EXCLUSION OF THE GENERAL PUBLIC FROM A CRIMINAL TRIAL—SOME PROBLEM AREAS

This note presents the legal problems which arise when the general public is excluded from a criminal trial.[1] Exclusion of the press from a criminal trial is dealt with only to the extent that the press is considered, as modern courts have done,[2] to be but one segment of the "public." The issues to be

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1. Exclusions of the public from non-criminal trials are beyond the scope of this note. For instance, juvenile court proceedings are not "criminal trials." *In re* Holmes, 379 Pa. 599, 109 A.2d 523 (1954), *cert. denied,* 348 U.S. 973 (1955); Dendy v. Wilson, 142 Tex. 460, 179 S.W.2d 269 (1944); *In re* Lewis, 51 Wash. 2d 193, 316 P.2d 907 (1957). Further, there are certain types of *civil* cases from which the public is normally excluded in accordance with statutory provision. These include cases involving divorce, seduction, breach of promise of marriage, slander, annulment, bastardy, adoption, and hospitalization of the mentally ill. For a fuller discussion see 6 WIGMORE, EVIDENCE § 1835 (3d ed. 1940).

Exclusion of the general public has also been upheld in civil cases involving the disclosure of trade secrets. See E. I. Du Pont de Nemours Powder Co. v. Masland, 244 U.S. 100, 103 (1917); National Starch Prods., Inc. v. Polymer Indus., Inc., 273 App. Div. 732, 79 N.Y.S.2d 357, *leave to appeal denied,* 274 App. Div. 822, 81 N.Y.S.2d 278 (1948). But if these trials were criminal rather than civil, such as in the case of a criminal anti-trust violation, it is doubtful that a general exclusion order would be sustained. See United States v. Consolidated Laundries Corp., 159 F. Supp. 860 (S.D.N.Y. 1958), *appeal dismissed,* 266 F.2d 941 (2d Cir. 1959); Sherman Anti-Trust Act, 26 Stat. 209-10 (1890), 15 U.S.C. §§ 1-7 (1964); 37 Stat. 731 (1913), 15 U.S.C. § 30 (1964).

2. Estes v. Texas, 381 U.S. 532 (1965); Kirtowsky v. Superior Court, 143 Cal. App. 2d 745, 300 P.2d 163 (1956); State v. Jackson, 43 N.J. 148, 163, 203 A.2d 1, 9 (1964) (by implication); United Press Ass'ns v. Valente, 308 N.Y. 71, 123 N.E.2d 777 (1954); E. W. Scripps Co. v. Fulton, 100 Ohio App. 157, 125 N.E.2d 896, *appeal dismissed per curiam,* 164 Ohio St. 261, 130 N.E.2d 701 (1955); *accord,* Tribune Review Publishing Co. v. Thomas, 153 F. Supp. 486 (W. D. Pa. 1957), *aff'd,* 254 F.2d 883 ((3rd Cir. 1958); see Geise v United States, 265 F.2d 659 (9th Cir.), *cert. denied,* 361 U.S. 842 (1959); Bonicelli v. State, 339 P.2d 1063 (Okla. Crim. App. 1959). *But see* Lyles v. State, 330 P.2d 734 (Okla. Crim. App. 1958); Commonwealth *ex rel.* Paylor v. Cavell, 185 Pa. Super. 176, 182, 138 A.2d 246, 249, *cert. denied,* 358 U.S. 854 (1958). In Lyles v. State, *supra* at 740, the court stated:

> The doors of our courts must never be closed for Star Chamber sessions. They must be open to the press and its prying eyes and purifying pen to report courtroom abuses . . . which despoil and stagnate the flow of equal and exact justice. In fact, it has been held the right of a public trial is abridged [per se] if the press is excluded. . . . [But the court goes on to say that] " 'no freedoms are absolute.' The freedoms of speech and press are not exceptions. . . . If at any time the representatives of the 'press' . . . interfere with the orderly conduct of court procedure, . . . the court has the inherent power to put an immediate stop to such conduct." (Citations omitted.)

The special problems relating to the freedom of the press are also beyond the scope of this note, but for a reasonable approach to some of these problems see 19 F.R.D. 16 (1955) (panel discussion). See also *A Free Press and a Fair Trial—A Symposium,* 11 VILL. L. REV. 677 (1966).

resolved are: (1) What is the basis for a public trial? (2) When and why has the general public been excluded from a criminal trial? (3) Are the reasons propounded for excluding the public valid when applied to specific factual situations? (4) How much discretion do trial judges have to exclude the public or segments thereof? (5) What is the present trend in American case law concerning the exclusion of the public from criminal trials?

In countries where the people have had an effective voice in their government, the administration of justice in secret seems to have been without legal foundation.[3] English jurisprudence was undoubtedly influenced at least to some extent by the open tribunals of Rome.[4] Though it is uncertain when English courts first required open attendance, the right to a public trial is firmly rooted in our common law heritage.[5] In fact, some courts have held that the right to a public trial is a right inherent in the common law and would exist even in the absence of legislative or constitutional sanction.[6] Underlying this heritage is a fundamental distrust of "justice" administered in private:

> The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French Monarchy's abuse of the *lettre de cachet.* (Footnotes omitted.)[7]

The sixth amendment to the Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." Each state, except one, has a similar guarantee by constitution, statute, or decision.[8] The precise question of whether the public trial guarantee of the sixth amendment is obligatory on the states through the fourteenth amendmend has never been passed on by the Court in a meaningful way.[9] The

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3. See E. W. Scripps Co. v. Fulton, 100 Ohio App. 157, 161, 125 N.E.2d 896, 900, *appeal dismissed per curiam,* 164 Ohio St. 261, 130 N.E.2d 701 (1955).

4. *Ibid.*

5. *In re* Oliver, 333 U.S. 257, 266 (1948).

6. E. W. Scripps Co. v. Fulton, 100 Ohio App. 157, 161-62, 125 N.E.2d 896, 900, *appeal dismissed per curiam,* 164 Ohio St. 261, 130 N.E.2d 701 (1955); State v. Holm, 67 Wyo. 360, 384, 224 P.2d 500, 508 (1950); see Dutton v. State, 123 Md. 373, 91 Atl. 417 (1914); State v. Copp, 15 N.H. 212 (1844).

7. *In re* Oliver 333 U.S. 257, 268-69 (1948). For a fuller discussion of the history of the right to a public trial see *In re* Oliver, *supra,* at 269-72 nn.21-30; E. W. Scripps Co. v. Fulton, *supra* note 6; CROSS, THE PEOPLE'S RIGHT TO KNOW 153-75 (1953); 6 WIGMORE, EVIDENCE § 1834 (3d ed. 1940); WIGGINS, THE PUBLIC'S RIGHT TO PUBLIC TRIAL, 19 F.R.D. 16, 25-36 (1955). For the view that there is no historical or any other rational basis for the right to a public trial see Radin, *The Right to a Public Trial,* 6 TEMP. L.Q. 381 (1932).

8. There are forty-three state constitutional provisions for the right to a public trial.

Supreme Court in *In re Oliver*[10] has held that a completely secret trial in a state court violates the due process clause of the fourteenth amendment. The Court has similarly reversed convictions which were based on trials that were too public.[11]

See *In re* Oliver, *supra* note 7; ALASKA CONST. art I, § 11; HAWAII CONST. art. I, § 11. These last two states construe their constitutional provisions for a public trial in substantially the same manner as the federal courts construe the sixth amendment of the federal constitution. See Goss v. State, 390 P.2d 220, 222 (Alaska), *cert. denied,* 379 U.S. 859 (1964); State v. Hashimoto, 47 Hawaii 185, 389 P.2d 146 (1963).

Two states provide for the right to a public trial by statute. NEV. REV. STAT. § 169.160 (1957); N.Y. CIV. RIGHTS LAW § 12. Three other states recognize the right by decision. Dutton v. State, 123 Md. 373, 387, 91 Atl. 417, 422 (1914) (no secret trials); State v. Copp, 15 N.H. 212, 215 (1844) (dictum); State v. Holm, 67 Wyo. 360, 384, 224 P.2d 500, 508 (1950) (common law rule).

Massachusetts recognizes the right to a public trial indirectly because of a statute which allows exclusion only in specific classes of sex cases—victim under age eighteen, bastardy, or seduction. MASS. ANN. LAWS ch. 278, § 16 (1956). This statute has been strictly limited to these types of cases. See Commonwealth v. Blondin, 324 Mass. 564, 87 N.E.2d 455 (1949), *cert. denied,* 339 U.S. 984 (1950). Virginia seems to be the only state where the accused has no recognized right to a public trial. See *In re* Oliver, *supra* note 7; VA. CONST. art. 1, § 8; VA. CODE ANN. § 19.1-246 (1950).

9. See Quick, *A Public Criminal Trial,* 60 DICK. L. REV. 21, 23 (1955). *Contra,* 4 CATHOLIC U.L. REV. 38 (1954).

10. 333 U.S. 257 (1948). The *Oliver* case was expressly limited to its peculiar facts—Michigan's unique one-man grand jury system. See *id.* at 273. However, in view of recent cases and the present composition of the Court, there is little doubt that the public trial provision of the sixth amendment would be made mandatory upon the states in the proper case. United States *ex rel.* Bruno v. Herold, 246 F. Supp. 363, 367 (N.D.N.Y. 1965); see Klopfer v. North Carolina, 87 Sup. Ct. 988 (1967); Estes v. Texas, 381 U.S. 532, 588-89 (1965); Pointer v. Texas, 380 U.S. 400 (1965).

Oliver appears to do no more than prohibit *secret* trials. A "non-secret" rule provides a minimal definition of "publicness," but in terms of their diverse criminal systems, this leaves the states without a workable standard. Moreover, any definition of "a public trial" runs the risk of being too inflexible. Defining "public" as the opposite of "secret" is the narrow view taken by older cases. See Reagan v. United States, 202 Fed. 488, 490 (9th Cir. 1913); Benedict v. People, 23 Colo. 126, 46 Pac. 637 (1896); Robertson v. State, 64 Fla. 437, 440, 60 So. 118, 119 (1912). However, some of the more recent cases have adhered to this narrow view. See Melanson v. O'Brien, 95 F. Supp. 230 (D. Mass.), *vacated on other grounds,* 191 F.2d 963 (1st Cir. 1951); Commonwealth v. Blondin, 324 Mass. 564, 87 N.E.2d 455 (1949), *cert. denied,* 339 U.S. 984 (1950). The "non-secret" rule seemed to imply that as long as the trial was not a Star Chamber proceeding the constitutional requirement of publicity was satisfied. See Commonweath v. Blondin, *supra* at 572, 87 N.E.2d at 460.

Merely allowing a trial by jury does not, standing alone, satisfy the constitutional definition of a "public trial." See People v. Medcoff, 344 Mich. 108, 73 N.W.2d 537 (1955). *But cf.* State *ex rel.* Dressler v. Rigg, 252 Minn. 239, 89 N.W.2d 699 (1958) (dictum) (post-plea of guilty hearing in chambers).

Until recently there was one situation in which the imposition of summary judgment, in the presence of only the officers of the court and the grand jury, was the extent of the defendant's "public" hearing. See Levine v. United States, 362 U.S. 610 (1960); FED. R. CRIM. P. 42. But this type of secret hearing was declared invalid. See Harris v.

While the Court has forbidden secret trials, it has not established any standards under either the sixth or the fourteenth amendment to measure the extent of the right to a public trial. The absence of such standards has caused wide diversity in both state and federal decisions.[12] Nearly all courts have placed some limitations on the right. Which of these limitations, if any, are violative of the sixth amendment or the due process clause is yet undetermined.[13]

The constitutional requirement of a public trial is primarily to protect one accused of crime from being unjustly condemned.[14] In public trials,

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United States, 382 U.S. 162 (1965). For a criticism of the *Levine* case see *The Supreme Court, 1959 Term,* 74 HARV. L. REV. 97, 144-47 (1960). Similar practices in state courts have also been overruled. See *In re* Murchison, 349 U.S. 133 (1955); *In re* Oliver, 333 U.S. 257 (1948).

Rarely have courts defined "public" in such a manner as to allow admittance of the public without any restriction. See People v. Hartman, 103 Cal. 242, 243, 37 Pac. 153, 154 (1894); State v. Smith, 90 Utah 482, 491, 62 P.2d 1110, 1115 (1936); State v. Holm, 67 Wyo. 360, 386, 224 P.2d 500, 509 (1950); 1 COOLEY, CONSTITUTIONAL LIMITATIONS 647 (8th ed. 1927). *But see* People v. Micalizzi, 223 Mich. 580, 582, 194 N.W. 540, 541 (1923); *cf.* People v. Teitelbaum, 163 Cal. App. 2d 184, 329 P.2d 157 (1958) (private conferences at bench and in chambers). However, some courts hold that a trial is not "public" unless all orderly, adult citizens are allowed to attend freely. Wade v. State, 207 Ala. 1, 92 So. 101 (1921); People v. Yeager, 113 Mich. 228, 71 N.W. 491 (1897) (Youths excluded to protect their morals); Neal v. State, 86 Okla. Crim. 283, 192 P.2d 294 (1948); State *ex rel.* Varney v. Ellis, 149 W. Va. 525, 142 S.E.2d 63 (1965); *accord,* Bonicelli v. State, 339 P.2d 1063 (Okla. Crim. App. 1959).

Other courts have said, "The term 'public trial' is used in a relative sense and its meaning depends largely upon the circumstances of each particular case." People v. Buck, 46 Cal. App. 2d 558, 562, 116 P.2d 160, 163 (1941); *accord,* People v. Hall, 51 App. Div. 57, 62, 64 N.Y.S. 433, 436 (1900). [*People v. Hall* was overruled on other issues by People v. Jelke, 308 N.Y. 56, 123 N.E.2d 769 (1954).]

In conclusion, no definition of "public" can be substituted for legal analysis; none is completely workable. The test of publicity cannot be based on the number present. See Keddington v. State, 19 Ariz. 457, 172 Pac. 273 (1918) (no irreducible number exists); Henderson v. Maxwell, 176 Ohio St. 187, 198 N.E.2d 456 (1964) (no spectators desired to attend). *But see* State v. Holm, 67 Wyo. 360, 224 P.2d 500 (1950) (attendance of 35 to 45 people held sufficient).

11. Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965). However, between these two extremes—the secret trial and the overly public, prejudicial trial—the Court has chosen to remain silent. See, *e.g.,* Geise v. United States, 158 F. Supp. 821 (D. Alaska), *aff'd,* 262 F.2d 151 (9th Cir. 1958), *aff'd on rehearing per curiam,* 265 F.2d 659 (9th Cir.), *cert. denied,* 361 U.S. 842 (1959); Commonwealth v. Blondin, 324 Mass. 564, 87 N.E.2d 455 (1949), *cert. denied,* 339 U.S. 984 (1950).

12. Notes 29-40 *infra* and accompanying text.

13. See *In re* Oliver, 333 U.S. 257, 273 (1948); State v. Haskins, 38 N.J. Super. 250, 254, 118 A.2d 707, 709 (App. Div. 1955); Quick, *supra* note 9, at 23; Note 7 W. RES. L. REV. 78, 83-84 & n.42 (1955).

14. 1 COOLEY, CONSTITUTIONAL LIMITATIONS 647 (8th ed. 1927).

defendants are generally said to be benefited by the greater likelihood of truthful testimony, the more conscientious performance by juries and court officers,[15] and the possibility of an unknown material witness being among spectators.[16] Open courts are also said to benefit society as a whole by safeguarding against any attempt to employ courts as instruments of oppression,[17] by creating public confidence, by educating the public in criminal justice, and by deterring potential criminals.[18]

I. Present Trend in Cases Concerning Exclusion of the General Public

Although there are some minor exceptions,[19] most of the present problems raised by the right to a public trial have emerged from two basic factual patterns.[20] These two have in common the fact that the trial usually in-

15. Judges also seem to be aware of the need for open hearings at stages of the criminal system other than the trial itself. See Newman, Conviction 86 (1966). The pressure exerted by the public on the court often may only be through unfavorable press coverage. The pressure is, of course, stronger when the judge holds an elective office, but it is no less real when the ballot box is not the sanction.

16. See 6 Wigmore, *op. cit. supra* note 7, § 1834; Wiggins, *supra* note 7, at 27; Note, 36 Ore. L. Rev. 345, 346 (1957). That none of these reasons is valid see Radin, *supra* note 7.

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

18. See authorities cited note 16 *supra.*

19. There have been instances in which the trial was *too* public. Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965).

20. In addition, other factual situations have raised the issue of a denial of the right to a public trial. For example, the accused is not denied a public trial where counsel for both parties have private conferences at the bench on matters of law. Steiner v. United States, 134 F.2d 931 (5th Cir.), *cert. denied,* 319 U.S. 774 (1943). A public trial relates to ". . . the impanelment of the jury, the opening statements of counsel, the presentation of evidence, the arguments, the instructions to the jury and the return of the verdict . . . ." People v. Teitelbaum, 163 Cal. App. 2d 184, 206-07, 329 P.2d 157, 172 (1958). Thus, a private pre-trial conference or hearing does not abridge the public-trial right. Hayes v. United States, 296 F.2d 657 (8th Cir. 1961). Similarly, a post-plea of guilty hearing held in chambers apparently does not offend the Constitution. See State *ex rel.* Dressler v. Rigg, 252 Minn. 239, 89 N.W.2d 699 (1958).

The public has also been excluded during the presentation of certain types of evidence. Iva Ikuko Torguri D'Aquino v. United States, 192 F.2d 338 (9th Cir. 1951), *cert. denied,* 343 U.S. 935 (1952) (evidence by earphones); *accord,* Lancaster v. United States, 293 F.2d 519 (D.C. Cir. 1961) (*per curiam*) (excluded public during showing of obscene film). *But see* Bonicelli v. State, 339 P.2d 1063 (Okla. Crim. App. 1959) (reversible error to have private jury hearing of evidentiary tape recording). See also People v. Montoya, 235 Cal. App. 2d 789, 45 Cal. Rptr. 572 (1965).

The right to a public trial applies to misdemeanors as well as felonies. State v. Moseng, 254 Minn. 263, 95 N.W.2d 6 (1959); State *ex rel.* Varney v. Ellis, 149 W. Va. 525, 142 S.E.2d 63 (1965). But a hearing on a probation violation is in the nature of a summary proceeding, entitling no violator to a public hearing. United States v. Hollien, 105 F. Supp. 987 (W.D. Mich. 1952). Similarly, there is no right to a public trial when the

volves a crime which has provoked extensive community interest.[21] In the first pattern the trial judge, in the exercise of his discretion, limits the extent to which the public is permitted to view the proceedings over the defendant's objection. The exclusion order may be directed toward only certain groups of spectators or may extend to the entire general public; the request for an exclusion order may come from the prosecutor,[22] the jury,[23] or the court on its own motion.[24] The second factual situation is one in which the trial court decides to exclude the entire general public, but the public through a representative asserts an independent right to attend the trial.[25] In this factual pattern the interests of the defendant and those of the community may come into direct conflict.[26] The press, usually a self-appointed representative of the public, views the exclusion as a violation of the first amendment freedom of the press. However, in point of fact, even those cases which recognize the existence of an independent right, vested in the public, do not consider exclusion orders to be a violation of this freedom.[27]

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case arises in the land or naval forces of the United States. See *Ex parte* Benton, 63 F. Supp. 808 (N.D. Cal. 1945).

There is no denial of the right if no spectators elect to attend. Henderson v. Maxwell, 176 Ohio St. 187, 198 N.E.2d 456 (1964). The same is true if the defendant pleads guilty. See People v. Henderson, 343 Mich. 465, 72 N.W.2d 177 (1955), *cert. denied,* 351 U.S. 967 (1956).

21. See, *e.g.,* United States v. Kobli, 172 F.2d 919 (3d Cir. 1949); United Press Ass'ns v. Valente, 308 N.Y. 71, 123 N.E.2d 777 (1954).

22. State v. Schmidt, 139 N.W.2d 800 (Minn. 1966). In some situations, the defendant himself requests the exclusion. State v. White, 97 Ariz. 196, 398 P.2d 903 (1965).

23. State v. Holm, 67 Wyo. 360, 224 P.2d 500 (1950).

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

25. *E.g.,* United Press Ass'ns v. Valente, 308 N.Y. 71, 123 N.E.2d 777 (1954). See generally 19 F.R.D. 16 (1955) (panel discussion); 27 CONN. B.J. 239, 242 (1953) (absolute right theory).

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

27. Kirstowsky v. Superior Court, 143 Cal. App. 2d 745, 300 P.2d 163 (1956); E. W. Scripps Co. v. Fulton, 100 Ohio App. 157, 125 N.E.2d 896, *appeal dismissed per curiam,* 164 Ohio St. 261, 130 N.E.2d 701 (1955). However, the press is normally not one of the excluded segments of the general public See, *e.g.,* Tanksley v. United States, 145 F.2d 58 (9th Cir. 1944); State v. Schmidt, 139 N.W.2d 800 (Minn. 1966); State v. Hensley, 75 Ohio St. 255, 79 N.E. 462 (1906); State v. Smith, 90 Utah 482, 62 P.2d 1110 (1936).

It is not always possible to ascertain whether the exclusion order extended to the press. See State v. Haskins, 38 N.J. Super. 250, 118 A.2d 707 (App. Div. 1955). When a blanket exclusion order has been limited in its duration, the press probably has been excluded. See Hogan v. State, 191 Ark. 437, 86 S.W.2d 931 (1935) (everyone excluded except the jury for ten minutes). The frequency of press exclusions, however, is difficult to determine because courts rarely have to deal squarely with such exclusions as a separate issue. See, *e.g.,* People v. Benedict, 23 Colo. 126, 46 Pac. 637 (1896);

The first section of this note deals with problems raised by exclusion of the general public over the defendant's objection. The second section examines case law concerning exclusion orders over the public's objection.

A. *Exclusion of the General Public Over Defendant's Objection*

A Third Circuit decision of 1949, *United States* v. *Kobli*,[28] is the landmark in the American law of the defendant's right to a public trial. However, the earlier case law will be discussed first to put *Kobli* in its proper perspective.

1. *Case Law before United States v. Kobli*

Prior to *Kobli*,[29] cases concerning exclusion of the public were hopelessly in conflict[30] even though a majority of courts purported to follow Professor Cooley's classic statement on public trials:

> It is also requisite that the trial be public. By this is not meant that every person who sees fit shall in all cases be permitted to attend criminal trials; because there are many cases where, from the character of the charge and the nature of the evidence by which it is to be supported, the motives to attend the trial on the part of portions of the community would be of the worst character, and where a regard to public morals and public decency would require that at least the young be excluded from hearing and witnessing the evidences of human depravity. . . . *The requirement of a public trial is for the benefit of the accused;* that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may

State v. Nyhus, 19 N.D. 326, 124 N.W. 71 (1909); State v. Osborne, 54 Ore. 289, 103 Pac. 62 (1909).

The press will be excluded when they interfere with a fair trial. Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965). But if the press creates no interference, it is free to print whatever transpires in a judicial proceeding. Phoenix Newspapers, Inc. v. Superior Court, 418 P.2d 594 (Ariz. 1966).

It is further to be noted that the press is not the public's only amicus curiae. See Beauchamp v. Cahill, 297 Ky. 505, 180 S.W.2d 423 (1944) (attorney excluded). Other cases have language to this effect:

"[T]he guarantee of a public trial confers no special benefit on the press, the radio industry, or the television industry." Estes v. Texas, 381 U.S. 532, 583 (1965) (Warren, C.J., concurring); *accord,* Kirstowsky v. Superior Court, 143 Cal. App. 2d 745, 300 P.2d 163 (1956); United Press Ass'ns v. Valente, 308 N.Y. 71, 123 N.E.2d 777 (1954); E. W. Sripps Co. v. Fulton, *supra.*

28. 172 F.2d 919 (3d Cir. 1949).

29. United States v. Kobli, 172 F.2d 919 (3d Cir. 1949). When *Kobli* was decided no trend in the cases was apparent. The decision stimulated case comments. See, *e.g.,* 33 MINN. L. REV. 662 (1949); 3 VAND. L. REV. 125 (1949).

30. For an illustration of the confusion that existed in the case law see the authorities cited in State v. Haskins, 38 N.J. Super. 250, 118 A.2d 707 (App. Div. 1955).

> keep his triers keenly alive to a sense of their responsibility . . . and the requirement is fairly observed if, without partiality or favoritism, *a reasonable proportion of the public* is suffered to attend, notwithstanding that those persons whose presence could be of no service to the accused, and who would only be drawn thither by a prurient curiosity, are excluded altogether.[31] (Emphasis added.)

Under this standard, courts applied a type of reasonableness test,[32] under which an accused had the right to "a reasonable portion of the public" in attendance at his trial.[33] However, what constituted a "reasonable portion of the public" often varied from court to court.[34] Cases were often distinguished on the basis of who was excluded—witnesses, close relatives, distant relatives, the press, the young, the old, friends of the accused, or any combination of these.[35] In fact, the authority of a case sometimes rested on the degree of repulsion created by the crime charged.[36] Statutes in some states which require exclusion of the public from trials involving certain crimes further complicated this area of the law.[37]

31. 1 COOLEY, CONSTITUTIONAL LIMITATIONS 647 (8th ed. 1927). Many courts have used it as a guide. *E.g.*, People v. Hartman, 103 Cal. 242, 37 Pac. 153 (1894); Robertson v. State, 64 Fla. 437, 60 So. 118 (1912); Wendling v. Commonwealth, 143 Ky. 587, 137 S.W. 205 (1911); Dutton v. State, 123 Md. 373, 91 Atl. 417 (1914); State v. Hensley, 75 Ohio St. 255, 79 N.E. 462 (1906); State v. Smith, 90 Utah 482, 62 P.2d 1110 (1936); People v. Jelke, 308 N.Y. 56, 123 N.E.2d 769 (1954) (dissenting opinion). *But see* People v. Yeager, 113 Mich. 228, 71 N.W. 491 (1897) (except youthful spectators). The *Yeager* opinion is from Cooley's home state, and its major objection is that protection of public morality is not a sound basis for excluding adults. What is "reasonable" is a universal standard in the law, but as Cooley uses it, the term may become self-contradictory. First he would require a "reasonable proportion of the public" to safeguard the principle of publicity, but in the same breath he excludes all prurient-minded. What he overlooks is that *all* of the spectators may be prurient-minded to some extent. The problem of exclusion under the Cooley standard is placed in the hands of the trial judge with little more to use as a guide than his own personal concepts of morality. The trend in the case law is that attendance is not to be limited to only a reasonable number and that public morality can never be the basis for exclusion of the general public. Notes 50-65 *infra* and accompanying text.

32. Authorities cited in note 31 *supra*.

33. Beauchamp v. Cahill, 297 Ky. 505, 180 S.W.2d 423 (1944).

34. Compare the results in the cases cited in note 31 *supra*. For a general treatment of the conflicts in the earlier case law see BOWERS, JUDICIAL DISCRETION OF TRIAL COURTS §§ 262-69 (1931).

35. To compare these distinctions see the cases cited in the footnotes in United States v. Kobli, 172 F.2d 919 (3d Cir. 1949). For a recent case which stretched factual distinctions to the limit see United States v. Geise, 158 F. Supp. 821 (D. Alaska), *aff'd*, 262 F.2d 151 (9th Cir. 1958), *rehearing denied per curiam*, 265 F.2d 659 (9th Cir.), *cert. denied*, 361 U.S. 842 (1959).

36. See, *e.g.*, Reagan v. United States, 202 Fed. 488 (9th Cir. 1913); Benedict v. People, 23 Colo. 126, 46 Pac. 637 (1898); State v. Genese, 102 N.J.L. 134, 130 Atl. 642 (Ct. Err. & App. 1925).

37. Thus cases have been determined by the construction of a pertinent statute. See,

Before *Kobli,* the confusion among cases dealing with public trials left three important questions unresolved: (1) whether the protection of public morals justifies the exclusion of the *entire* general public who are not involved or interested in the case—including mature adults;[38] (2) whether

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e.g., Wade v. State, 207 Ala. 1, 92 So. 101 (1921); Moore v. State, 151 Ga. 648, 108 S.E. 47 (1921), *appeal dismissed per curiam,* 260 U.S. 702 (1922); Commonwealth v. Blondin, 324 Mass. 564, 87 N.E.2d 455 (1949), *cert. denied,* 339 U.S. 984 (1950); People v. Jelke, 308 N.Y. 56, 123 N.E.2d 769 (1954); State v. Beckstead, 96 Utah 528, 88 P.2d 461 (1939). *But see* People v. Yeager, 113 Mich. 228, 71 N.W. 491 (1897). For a complete list of these statutes, listed by jurisdiction, see 6 WIGMORE, EVIDENCE § 1835 (3d ed. 1940, Supp. 1964).

A provison of the Alabama constitution reads:

> In all prosecutions for rape and assault with intent to ravish, the court may, in its discretion, exclude from the courtroom all persons, except such as may be necessary in the conduct of the trial.

ALA. CONST. art 6, § 169. When the crime alleged falls into one of these two specific categories, it is held to be proper in Alabama to exclude the general public. *Ex parte* Rudolph, 276 Ala. 392, 162 So. 2d 486 (1964). But in general this provision is narrowly construed. See, *e.g.,* Hull v. State, 232 Ala. 281, 167 So. 553 (1936) (carnal knowledge of girl under age twelve); Wade v. State, 207 Ala. 1, 92 So. 101 (1921) (mayhem by castration). Even when the prosecution was for *rape,* exclusion of the accused's close relatives was held to be improper. See Weaver v. State, 33 Ala. App. 207, 31 So. 2d 593 (1947).

Although some courts have given a broad construction to their statutes, these courts represent a small minority. See Moore v. State, 151 Ga. 648, 108 S.E. 47 (1921), *appeal dismissed per curiam,* 260 U.S. 702 (1922) (lacked jurisdiction); Sallie v. State, 155 Miss. 547, 124 So. 650 (1929) (*attempted* rape). The better view is that these statutes should be narrowly construed in favor of open courts. People v. Jelke, 308 N.Y. 56, 123 N.E.2d 769 (1954). At least one court has held an exclusionary statute unconstitutional where it conflicted with the right to a public trial. People v. Yeager, 113 Mich. 228, 71 N.W. 491 (1897). The statute had been passed in an attempt to nullify the effect of a prior Michigan case that had reversed an exclusion order based on the protection of public morals. See People v. Murray, 89 Mich. 276, 50 N.W. 995 (1891).

38. Exclusion based on the protection of public morals created a sharp conflict in the cases. A large group of cases (now a small minority) approved exclusions on this basis. See Callahan v. United States, 240 Fed. 683 (9th Cir. 1917); Reagan v. United States, 202 Fed. 488 (9th Cir. 1913); Keddington v. State, 19 Ariz. 457, 172 Pac. 273 (1918); People v. Stanley, 33 Cal. App. 624, 166 Pac. 596 (1917); State v. Johnson, 26 Idaho 609, 144 Pac. 784 (1914) (leading case for this view); State v. Croak, 167 La. 92, 118 So. 703 (1928); State v. Nyhus, 19 N.D. 326, 124 N.W. 71 (1909); Sawyer v. Duffy, 60 F. Supp. 852 (N.D. Cal. 1945) (dictum). Another group of cases *refused* to exclude the general public on the basis of public morality. See, *e.g.,* Tanksley v. United States, 145 F.2d 58 (9th Cir. 1944); People v. Byrnes, 84 Cal. App. 2d 72, 190 P.2d 290 (1948); People v. Yeager, 113 Mich. 228, 71 N.W. 491 (1897); State *ex rel.* Baker v. Utecht, 221 Minn. 145, 21 N.W.2d 328, *cert. denied,* 327 U.S. 810 (1946); State v. Keeler, 52 Mont. 205, 156 Pac. 1080 (1916) (leading case for this viewpoint); Rhoades v. State, 102 Neb. 750, 169 N.W. 433 (1918). These courts reason:

> Many other judges have been actuated by the same high motive [to protect public morals and decency]. The purpose, however, was one which could not be accomplished legally. The public includes persons of all classes. If there were any process by which any group or groups could be screened out for exclusion solely on the basis of their ulterior motives in attending the trial, this purpose could not have

in an appropriate situation for exclusion, the order should be applied indiscriminately to the general public or be applied only to those specific persons or groups for whom reasons, particularly applicable to them, exist;[39] and (3) whether the defendant must show actual prejudice because of the exclusion before he has a ground for reversible error.[40] *Kobli* clearly answered each of these questions.[41]

2. *Kobli: The General Rule*

In *Kobli,* the defendant was charged with violating the Mann Act.[42] Her case received considerable notoriety, and on the day of the trial, the courtroom was packed with many young girls. The trial judge gave notice of his pending exclusion order, and only Kobli objected. Apparently her codefendants waived their right to a public trial.[43] The trial court, overruling Kobli's objection, excluded *everyone except* defendants, counsel, witnesses and the press. However, the defendant was extended the privilege to readmit any particular person she desired to have in attendance.[44] On appeal the

been accomplished without depriving the trial of a public character. The exclusion of the general public upon this ground alone was a violation of the defendant's constitutional right. People v. Byrnes, 84 Cal. App. 2d 72, 78, 190 P.2d 290, 294 (1948).

39. Often exclusions were indiscriminate. Authorities cited note 38 *supra.* However, some courts limited their exclusion to particular persons or groups. See State v. McCool, 34 Kan. 617, 9 Pac. 745 (1886) (women); New York State Licensed Bail Agent's Ass'n v. Murtagh, 279 App. Div. 851, 110 N.Y.S.2d 154, *appeal denied mem.,* 279 App. Div. 893, 111 N.Y.S.2d 606, *appeal denied mem.,* 303 N.Y. 1009, 106 N.E.2d 284 (1952) (soliciting bondsmen); Commonwealth v. Principatti, 260 Pa. 587, 104 Atl. 53 (1918) (other Italians).

40. Prior to *Kobli,* a minority of cases required that actual prejudice be shown by the defendant. See Reagan v. United States, 202 Fed. 488 (9th Cir. 1913); Benedict v. People, 23 Colo. 126, 46 Pac. 637 (1896); State v. Genese, 102 N.J.L. 134, 130 Atl. 642 (Ct. Err. & App. 1925) (by implication); State v. Smith, 90 Utah 482, 62 P.2d 1110 (1936). *Reagan* and *Benedict* have been overruled on the requirement of prejudice. See Tanksley v. United States, 145 F.2d 58 (9th Cir. 1944); Thompson v. People, 399 P.2d 776 (Colo. 1965); 37 U. COLO. L. REV. 511 (1965). The majority before *Kobli* held that prejudice would be *implied* when the accused was denied a public trial. See, *e.g.,* Davis v. United States, 247 Fed. 394 (8th Cir. 1917); People v. Hartman, 103 Cal. 242, 37 Pac. 153 (1894); Tilton v. State, 5 Ga. App. 59, 62 S.E. 651 (1908); State v. Keeler, 52 Mont. 205, 156 Pac. 1080 (1916). Some courts, using stronger language, said that prejudice would be *conclusively* presumed. People v. Yeager, 113 Mich. 228, 71 N.W. 491 (1897); State v. Osborne, 54 Ore. 289, 103 Pac. 62 (1909).

41. Notes 42-49 and accompanying text.

42. 18 U.S.C. §§ 2421-22 (1964).

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

44. This modification, however, was held on appeal not to cure the error caused by the exclusion because at best the defendant's request could only be for *interested* parties, not *disinterested* members of the general public. United States v. Kobli, 172 F.2d 919, 924 (3d Cir. 1949).

sole issue was whether it was proper to exclude the adult populace indiscriminately on the basis of protecting public morals. The court set out the *general rule* that in a federal court *indiscriminate exclusion of the disinterested, adult general public in a criminal case, over the defendant's objection, is reversible error per se.* It went on to say that protection of public morals alone, though a noble objective, is never a valid reason for excluding the general adult public:

> Moreover 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 toward matters of sex precluded a determination that all members of the public, the mature and experienced as well as the immature and impressionable, may reasonably be excluded from the trial of a sexual offense upon the ground of public morals.[45]

However, the court indicated in dictum that exclusion of the general public for the duration of the testimony of a very young witness would be permissible.[46] The court also ruled that when the right to a public trial has been violated, prejudice will necessarily be implied; thus, the defendant has no burden of proving personal detriment. In so holding the court followed *Davis* v. *United States*[47] and *Tanksley* v. *United States.*[48] The latter case had expressly overruled the requirement of a showing of actual prejudice established in *Reagan v. United States.*[49] In further dicta, the court accepted as standard exceptions to the general rule the propriety of exclusions to protect courtroom decorum, to prevent overcrowding, and to protect the morals of the young and immature.

3. *Clear Indications of a Trend in Case Law*

In the last seventeen years, *Kobli* has been followed in whole or in part by most state cases in which the exclusion of the general public has been in issue.[50] One of the earliest cases to express approval of the *Kobli* approach was *State v. Holm,*[51] which also expressed approval of a number of

45. *Id.* at 923.

46. *Ibid.*

47. 247 Fed. 394 (8th Cir. 1917).

48. 145 F.2d 58 (9th Cir. 1944).

49. 202 Fed. 488 (9th Cir. 1913).

50. See Sirratt v. State, 240 Ark. 47, 398 S.W.2d 63 (1966); Thompson v. People, 399 P.2d 776 (Colo. 1965); State v. Schmit, 139 N.W.2d 800 (Minn. 1966); State v. Haskins, 38 N.J. Super. 250, 118 A.2d 707 (App. Div. 1955); People v. Jelke, 308 N.Y. 56, 123 N.E.2d 769 (1954); Lyles v. State, 330 P.2d 734 (Okla. Crim. App. 1958); Commonwealth *ex rel.* Paylor v. Cavell, 185 Pa. Super. 176, 138 A.2d 246, *cert. denied,* 358 U.S. 854 (1958); State v. Holm, 67 Wyo. 360, 244 P.2d 500 (1950).

51. 67 Wyo. 360, 224 P.2d 500 (1950); see Note, 17 WYO. L.J. 58 (1962). In this case of first impression, the Wyoming supreme court held that, although the state had

other approaches. However, contrary to the *Kobli* rule, the court allowed a general exclusion order to stand because the trial court had allowed thirty-five to forty persons, including friends and relatives of the accused, to be present at the trial. But the court went on to say that in some cases general public attendance may be mandatory regardless of "the nature of the case":[52]

> It may well happen that a person might be arrested and tried for a crime . . . who has no acquaintenances, no relatives and no friends in the community. Hence, only the presence of the public generally could insure him a public trial to which he is rightfully entitled.[53]

In New York, a statute provides that trial judges may exclude the general public from trials involving divorce, seduction, abortion, rape, assault with intent to commit rape, sodomy, bastardy, or filiation.[54] In *People* v. *Jelke*,[55] which involved a charge of compulsory prostitution, a New York trial judge excluded the general public because of the "obscene and sordid details" in the evidence. The court of appeals, strictly construing the statute, held that the trial court had no authority to issue a general exclusion order in a case not specified in the statute. Prior to *Jelke*, New York courts had applied the Cooley standard in cases not covered by the statute,[56] and the trial judge's order would have been permissible.[57] However, the majority in *Jelke* clearly held that cases not covered by the statute will be governed by the *Kobli* principles, which prohibit general indiscriminate exclusions and require that exclusions be based on reasons particularly applicable to the class of persons excluded:

> The exclusion of particular spectators or classes of spectators may then be justified, without impairing the essential nature of the trial, which remains otherwise open to the public at large.[58]

The court also followed *Kobli* in holding that the accused is not required to show prejudice when the general public has been excluded. There are

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no statutory or constitutional provision which specifically guaranteed the right to a public trial, that right was a part of the common law. Then the court for the first time had to define a "public trial." The defendant was charged with statutory rape, and because of "the nature of the case," the general public had been completely excluded.

52. State v. Holm, 67 Wyo. 360, 383, 224 P.2d 500, 508 (1950). The court also adopted the four standard exceptions from the *Kobli* opinion.

53. *Id.* at 387, 224 P.2d at 510.

54. N.Y. JUDICIARY LAW § 4.

55. 308 N.Y. 56, 123 N.E.2d 769 (1954).

56. People v. Hall, 51 App. Div. 57, 64 N.Y.S. 433 (1900). See generally Note, 6 SYRACUSE L. REV. 339 (1954).

57. People v. Jelke, 308 N.Y. 56, 68, 123 N.E.2d 769, 775 (1954) (dissenting opinion).

58. *Id.* at 66, 123 N.E.2d at 774.

several cases similar to *Jelke* and *Holm* in which state courts have also expressed approval of the *Kobli* approach.[59]

In the two latest state cases dealing with exclusion of the general public—*Thompson* v. *People*[60] and *State* v. *Schmit*[61]—both the Colorado and the Minnesota courts followed *Kobli* without qualification. The *Thompson* case overruled an earlier Colorado opinion which followed the Cooley standard.[62] In *Schmit,* the Minnesota court reasoned that the strong likelihood that the sixth amendment public trial guarantee would be applied to the states through the due process clause gave "special significance" to federal cases.[63] Since *Kobli* has clarified and to some extent solidified federal law in this area,[64] it was the obvious case for the Minnesota court to follow, and it did. In fact, the court in *Schmit* found that the *Kobli* rule prohibiting general exclusions based on public morality is now the "majority" rule.[65]

4. *Exceptions to the General Rule*

a. standard exceptions. Prior to *Kobli,* there was general agreement that in four specific situations part of the public could be excluded from the courtroom without prejudice to the defendant.[66] Exclusions were permitted

59. Sirratt v. State, 240 Ark. 47, 398 S.W.2d 63 (1966); State v. Haskins, 38 N.J. Super. 250, 118 A.2d 707 (App. Div. 1955); Lyles v. State, 330 P.2d 734 (Okla. Crim. App. 1958); Commonwealth *ex rel.* Paylor v. Cavell, 185 Pa. Super. 176, 138 A.2d 246, *cert. denied,* 358 U.S. 854 (1958).

60. 399 P.2d 776 (Colo. 1965); see 42 DENVER L. CENTER J. 54 (1965).

61. 139 N.W.2d 800 (Minn. 1966).

62. Authorities cited note 60 *supra.* The majority in *Thompson* attempted unsuccessfully to distinguish *Benedict.* See Benedict v. People, 23 Colo. 126, 46 Pac. 637 (1896).

63. State v. Schmit, 139 N.W.2d 800, 803 (Minn. 1966); *accord,* United States *ex rel.* Bruno v. Herold, 246 F. Supp. 363 (N.D.N.Y. 1965).

64. *Kobli* resolved the conflict over presumed prejudice that had created two lines of cases.

The Supreme Court has chosen not to review many cases in which a public trial was an issue. See Quick, *A Public Criminal Trial,* 60 DICK. L. REV. 21, 23 (1955). *But see* Estes v. Texas, 381 U.S. 532 (1965); *In re* Oliver, 333 U.S. 257 (1948). The reason for this, as it appears in retrospect, may be that *Kobli* is sound law, and the state courts have recognized this by adopting the principles of that case. See authorities cited *supra* note 50. *But cf.* State v. Meyers, 14 Utah 2d 417, 385 P.2d 609 (1963). A similar self-restraint was exercised in Wolf v. Colorado, 338 U.S. 25 (1949), but when this restraint was unrewarded, Mapp v. Ohio, 367 U.S. 643 (1961), became necessary.

65. State v. Schmit, 139 N.W.2d 800, 804 (Minn. 1966).

66. Similarly, there seems to be general agreement that exclusion is proper in a few other isolated situations. For example, exclusion may be necessary to protect health. This situation has not often arisen, but when it has, exclusion has been deemed proper. People v. Miller, 257 N.Y. 54, 177 N.E. 306 (1931) (to keep courtroom air pure); Colletti v. State, 31 Ohio Ct. App. 81, 12 Ohio App. 104 (1919) (epidemic); see Commonwealth v. Trinkle, 279 Pa. 564, 124 Atl. 191 (1924) (court adjourned to sickroom of material witness). A related problem is the protection of public safety. See E. W. Scripps Co. v. Fulton, 100 Ohio App. 157, 125 N.E.2d 896, *appeal dismissed per curiam,* 164 Ohio St. 261, 130 N.E.2d 701 (1955); Makley v. State, 49 Ohio App. 359, 197

to prevent overcrowding due to the limited physical capacity of the courtroom,[67] to preserve proper order and decorum during the trial,[68] to protect

N.E. 339 (1934); State v. White, 97 Ariz. 196, 398 P.2d 903 (1965) (dictum). No case has arisen on the point, but exclusion would be proper to protect national security. Thus, earphones have been used for purposes of convenience, but they could be used to protect secret information. See Iva Ikuko Torguri D'Aquino v. United States, 192 F.2d 338 (9th Cir. 1951), *cert. denied,* 343 U.S. 935 (1952); Gillars v. United States, 182 F.2d 962 (D.C. Cir. 1950). When national security is at stake, it is not likely that any court would hesitate to exclude at least the general public to whatever extent necessary to protect the specific government secret involved. For a more complete discussion of some of the problems involved in the exclusion of the public from a criminal trial for reasons based on national security, see Haydock, *Some Evidentiary Problems Posed by Atomic Energy Security Requirements,* 61 HARV. L. REV. 468, 478-91 (1948).

Exclusion of the public has occurred when necessary "to obtain a fair trial." Trial courts are said to have the discretion to take whatever steps necessary to provide the accused with a fair trial. See State v. Jackson, 43 N.J. 148, 203 A.2d 1 (1964). Some concrete situations have occurred in which "obtaining a fair trial" was the main issue. See, *e.g.,* Estes v. Texas, 381 U.S. 532 (1965) (radio and television equipment prevented fair trial); People v. Teitelbaum, 163 Cal. App. 2d 184, 329 P.2d 157, *cert. denied,* 359 U.S. 206 (1958) (matters of law heard in private conferences at the bench); People v. Bernatowicz, 413 Ill. 181, 108 N.E.2d 479 (1952), *cert. denied,* 345 U.S. 928 (1953) (private conference reviewing defendant's record to determine possible sentence mitigation); Roberts v. State, 100 Neb. 199, 158 N.W. 930 (1916) (removed trial to public theater); State v. Pope, 257 N.C. 326, 126 S.E.2d 126 (1962) (private computation of sixty-eight separate indictments); State v. Collins, 50 Wash. 2d 740, 314 P.2d 660 (1957) (locked courtroom doors to prevent distraction of the jury).

There have been three cases in which obtaining material testimony justified exclusion. State v. Poindexter, 231 La. 630, 92 So. 2d 390 (1956); People v. Pacuicca, 134 N.Y.S.2d 381 (Bronx County Ct. 1954), *aff'd mem.,* 286 App. Div. 985, 144 N.Y.S.2d 711 (1955); Commonwealth v. Principatti, 260 Pa. 587, 104 Atl. 53 (1918). *But see* State v. Velasquez, 76 N.M. 49, 412 P.2d 4 (1966). In *State v. Poindexter,* the court held that the defendant was denied a fair trial and that the trial judge had abused his discretion by refusing to exclude all penitentiary officials. The defendant had been a "trusty guard" at the prison and was charged with the murder of another "trusty guard." The inmate who refused to testify until the officials were excluded had heard the deceased victim threaten the life of the defendant only a few hours before the homicide. In *Commonwealth v. Principatti,* the witness was afraid to testify because he feared personal violence from other Italians in the audience. The court held that it was proper under the circumstances to exclude that class of persons. In *People v. Pacuicca,* the court held that it was proper to exclude *all* the spectators *during* the testimony of a police witness to protect her future usefulness as a narcotics decoy and to safeguard her life. The reasons for exclusion in these three cases seem valid if limited to their peculiar factual situations. Each exclusion was limited either to a short time span or to a specific class of persons to whom particular discretionary reasons applied.

Excluding the public for the purpose of coercing "truthful testimony" is without legal foundation. E. W. Scripps Co. v. Fulton, 100 Ohio App. 157, 125 N.E.2d 896, *appeal dismissed per curiam,* 164 Ohio St. 261, 130 N.E.2d 701 (1955). *But see* Radin, *The Right to a Public Trial,* 6 TEMP. L.Q. 381, 384 & n.6a (1932). It is quite proper to exclude witnesses other than the one testifying. People v. Martin, 210 Mich. 139, 177 N.W. 193 (1920); Commonwealth v. Turner, 371 Pa. 417, 88 A.2d 915 (1952). See generally Annot., 32 A.L.R.2d 358 (1953).

67. *E.g.,* Wendling v. Commonwealth, 143 Ky. 587, 137 S.W. 205 (1911); State v.

the morals of youthful spectators when the recital of obviously scandalous and obscene matters was likely,[69] and to protect a child witness who had been the victim of a sex offense.[70] Whenever one of these situations arose, the trial judge had broad discretion to take whatever protective action was necessary.[71]

Dicta in the *Kobli* opinion unambiguously described and adopted these four exceptions to the general rule of public attendance.[72] Today, because

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Brooks, 92 Mo. 542, S.W. 257 (1887); Commonwealth v. Trinkle, 279 Pa. 564, 124 Atl. 191 (1924).

68. *E.g.*, United States v. Buck, 24 Fed. Cas. 1289 (No. 14680) (E.D. Pa. 1860) (oldest federal exclusion case—threatened disturbance concerning a fugitive slave); Lide v. State, 133 Ala. 43, 31 So. 953 (1902); People v. Kerrigan, 73 Cal. 222, 14 Pac. 849 (1887); People v. Santo, 43 Cal. App. 2d 319, 273 P.2d 249 (1954); Stone v. People, 3 Ill. (2 Scam.) 326 (1840) (oldest American case on record in which public trial issue raised); State v. Scruggs, 165 La. 842, 116 So. 206 (1928) (within discretion of court in murder case); State v. Genese, 102 N.J.L. 134, 130 Atl. 642 (Ct. Err. & App. 1925) (repeated laughter during murder case); see People v. Greeson, 230 Mich. 124, 203 N.W. 141 (1925). *Cf.* Estes v. Texas, 381 U.S. 532, 583-84 (1965); *In re* Canons of Judicial Ethics, 132 Colo. 591, 296 P.2d 465 (1956).

If the accused, without restriction, could force the attendance of a noisy, disorderly multitude or if he could demand that enough space be provided to put the trial on a theatrical basis—the efficient administration of justice would be hindered. See Keddington v. State, 19 Ariz. 457, 172 Pac. 273 (1918); Myers v. State, 97 Ga. 76, 25 S.E. 252 (1895); Dutton v. State, 123 Md. 373, 387, 91 Atl. 417, 423 (1914); Roberts v. State, 100 Neb. 199, 158 N.W. 930 (1916); State v. Weldon, 91 S.C. 29, 74 S.E. 43 (1912); BOWERS, JUDICIAL DISCRETION OF TRIAL COURTS § 266 (1931); Radin, *supra* note 66, at 397.

69. See Reynolds v. State, 41 Ala. App. 202, 126 So. 2d 497 (1961) (all "children" under age 14); Milow v. People, 89 Colo. 469, 3 P.2d 1077 (1931) (all under age 18); State v. Smith, 179 La. 614, 154 So. 625 (1934) (all youth under age 15); State *ex rel.* Baker v. Utecht, 221 Minn. 145, 21 N.W.2d 328, *cert. denied*, 327 U.S. 810 (1946); State v. Adams, 100 S.C. 43, 84 S.E. 368 (1915) (all Negroes and boys). One recent case has indicated that the trial court not only has the right, but the duty, to exclude immature spectators. E. W. Scripps Co. v. Fulton, 100 Ohio App. 157, 169, 125 N.E.2d 896, 904, *appeal dismissed per curiam*, 164 Ohio St. 261, 130 N.E.2d 701 (1955). The exclusion of youth in the interest of public morals is also supported by considerable dicta. See, *e.g.*, Wade v. State, 207 Ala. 1, 92 So. 101 (1921) (children of tender age); Tilton v. State, 5 Ga. App. 59, 62 S.E. 651 (1908) (minors); Rhoades v. State, 102 Neb. 750, 169 N.W. 433 (1918); State v. Hensley, 75 Ohio St. 255, 79 N.E. 462 (1906).

In *Reynolds v. State, supra*, the court held that the dicta in *Wade v. State, supra*, to the effect that "children of tender age" could be properly excluded in the interest of public decency did not include *all persons* up to age eighteen. The court's reasoning was that a person of eighteen could serve in the armed forces, could vote in some states, and could marry without parental consent if a female (in Alabama). The court also indicated that probably fourteen was the maximum age for the "tender-age" rule.

In a recent case, news media equipment was excluded from the courtroom to protect youthful morals. Cody v. State, 361 P.2d 307 (Okla. Crim. App. 1961).

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

71. See United States *ex rel.* Orlando v. Fay, 350 F.2d 967 (2d Cir. 1965).

72. This adoption has tended to standardize these exceptions. See authorities cited note 50 *supra*.

of *Kobli's* increasing prominence these four exceptions carry nearly the same stamp of authority as the general rule itself.

A frequently advanced argument against these four exceptions is the "unknown witness" theory.[73] This theory is based on the proposition that an unknown witness may at any time appear in the courtroom audience and come forth with material evidence—whether he be youthful, disorderly, or part of an overflow crowd. However, this possibility is largely theoretical, and there are no recorded cases in which an unknown spectator has stepped from the audience to testify.[74] In fact, one author believes that spectators at most trials are mainly curiosity-seekers.[75] Some courts which approve of the "unknown witness" theory have held nonetheless that the right to a public trial was subject to the four general limitations.[76] In spite of the "unknown witness" objection, the majority of courts have permitted exclusion in *these four specific* situations.[77]

b. discretion of the trial judge. From the foregoing discussion it is apparent that the discretion of the trial judge is an important factor in each of the issues discussed. The vast majority of courts allow the trial judge nearly complete discretion when the trial situation falls within one of the four standard exceptions—overcrowding, court decorum, youthful spectators in morality cases, and the protection of the child witness.[78] In these situations the judge needs only to be concerned with his duty to provide a fair trial.[79] In fact, the abuse of discretion in the first two of these categories is usually the *failure* to exclude.[80]

By contrast, exclusion based on the protection of adult morality has in the past been a frequent source of abuse.[81] As discussed earlier, the view of the modern courts is, with the exception of youthful spectators, to take morality-based exclusions out of the realm of discretion.[82] This view is based on the

73. See United States v. Kobli, 172 F.2d 919, 923 (3d Cir. 1949); Tanksley v. United States, 145 F.2d 58 (9th Cir. 1944); Estes v. Texas, 381 U.S. 532, 583 (1965) (Warren, C.J., concurring); 6 WIGMORE, EVIDENCE § 1834 (3d ed. 1940).

74. The only case cited by Wigmore in which the theory proved correct was a case in which the material witness was a newspaper reader, not a casual spectator. See 6 WIGMORE, *op. cit. supra* note 73, at § 1834.

75. Radin, *supra* note 66, at 393.

76. United States v. Kobli, 172 F.2d 919, 923-24 (1949); State v. Schmit, 139 N.W.2d 800, 803-04 (Minn. 1966).

77. See United States v. Kobli, *supra* note 76, at 922.

78. For an excellent example of discretion properly exercised see Milow v. People, 89 Colo. 469, 3 P.2d 1077 (1931).

79. The trial judge is not personally liable to any excluded spectator. Williamson v. Lacy, 86 Me. 80, 29 Atl. 943 (1893).

80. See Estes v. Texas, 381 U.S. 532 (1965).

81. See United States v. Kobli, 172 F.2d 919 (3d Cir. 1949); People v. Jelke, 308 N.Y. 56, 123 N.E.2d 769 (1954).

82. See cases cited note 50 *supra.*

proposition that a trial judge is not the conservator of public morality.[83] Though denied his former role as the protector of public morality, the trial judge today still exercises much discretion through the standardized exclusion rules. To avoid abuses of this discretion, the trial record should clearly specify (1) the number present, (2) whether the general public was present, and (3) the circumstances and reasons for any exclusion. The record should also clarify whether the reasons for excluding particular classes were limited to the four standard exceptions.[84]

B. Does the Public Have an Independent Right to Attend Criminal Trials?

Instead of objecting, the defendant may, with the aid of counsel, decide to waive his right to a public trial.[85] When an accused decides to waive his right because exclusion will afford a better opportunity for a fair trial, the question may arise whether the public has an independent right to attend criminal trials regardless of the defendant's view of his best interests.[86] A court's opinion of the primary purpose of the public trial guarantee will, of course, influence its decision on this question.[87] A few modern courts have

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

84. See State *ex rel.* Baker v. Utecht, 221 Minn. 145, 149, 21 N.W.2d 328, 331, *cert. denied,* 327 U.S. 810 (1946).

85. See Kirstowsky v. Superior Court, 143 Cal. App. 2d 745, 300 P.2d 163 (1956). However, this right to waive can be abused. A defendant has no right to a private hearing just to get the "truth" out of a witness through coercion. See E. W. Scripps Co. v. Fulton, 100 Ohio App. 157, 125 N.E.2d 896, *appeal dismissed per curiam,* 164 Ohio St. 261, 130 N.E.2d 701 (1955).

The harbinger of the right to waive a public trial was Patton v. United States, 281 U.S. 276 (1930). There the court held that since a defendant could plead guilty and thus effectively waive any trial at all, he could also waive his right to a trial by jury. Some courts have apparently applied the same reasoning to the right to a public trial. The right to waive a public hearing seems well established. See, *e.g.,* United States v. Sorrentino, 175 F.2d 721 (3d Cir.), *cert. denied,* 338 U.S. 868 (1949); Keddington v. State, 19 Ariz. 457, 172 Pac. 273 (1918); People v. Tugwell, 32 Cal. App. 520, 163 Pac. 508 (1917); Commonwealth *ex rel.* Paylor v. Cavell, 185 Pa. Super. 176, 138 A.2d 246, *cert. denied,* 358 U.S. 854 (1958). The defendant need not *personally* waive his right. United States v. Sorrentino, *supra;* People v. Cash, 52 Cal. 2d 841, 345 P.2d 462 (1959). Similarly, the defendant can usually waive his right to a public hearing by his failure to make a timely objection. State v. Smith, 90 Utah 482, 62 P.2d 1110 (1936); State v. Collins, 50 Wash. 2d 740, 314 P.2d 660 (1957); *accord,* People v. Teitelbuam, 163 Cal. App. 2d 184, 329 P.2d 157, *cert. denied,* 359 U.S. 206 (1958). *But see* Wade v. State, 207 Ala. 1, 92 So. 101 (1921); State v. Hensley, 75 Ohio St. 255, 79 N.E. 462 (1906). The waiver must, however, be an expression of intelligent acquiescence. United States *ex rel.* Bruno v. Herold, 246 F. Supp. 363 (N.D.N.Y. 1965).

86. See Kirstowsky v. Superior Court, 143 Cal App. 2d 745, 300 P.2d 163 (1956); United Press Ass'ns v. Valente, 308 N.Y. 71, 123 N.E.2d 777 (1954); E. W. Scripps Co. v. Fulton, 100 Ohio App. 157, 125 N.E.2d 896, *appeal dismissed per curiam,* 164 Ohio St. 261, 130 N.E.2d 701 (1955).

87. Most courts hold that the purpose of a public trial is to benefit the defendant.

construed language from earlier opinions to mean that the public has such a right.[88] However, that language is often a mere expression of the historical basis and importance of open courts, not an attempt to create for the public an independently vested right to attend.[89] In *E. W. Scripps Co. v. Fulton*,[90] one such modern case, the court held that a defendant has the right to waive a public trial, but in the same opinion this waiver was held to have no effect when the public asserts an independent right to attend.[91] One author has noted that such a holding is unfair to the accused:

> The somewhat anomalous result is that the defendant may waive *his* right to the extent of foreclosing the issue of public trial upon ap-

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E.g., Geise v. United States, 265 F.2d 659 (9th Cir.) (per curiam), *cert. denied*, 361 U.S. 842 (1959); United States v. Sorrentino, 175 F.2d 721 (3d Cir.), *cert. denied*, 338 U.S. 868 (1949); Estes v. Texas, 381 U.S. 532, 583-85 (1965) (concurring opinion); *accord*, Tribune Review Publishing Co. v. Thomas, 153 F. Supp. 486 (W.D. Pa. 1957), *aff'd*, 254 F.2d 883 (3d Cir. 1958); *Ex parte* Sturm, 152 Md. 114, 136 Atl. 312 (1927); see Keddington v. State, 19 Ariz. 457, 172 Pac. 273 (1918); *cf.* Patton v. United States, 281 U.S. 276 (1930); *In re* Canons of Judicial Ethics, 132 Colo. 591, 296 P.2d 465 (1956); People v. Harris, 302 Ill. 590, 135 N.E. 75 (1922). *But see* State v. Copp, 15 N.H. 212, 215 (1844); Lyles v. State, 330 P.2d 734 (Okla. Crim. App. 1958); *cf. In re* Shortridge, 99 Cal. 526, 34 Pac. 227 (1893). The opinions which discuss the purpose of a public trial in terms of the interests of both the public *and* the individual have led to confusion. See State v. Keeler, 52 Mont. 205, 218-19, 156 Pac. 1080, 1083-84 (1916); State v. Holm, 67 Wyo. 360, 387, 224 P.2d 500, 510 (1950). An example of such confusion is found in the ambiguity of:

> . . . the accused may waive a constitutional right or privilege designed for his protection where no question of public policy is involved. . . . That the courts of Oklahoma be open to *every* person is a matter of public policy. (Emphasis added). Lyles v. State, *supra* at 740.

Even those who most strongly favor an independent public right concede that, "the accused's right to a public trial is a part of his broad right to a fair trial." Note, 31 IND. L.J. 377, 381 (1956); *cf.* State *ex rel.* Dressler v. Rigg, 252 Minn. 239, 89 N.W.2d 699 (1958).

88. See Kirstowsky v. Superior Court, 143 Cal. App. 2d 745, 300 P.2d 163 (1956); E. W. Scripps Co. v. Fulton, 100 Ohio App. 157, 125 N.E.2d 896, *appeal dismissed per curiam*, 164 Ohio St. 261, 130 N.E.2d 701 (1955).

Although never discussed by courts, the ninth amendment of the Constitution could lend some support to the independent right theory. There has been considerable discussion of whether the *public's* right to attend is a right which is distinct from the *accused's* right. See, *e. g.*, Quick, *supra* note 64, at 29-35; Note, 31 IND. L.J. 377, 381-82 (1956); 7 WASH. & LEE L. REV. 193 (1950). It must be noted that when this independent right is asserted, the press is not held to be the exclusive representative of the public. *E.g.*, Kirstowsky v. Superior Court, *supra*. *But see* Sullivan, *The 'Public' Interest in Public Trial*, 25 PA. B.A.Q. 253 (1954).

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

90. 100 Ohio App. 157, 125 N.E.2d 896, *appeal dismissed per curiam*, 164 Ohio St. 261, 130 N.E.2d 701 (1955).

91. *Id.* at 167, 125 N.E.2d at 903. For comprehensive coverage of the defendant's right to waive a public trial see Note, 36 ORE. L. REV. 345 (1957).

peal and yet gain nor [*sic*] corresponding benefit of having the curiosity-seeking public excluded from the courtroom.[92] (Emphasis original.)

In *Kirstowsky* v. *Superior Court*,[93] the defendant was charged with murdering her husband. As part of her defense, it was necessary for her to testify, in her own behalf, as to abnormal sexual practices that had been forced upon her. She waived her right to a public hearing of her testimony because the details were alleged to be prejudicial to her, and because the thought of making a public disclosure of the sordid details had disturbed her emotionally to the point that she could no longer adequately assist in her own defense. The trial court granted the motion. The excluded newspaper corporations brought a writ of mandate against the trial court to vacate the exclusion order. The question was moot by the time a final judgment was rendered because the criminal trial itself had already terminated. Nevertheless, the court laid down the applicable principles. If, as under the facts of the case, the exclusion was necessary to insure the accused a fair trial, the trial court could properly exclude the entire public from such portion of the trial as was necessary. Thus, it would have been proper to exclude everyone during this defendant's testimony, but the trial court's extension of the exclusion to the entire trial was held to have been improper. The alternative rule given by the court was that, when the issue of a fair trial is not involved, the mere waiver by a defendant of his right to a public trial does not justify exclusion of the general public.

In *People v. Jelke*,[94] the trial judge on his own motion and over the defendant's objection excluded all segments of the general public. Jelke was convicted, but even before he could take an appeal, a number of newspaper publishers had not only proceeded against the trial judge by an action in the nature of a writ of prohibition to restrain the execution of the exclusion order but had also effected an appeal.[95] The result of this appeal was the leading case, *United Press Ass'ns v. Valente*.[96] The New York court held that while the public has a legitimate "interest in seeing that every person accused of crime shall have a fair trial,"[97] this interest does not achieve the status of a vested right which can be independently asserted:

It is for the defendant alone to determine whether, and to what extent, he shall avail himself of [his right to a public trial]. . . . The pub-

92. *Id.* at 354.

93. 143 Cal App. 2d 745, 300 P.2d 163 (1956).

94. 308 N.Y. 56, 123 N.E.2d 769 (1954).

95. Final decision on their case was delayed until Jelke had perfected his own appeal. United Press Ass'ns v. Valente, 308 N.Y. 71, 123 N.E.2d 777 (1954).

96. *Ibid.* The case has been noted. 53 MICH. L. REV. 995 (1955).

97. United Press Ass'ns v. Valente, 308 N.Y. 71, 80, 123 N.E.2d 777, 780 (1954).

> lic's interest is adequately safeguarded as long as the accused himself is given the opportunity to assert on his own behalf, in an available judicial forum, his right to a trial that is fair and public.[98]

The court further stated that if the petitioners were correct in their assertion of the existence of an independent right, then any time *any* individual demanded that a court be kept open, the court would be powerless to promote a fair trial by excluding certain segments of the public. Not only would such a right flood the courts "with a host of collateral proceedings," but to recognize an independent right would be

> To permit outsiders to interfere with the defendant's own conduct of his defense. . . .[99]
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> . . . .
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> Still another strange consequence of the petitioners' position would be to permit the defendant's rights to be determined in proceedings in which he was not a party and had no voice, as exemplified by the very case before us.[100]

II. Critique

A. *Status of Kobli*

1. *In General*

Of the two basic factual patterns, the *Kobli* pattern seems to involve a more nearly settled area of law than that developed to support an independent right in favor of the general populace. In the future, *Kobli* will likely be the leading case on exclusion of the public in criminal trials at least until the Supreme Court decides to define a "public trial" in more precise terms. Thus, Cooley's famous statement is significant today only insofar as it recognizes that the benefit of a public trial is primarily for the accused. An important reason for *Kobli's* growing prominence is that its principles are relatively easy to administer. The conclusive presumption of prejudice which arises when the general public is excluded means that this issue will not have to be litigated. Because *Kobli* eliminated protection of adult morality as a basis for exclusion and rejected any type of reasonableness test, courts following it need only determine whether the general, disinterested public was permitted to attend. Thus, such courts need not con-

98. *Id.* at 81, 123 N.E.2d at 780-81.

99. *Id.* at 81, 123 N.E.2d at 780.

100. *Id.* at 83, 123 N.E.2d at 782. This would have been the result if the court had not delayed its decision. *Accord,* Kirstowsky v. Superior Court, 143 Cal. App. 2d 745, 300 P.2d 163 (1956) (mandamus); E. W. Scripps Co. v. Fulton, 100 Ohio App. 157, 125 N.E.2d 896, *appeal dismissed per curiam,* 164 Ohio St. 261, 130 N.E.2d 701 (1955) (writ of prohibition).

sider unimportant factual distinctions or list exactly who was in attendance.[101]

The premise on which the *Kobli* principles rest is that a trial with friends, relatives, bar members, and reporters attending is simply not the same as one in "which the public is free to attend."[102] Newsmen, with their sometimes "blasé professional" attitudes,[103] may overlook acts of judicial oppression or prejudice. Members of the bar, relatives, and friends are not likely "to represent or speak for the entire community interest"[104] and thus are less likely to influence the court toward a fair administration of justice. In short, the constitutional provision can provide an accused with all possible benefits which a public trial was meant to bestow only when the general public is also in attendance.

2. *The Problem of the Child Witness*

In the vast majority of jurisdictions, a standard exception to the general rule of publicity permits the blanket exclusion of the public during the testimony of a child witness who was the victim of a sex offense.[105] For several reasons, however, the validity of this exclusion is doubtful when the defendant objects.[106]

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101. See Sirratt v. State, 240 Ark. 47, 398 S.W.2d 63 (1966); Thompson v. People, 399 P.2d 776 (Colo. 1965); State v. Schmit, 139 N.W.2d 800 (Minn. 1966); State v. Haskins, 38 N.J. Super. 250, 118 A.2d 707 (App. Div. 1955); People v. Jelke, 308 N.Y. 56, 123 N.E.2d 769 (1954); Lyles v State, 330 P.2d 734 (Okla. Crim. App. 1958); Commonwealth *ex rel.* Paylor v. Cavell, 185 Pa. Super. 176, 138 A.2d 246, *cert. denied,* 358 U.S. 854 (1958); State v. Holm, 67 Wyo. 360, 224 P.2d 500 (1950). The groups excluded may, however, have to be listed to demonstrate that they fall within one of the standard exceptions. See notes 66-72 *supra* and accompanying text.

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

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

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

105. See, *e.g.,* Reagan v. United States, 202 Fed. 488 (9th Cir. 1913); United States v. Geise, 158 F. Supp. 821 (D. Alaska), *aff'd,* 262 F.2d 151 (9th Cir. 1958), *rehearing denied per curiam,* 265 F.2d 659 (9th Cir.), *cert. denied,* 361 U.S. 842 (1959); Hogan v. State, 191 Ark. 437, 86 S.W.2d 931 (1935); State *ex rel.* Baker v. Utecht, 221 Minn. 145, 21 N.W.2d 328, *cert. denied,* 327 U.S. 810 (1946); State v. Damm, 62 S.D. 123, 252 N.W. 7 (1933). *But see* People v. Yeager, 113 Mich. 228, 71 N.W. 491 (1897); Rhoades v. State, 102 Neb. 750, 169 N.W. 433 (1918).

However, less protection is afforded the adult witness than the child witness. See, *e.g.,* Tanksley v. United States, 145 F.2d 58 (9th Cir. 1944); State v. Callahan, 100 Minn. 63, 70, 110 N.W. 342, 345 (1907) (dissenting opinion). *But see* Kirstowsky v. Superior Court, 143 Cal. App. 2d 745, 300 P.2d 163 (1956); Dutton v. State, 123 Md. 373, 91 Atl. 417 (1914). The conclusion of the dissenting judge in *State v. Callahan, supra,* seems undeniable: "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."

106. In light of the numerous problems raised by the exclusion of the public during

One cause for doubt is the weak justification advanced for this exception. Though framed in austere and conservative legal terminology, this justification is largely based on the general repulsion which our society has for sex offenses against young girls. Suffering embarrassment, which may range from mere discomfort and shame before a strange crowd to complete incoherence and hysteria, a young sex-offense victim presents a truly pathetic picture to the court and calls for the utmost sympathy. A few courts have been candid and have admitted their aversion to the hardship placed on ". . . the unfortunate girl who was called upon to testify to the story of the defendant's crime and her shame."[107] However, courts normally have said that the exclusion is necessary to prevent a "miscarriage of justice."[108] Of course, "miscarriage of justice" could simply mean that it is unjust to force such a helpless witness to publicly display her shame and to subject herself to the indirect punishment of great discomfort, which possibly could lead to psychological deterioration. Similarly, this phrase could mean that it would be unjust to release one "guilty" of crime merely because the only evidence available was from a witness who, for emotional reasons, was unable to testify. Conceivably, the phrase could mean that the trial judge believes the defendant could not receive a fair trial unless the public is excluded. But if an exclusion is made over the defendant's objection, the trial judge has simply substituted his judgment for that of the defendant. The prevention of a "miscarriage of justice," if construed as favoring the defendant, can at best mean that an accused will obtain the benefit of the calm and solemnity which accompany a relatively private hearing of testimony. On the other hand, the exclusion may be detrimental to an accused by drawing attention to the heinous nature of the crime and by arousing sympathy for the victim and indignation toward the defendant.[109] Furthermore, some members of the jury may erroneously conclude that since the witness needs protection, her story must be true, or that since the defendant does not need publicity to disprove the testimony his innocence is to be

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the testimony of a child witness, it is unfortunate that the Supreme Court has not chosen to give this problem further analysis. One recent denial of review was United States v. Geise, 158 F. Supp. 821 (D. Alaska), *aff'd*, 262 F.2d 151 (9th Cir. 1958), *rehearing denied per curiam*, 265 F.2d 659 (9th Cir.), *cert. denied*, 361 U.S. 842 (1959).

107. Reagan v. United States, 202 Fed. 488, 490 (9th Cir. 1913); *accord*, Dutton v. State, 123 Md. 373, 387, 91 Atl. 417, 423 (1914).

108. United States v. Kobli, 172 F.2d 919 (3d Cir. 1949); Commonwealth v. Blondin, 324 Mass. 564, 87 N.E.2d 455 (1949), *cert. denied*, 339 U.S. 984 (1950); State v. Holm, 67 Wyo. 360, 224 P.2d 500 (1950).

109. See Tanksley v. United States, 145 F.2d 58, 59 (9th Cir. 1944) (rape of adult married woman but reasoning should apply to child witness); Quick, *A Public Criminal Trial*, 60 DICK. L. REV. 21, 28 (1955).

doubted.[110] Since few courts have ever discussed either the basic merits of affording a youthful witness such protection or its effect on the accused,[111] the rationale for this exclusion must be more carefully examined in the future.[112]

A second reason for questioning the validity of exclusions of the public for child witnesses is the high probability that the testimony may be false. The falsity of youthful testimony is more difficult to detect than its adult counterpart because immature speech patterns disarm suspicions. Furthermore, young witnesses in sex offense cases often believe that the false accusations are actually true.[113] Although no empirical studies are available which sub-

110. *Ibid.*

111. See cases cited note 105 *supra*. *But see* Dutton v. State, 123 Md. 373, 387, 91 Atl. 417, 423 (1914).

112. This note does not attempt to deny the basic merits of the need for protecting witnesses of tender years. Often the shock of a heinous sexual offense against one's person (at that age) will have lifelong effects, and assuming an offense has in fact been committed, the additional shock of having to testify to it publicly may be the personal breaking point for some individuals. Though no empirical courtroom studies have been made, testifying publicly may destroy any formerly-created denial or defense mechanisms which had mitigated the emotional damage of the original offensive act. See generally HALL, A PRIMER OF FREUDIAN PSYCHOLOGY (1954). However, without castigating the rights of the particularly vulnerable witness to protection through exclusion, this note is attempting to make clear the defendant's position. He stands innocent until proven guilty beyond a reasonable doubt. See generally Annot., 34 A.L.R. 938 (1925); MCCORMICK, EVIDENCE § 321 (1954). The official act of exclusion in favor of the child witness may lessen the presumption of innocence in the eyes of the jury.

113. False accusations in sex cases are made for a variety of reasons. See PLOSCOWE, SEX AND THE LAW 187-90 (1951); 3 WIGMORE, EVIDENCE § 924a (3d ed. 1940). Ploscowe notes the paucity of cases that have recognized this danger of falsity. Wigmore explains the problem in this way:

> Modern psychiatrists have amply studied the behavior of errant young girls and women coming before the courts . . . . Their psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offenses by men. . . .[These take expression] in the narration of imaginary sex-incidents of which the narrator is the heroine or the victim. On the surface the narration is straightforward and convincing. The real victim, however, too often in such cases is the innocent man; for the respect and sympathy naturally felt by any tribunal for a wronged female helps to give easy credit to such a plausible tale.
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> . . . But the lamentable thing is that the orthodox rules of Evidence in most instances prevent adequate probing of the testimonial mentality of a woman-witness. . . . Judging merely from the reports of cases in the appellate courts, one must infer that many innocent men have gone to prison because of tales whose falsity could not be exposed.

Id. at 459; see Quick, *supra* note 109, at 26.

Statutes requiring corroboration of the youthful victim's testimony may be one solution. See N.Y. PEN. LAW § 2013. But in the absence of a statute, the law in the vast majority of states is that no corroboration is required. Annot., 60 A.L.R. 1124 (1929). For the Canadian view and experience in this area see Cartwright, *The Prospective Child Witness,* 6 CRIM. L.Q. 196 (1963); Savage, *Corroboration in Sexual Offenses,* 6 CRIM. L.Q. 282 (1964); Savage, *Corroboration,* 6 CRIM. L.Q. 159 (1963).

stantiate the proposition that open hearings will insure a greater likelihood of truthful testimony,[114] certainly, private hearings of morality offenses make perjury easier.[115] In terms of the truthful prosecutrix, however, mandatory public trials could mean that fewer of these crimes will be reported. A young sex offense victim may rather see her attacker go free than suffer the humiliation resulting from public exposure of the sordid details of the crime. This may be the price of the sixth amendment.

The inherent weakness of the defendant's position in sex offense cases is another reason for doubting the validity and fairness of the exclusion.[116] In these cases the evidence often consists only of a suspect's word against that of his accuser, and the jury is, of course, very sympathetic toward the latter. Sir Matthew Hale has described the problem:

> [T]he 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, sometimes of malicious and false witnesses.[117]

The presence of the general public during a victim's testimony could allow objective observers to expose blatant partialities and to criticize obvious weaknesses in the child's story which might otherwise remain unquestioned. Confronted with this dilemma, the decision of exclusion should be governed by the *defendant's* best interests and rarely granted over his objection.

The decision to exclude the public could involve an attempt to balance the fairness to a defendant against the need for protecting a young witness. However, her suffering is usually temporary, whereas the defendant's conviction will result in irreparable damage. It cannot be denied that a witness of tender years should be allowed some protection,[118] but because of the extreme danger of prejudice from exclusion orders, some safeguards should

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114. Even public testimony may produce false accusations. See GILES-JOHNSON DEFENSE COMM., DOCUMENTARY OF A CAPITAL CRIM. PROCEEDING: THE GILES-JOHNSON CASE (1964).

115. There are a few studies of individual cases which indicate that public attendance would create a greater likelihood of truthful testimony. See 3 WIGMORE, EVIDENCE § 924a (3d ed. 1940).

116. As Dr. William A. White has said:

> Many well known cases which have . . . resulted in mob violence have indicated . . . the extreme prejudice which may be mobilized against an accused person, often quite without anything that could be properly called adequate evidence. . . . These facts make the whole situation one which needs to be surrounded by as many safeguards as possible. . . .

3 WIGMORE, EVIDENCE § 924a, at 465 (3d ed. 1940).

117. PLOSCOWE, *op. cit. supra* note 113, at 188.

118. See note 112 *supra*.

be annexed to insure a fair trial.[119] The author suggests the following safeguards: (1) The maximum duration of the exclusion should be the duration of the testimony of the particular witness to be protected.[120] (2) Any such witness, in order to be entitled to a relatively private hearing of her testimony, should submit to a pre-trial psychiatric examination.[121] Wigmore declares, "No judge should ever let a sex-offense charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician."[122] (3) The report of the examination should be testified to in open court; exclusion should be granted *only* when experts, independently selected by the court, decide that the potential witness is *not* suffering from any personality complexes which might affect the truthfulness of her testimony or which might cause her to suffer serious psychological damage if she is required to testify publicly. (4) If exclusion is granted contrary to the advice of psychiatrists, then the

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119. *Cf.* Schatkin, *Should Paternity Cases be Tried in a Civil or Criminal Court?*, 1 CRIM. L. REV. (N.Y.) 18, 23-24 (1954).

120. See, *e.g.*, Hogan v. State, 191 Ark. 437, 86 S.W.2d 931 (1935); State v. Damm, 62 S.D. 123, 252 N.W. 7 (1933). In both these cases the duration was correct, but the exclusion order was too broad in its scope.

121. Only one case has considered this limitation; it rejected any such restriction. See Wedmore v. State, 237 Ind. 212, 143 N.E.2d 649 (1957). The court said:

> We do not believe this court has the power or authority to require the State to support the testimony of a prosecuting witness in a sex case by requiring her to submit to a psychiatric examination, the report of which is to be presented in evidence, in order to sustain a conviction.

Id. at 223, 143 N.E.2d at 654. However, this was not an exclusion case.

The form of the examination may vary if the witness is too young to take an oath.

122. 3 WIGMORE, EVIDENCE § 924a, at 460 (3d ed. 1940). (All italicized in original.)

Wigmore draws his conclusions from the commentary and extensive research of psychiatrists who have observed this type of false testimony over a lifetime of clinical work. Dr. W. F. Lorenz summarized the type of authority which supports Wigmore's view:

> We, who have had extensive criminal experience among the mentally ill, know how frequently sexual assault is charged or claimed with nothing more substantial supporting this belief than an unrealized wish or unconscious, deeply suppressed sex-longing. . . . I, therefore, believe that while psychiatric examination is desirable in all criminal cases, it is imperative in every case where sexual assault is charged.
>
> Nor should the comparative youth or apparent helplessness of the accuser be in itself a presumptive circumstance to support the charges. I have known of hysterical girls of twelve years and less to live through a fantastic sex drama that would be credible imagination for a playwright. In short, I recommend a thorough psychiatric examination; by which I mean an all-inclusive survey of the individual, her physical and mental make-up, her adjustments, aims and interests, as all of these are pertinent . . . to develop the truth.

3 WIGMORE, EVIDENCE § 924a, at 465 (3d ed. 1940). Wigmore also notes that the American Bar Association's Committee on the Improvement of the Law of Evidence approved his position by a vote of 47 to 2. *Id.* at 466.

court must not "deprive the accused of the right to have his family and friends present *as well as a reasonable portion of the public.*"[123]

B. *Independent Right Theory*

Since only three cases have dealt with the independent right problem, and since each one of these offered a different solution, the law in this area is not settled. *United Press Ass'ns v. Valente,*[124] which denies the existence of a right distinct and independent of the defendant's right to a public trial, appears to be the better view. Even if the existence is conceded, the right is possssed by the public *as a whole,*[125] and to give any individual member of the public sufficient standing to assert the independent right would be to overburden the courts with collateral appeals and to prejudice the defendant by converting a constitutional privilege into an imperative requirement.[126] *Valente* provides a workable standard. By contrast, *Kirstowsky v. Superior Court*[127] is too ambivalent; it seems to put the burden on the defendant to demonstrate that, because of the potential prejudice to him through general attendance of the public, exclusion pursuant to his waiver is warranted. *E. W. Scripps Co. v. Fulton*[128] ignores the defendant's best interests and therefore reaches an untenable result.

While it is true that a defendant has no right to a secret trial,[129] he should be able to restrict attendance to an extent sufficient to secure a jury verdict uninfluenced by the prejudice of observers.[130] The benefits to society derived from open courts will not be diminished if the concept of an independent public right to attend criminal trials is rejected. It is hard to imagine how exclusion of segments of the general public in certain cases would nullify any of those benefits listed earlier —protection against the use of oppressive tactics by courts, building of public confidence in the court system, deterrence of potential criminals, or education of the public in crimi-

123. Beauchamp v. Cahill, 297 Ky. 505, 508, 180 S.W.2d 423, 424 (1944). (Emphasis added.)

124. 308 N.Y. 71, 123 N.E.2d 777 (1954).

125. *Id.* at 84-85, 123 N.E.2d at 783.

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

127. 143 Cal. App. 2d 745, 300 P.2d 163 (1956).

128. 100 Ohio App. 157, 125 N.E.2d 896, *appeal dismissed per curiam,* 164 Ohio St. 261, 130 N.E.2d 701 (1955).

129. State v. White, 97 Ariz. 196, 398 P.2d 903 (1965); Singer v. United States, 380 U.S. 24, 35 (1965) (dictum); see Green v. State, 135 Fla. 17, 184 So. 504 (1938); State v. Hashimoto, 47 Hawaii 185, 389 P.2d 146 (1963).

130. See Sheppard v. Maxwell, 384 U.S. 333 (1966).

nal law. In fact, a defendant's realization of a fair trial, which is clearly society's greatest benefit, will be enhanced by rejection of the independent right theory. Though under normal circumstances the public should be able to attend, little justice is given the accused or the public as a whole when the privilege of a public trial is converted into an "imperative requirement."[131] Furthermore, the decision to exclude certain portions of the public on request of a defendant is within the discretion of the trial judge,[132] who is likely to consider the interests of the public in reaching his conclusion.[133] Even when an exclusion order is granted, impartial observers will probably be present since an accused clearly cannot demand a private trial.

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

132. Green v. State, 135 Fla. 17, 184 So. 504 (1938); State v. Hashimoto, 47 Hawaii 185, 389 P.2d 146 (1963); Note, 36 ORE. L. REV. 345, 350 (1957).

133. See, *e.g.,* E. W. Scripps Co. v. Fulton, 100 Ohio App. 157, 125 N.E.2d 896, *appeal dismissed per curiam,* 164 Ohio St. 261, 130 N.E.2d 701 (1955); *cf.* NEWMAN, CONVICTION 86 (1966) (impact of public criticism). *But see* United States *ex rel.* Bruno v. Herold, 246 F. Supp. 363, 367 (N.D.N.Y. 1965) (public trial right belongs *only* to the accused).