901).

⁶⁰ *People v. Miller*, 257 N.Y. 54, 177 N.E. 306 (1931).

⁶¹ *People v. Southack*, (Cal. 1952) 241 P. (2d) 558, modified on other grounds, 248 P. (2d) 12.

⁶² *D'Aquino v. United States*, (9th Cir. 1951) 192 F. (2d) 338, cert. den. 343 U.S. 935, 72 S.Ct. 772 (1952).

⁶³ *Commonwealth v. Principatti*, 260 Pa. 587 at 598, 104 A. 53 (1918). If the presence of a hostile audience creates an atmosphere inimical to accused's right to a fair trial, there may be a denial of due process. See *Moore v. Dempsey*, 261 U.S. 86, 43 S.Ct. 265 (1923).

⁶⁴ *Green v. State*, 135 Fla. 17, 184 S. 504 (1938). Exclusion to prevent embarrassment to an innocent victim requires an assumption that the victim's recital of shame is true and the accused's denial or plea of consent is false. Since there is particular danger in cases involving sex crimes that an order will exclude persons who may be capable of impeaching the one witness testifying against the accused, it has been suggested that embarrassment alone does not justify exclusion. *Tanksley v. United States*, (9th Cir. 1944) 145 F. (2d) 58, noted 8 *UNIV. DETROIT L.J.* 129 (1945).

accused is the cause of the situation.⁶⁵ When the humiliation is so extreme that the witness cannot testify coherently in the presence of an audience, the public may be excluded in order to facilitate the testimony.⁶⁶

In cases where the evidence contemplated is of a particularly obscene and immoral nature, the courts are widely split as to the advisability of excluding the public, agreeing only that exclusion of immature persons from the proceedings is proper.⁶⁷ In some states, statutes provide that the public may be excluded in such cases, and the courts have generally ruled that these statutes do not conflict with the state constitutional provisions requiring a public trial.⁶⁸ These courts minimize the latent dangers accompanying restricted publicity of trials and accentuate the benefits thereby inuring to the public. The audience, it is argued, is composed for the most part of individuals drawn by the lurid and sensational who are not motivated by any desire to assure themselves that justice is being done and the courts are properly functioning. If the accused desires exclusion of the public and the press in such cases because their presence may create an atmosphere hostile to his interest, there is no serious objection to excluding onlookers temporarily on the ground that testimony is unfit to be heard. However, the rights of the accused should not be subordinated to the motives drawing those in attendance if he believes their presence is beneficial. It is doubtful whether the testimony presented in court will ordinarily have any serious deleterious effect on the standards of morality.

V. *Conclusions*

Our courts have operated successfully for nearly two centuries under a theory which permits exclusion of the public only when a particularly grave reason exists and only so long as that reason exists. Any exclusion which is more than temporary in nature renders the trial secret so far as the public is concerned. A judge is not defenseless. He can maintain order and protect witnesses by temporary exclusion, and there is no necessity for permanently excluding the press so long

⁶⁵ *Dutton v. State*, 123 Md. 373, 91 A. 417 (1914).

⁶⁶ *State v. Callahan*, 100 Minn. 63, 110 N.W. 342 (1907).

⁶⁷ *Wade v. State*, 207 Ala. 1, 92 S. 101 (1921).

⁶⁸ *Moore v. State*, 151 Ga. 648, 108 S.E. 47 (1921); *contra*: *People v. Yeager*, 113 Mich. 228, 71 N.W. 491 (1897).

as the judge is armed with the sword of contempt and has the courage to use it. It is one thing to place discretion in the hands of the jurist; it is another to elevate him to the exalted status of conservator of the public morals and censor of the public press.⁶⁹

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⁶⁹ Further references: 49 COL. L. REV. 110-118 (1949); 35 MICH. L. REV. 474 (1937); 14 AM. JUR., Criminal Law §§139-143 (1938); 156 A.L.R. 265 (1945); ABBOTT, CRIMINAL TRIAL PRACTICE, 4th ed., Viesselman, §240 (1931); ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 352, 353, 385-387 (1947).