THE RIGHT OF AN INDIVIDUAL OTHER THAN THE CRIMINALLY ACCUSED TO PETITION FOR A PUBLIC TRIAL

Oliver v. Postel
*37 App. Div. 2d 498, 327 N.Y.S.2d 44 (1971)**

Prior to an extortion trial,[1] newspapers commented adversely on the defendant's character and associations.[2] After the trial judge warned the press to limit their coverage of the trial,[3] editorials critical of the judge's action were published.[4] Rejecting the prosecution's arguments that other remedies, including sequestering the jury, were more appropriate,[5] the trial judge granted the defendant's motion for an order excluding spectators and the press and sealing the record un-

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* Since the writing of this comment, the Court of Appeals of New York has rendered its decision on an appeal from the Supreme Court, Appellate Division. Although the issue was mooted by the acquittal of the criminal defendant, the court held that Judge Postel's order was improper. The court stated, "[T]he record in the present case makes it exceedingly plain that the order closing the courtroom—made upon the defendant's application—was aimed specifically at the news media and was intended as a punishment for what the respondent characterized as their 'contumacious conduct' in disregarding his prior admonitions not to publish 'anything other than [what] transpires in this courtroom.'" Oliver v. Postel, 30 N.Y.2d 171, —, 331 N.Y.S.2d 407, 412, 282 N.E.2d 306, 309 (1972). The court then concluded that "[T]he respondent's order was an unwarranted effort to punish and censor the press, and the fact that it constituted a novel form of censorship cannot insulate or shield it from constitutional attack." *Id.* at —, 331 N.Y.S.2d at 415, 282 N.E.2d at 311.

1. The trial continued behind closed doors until its conclusion, resulting in the defendant's acquittal on Dec. 10, 1971. Brief of Appellant at 4, Oliver v. Postel, 37 App. Div. 2d 498, 327 N.Y.S.2d 444 (1971).

2. N.Y. Times, Nov. 11, 1971, at 53, col. 1 (city ed.).

3. Oliver v. Postel, 37 App. Div. 2d 498, 499, 327 N.Y.S.2d 444, 446 (1971). Judge Postel, when questioned as to the legal authority for his warning by reporters in his chambers replied, "Postel's law." N.Y. Times, Nov. 12, 1971, at 42, col. 2 (city ed.).

4. N.Y. Times, Nov. 12, 1971, at 1, cols. 2-3 (city ed.); *id.*, Nov. 13, 1971, at 1, col. 5 (city ed.); *id.*, Nov. 17, 1971, at 46, col. 2 (city ed.). As to the significance of the timing of publicity prior to, as opposed to after, empanelment, see Barist, *First Amendment and Regulation of Prejudicial Publicity—An Analysis*, 36 FORDH. L. REV. 425, 442 (1968); McCarthy, *Fair Trial and Prejudicial Publicity: A Need for Reform*, 17 HAST. L.J. 79, 82 (1965); Note, *The American Bar Association Suggests an Answer to the "Fair Trial—Free Press" Dilemma*, 1967 DUKE L.J. 593, 609 n.181; Note, 45 TUL. L. REV. 1043, 1044 (1971).

5. *See* note 13 *infra* and accompanying text for a discussion of other possible remedies.

til verdict.[6] Members of the press and general public brought an action against the trial judge to compel the opening of the court.[7] *Held*: Petitioners have no enforceable right to be present at a criminal jury trial which is closed to insure that the defendant receives a fair trial.[8]

The right to a public trial, though subject to recognized exceptions,[9] is guaranteed by the sixth amendment[10] and is applied to the states

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6. As to whether the availability of a transcript fulfills the public trial requirement, see Craemer v. Superior Court, 265 Cal. App. 2d 216, 71 Cal. Rptr. 193 (1968) (the right of the court to deny the press access to transcript of the proceedings). *Cf.* Oxford Publishing Co. v. Superior Court, 68 Cal. Rptr. 83, 95 (Ct. App. 1968) (the availability of a transcript at the conclusion of a trial does not satisfy the public's interest in securing a public trial).

7. The action was brought under N.Y. CIV. PRAC. LAW art. 78 (McKinney 1963).

8. Oliver v. Postel, 37 App. Div. 2d 498, 327 N.Y.S.2d 444 (1971). The timelessness of the following observation is an obvious illustration of the historical concern about the problem of a fair trial:

> In these days of newspaper enterprise and universal education, every case of public interest is almost, as a matter of necessity, brought to the public attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits.

Reynolds v. United States, 98 U.S. 145 (1878). *See* Radin, *The Right to a Public Trial*, 6 TEMP. L.Q. 381 (1932). As to the historical concern with the right to a public trial see note 18 *infra* and accompanying text.

Upon the face of the text of both the first and sixth amendments the problem is not apparent; however, in the factual context of a pending criminal trial involving a *cause celebre*, the conflict is acute. Many such cases reach the Supreme Court for adjudication as to whether the extensive publicity precluded the possibility of a fair trial. *See, e.g.*, Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965); Stroble v. California, 343 U.S. 181 (1952); Bridges v. California, 314 U.S. 252 (1941). The function of appellate review by the Court was expressed in Pennekamp v. Florida, 328 U.S. 331, 336 (1946):

> [R]eviewing courts are brought in cases of this type to appraise the comment on a balance between the desirability of free discussion and the necessity for fair adjudication, from free interruption of its processes.

9. *See* note 21 *infra* and accompanying text.

10. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ." U.S. CONST. amend. VI.

In addition to the constitutional guarantee, many state constitutions embody the same protection. *See* LEGISLATIVE DRAFTING RESEARCH FUND OF COLUMBIA UNIVERSITY, INDEX DIGEST OF STATE CONSTITUTIONS 326 (1950). In New York the guarantee of a public trial for the criminal defendant is also secured by statute:

N.Y. JUDICIARY LAW § 4 (McKinney 1968).

> § 4. Sittings of courts to be public
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> The sittings of every court within this state shall be public, and every citizen may freely attend the same, except in all proceedings and trials in cases for divorce, seduction, abortion, rape, assault with intent to commit rape, sodomy, bastardy or filiation, the court may in its discretion, exclude therefrom all persons who are not directly interested therein, excepting jurors, wit-

through the due process clause of the fourteenth amendment.[11] The court in *Oliver* confronted the issue whether the press or public, in addition to the criminal defendant, can assert the right to a public trial. The sixth amendment is silent about the interests of the public[12] in an open trial, and a division among the courts currently exists.

Various remedies may be used to minimize the effect of prejudicial publicity: a jury trial may be waived, a change of venue or a continuance granted, a searching *voir dire* conducted.[13] Perhaps the most effective weapon, the contempt power, can be used only to prevent "a clear and present danger" to the administration of justice.[14]

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nesses, and officers of the court.

Also the rights secured by the Federal Constitution may be made applicable to the states through the fourteenth amendment. *See, e.g.*, United States *ex rel.* Bennett v. Rundle, 419 F.2d 599 (3d Cir. 1970) (sixth amendment right to a public trial). *See also* Duncan v. Louisiana, 391 U.S. 145 (1968).

11. *In re* Oliver, 333 U.S. 257 (1948). *See also* Duncan v. Louisiana, 391 U.S. 145 (1968).

12. It is established that with regard to the right of the press to compel the opening of the trial, it has no superior right over the general public to attend judicial proceedings. United States v. Kobli, 172 F.2d 919, 923 (3d Cir. 1949); Oxnard Publishing Co. v. Superior Court, 68 Cal. Rptr. 83, 88 (Ct. App. 1968); Kirstowsky v. Superior Court, 143 Cal. App. 2d 745, 300 P.2d 163 (1956); United Press Ass'ns v. Valente, 308 N.Y. 71, 77, 123 N.E.2d 777, 783 (1954); *cf.* E.W. Scripps Co. v. Fulton, 100 Ohio App. 157, 125 N.E.2d 896, 903 (1954).

However, members of the press have alleged that a necessary corollary of the freedom of the press guaranteed by the first amendment is the right of access to the functionings of the branches of government, see Note, *Journalistic Media and Fair Trials*, 18 CLEV. STATE L. REV. 440, 441 (1968); *cf.* Note, *Right of the Press to Gather Information*, 71 COLUM. L. REV. 838 (1971).

13. *See, e.g.*, Sheppard v. Maxwell, 384 U.S. 333 (1966); *see* Wright, *Fair Trial—Free Press*, 45 F.R.D. 435 (1965); Hudon, *Freedom of the Press versus Fair Trial: The Remedy Lies with the Courts*, 1 VALPARAISO L. REV. 8 (1966); Jaffe, *Trial by Newspaper*, 40 N.Y.U.L. REV. 504 (1965); Note, *The American Bar Association Suggests an Answer to the "Fair Trial—Free Press" Dilemma*, 1967 DUKE L.J. 593; Note, *Procedural Compromise and Contempt: Feasible Alternatives in the Fair Trial Versus Free Press Controversy*, 22 U. FLA. L. REV. 650 (1970).

14. *See, e.g.*, Bridges v. California, 314 U.S. 252 (1941). This problem is not new to legal circles for the debate on the "free press—fair trial" issue has continued for many years. The debate or conflict is multifaceted and may focus upon the use of prior restraint to control the press, *e.g.*, Near v. Minnesota, 283 U.S. 697 (1931).

Also the issue raised by the petitioners in *Oliver* is not unique to that case, for it has been litigated elsewhere. *See, e.g.*, Phoenix Newspaper, Inc. v. Superior Court, 101 Ariz. 257, 418 P.2d 594 (1966); Kirstowsky v. Superior Court, 143 Cal. App. 2d 745, 300 P.2d 163 (1956). *See generally* Note, *Exclusion of the General Public from a Criminal Trial—Some Problem Areas*, 1966 WASH. U.L.Q. 458.

The ABA recommendations and those of the states have been the subject of extensive commentary. *See generally* Center for the Study of Democratic Institutions,

Though courts consistently recognize that open proceedings—including criminal trials—are in the public interest, a majority of them find no constitutional basis for that interest.[15] In the face of sup-

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Fair Trial vs. A Free Press (Occasional Paper 1965); Cooper, *The Rationale for the ABA Recommendations*, 42 NOTRE DAME LAW. 857 (1967); Douglas, *The Press and First Amendment Rights*, 7 IDAHO L. REV. 1 (1970); Douglas, *The Public Trial and the Free Press*, 46 A.B.A.J. 840 (1960); Fuld, *Free Press-Fair Trial Principles and Guidelines for the State of New York*, 42 N.Y. ST. B.J. 13 (1970); Gard, *Free Press v. Fair Trial: Another Tempest in the Teapot*, 54 A.B.A.J. 669 (1968); Jafee, *Trial by Newspaper*, 40 N.Y.U.L. REV. 504 (1965); Reardon, *The Fair Trial-Free Press Standards*, 54 A.B.A.J. 343 (1968); Reardon, *Fair Trial-Free Press*, 52 MARQUETTE L. REV. 547 (1969); Taylor, *Crime Reporting and Publicity of Criminal Proceedings*, 66 COLUM. L. REV. 34 (1966); Note, *Right of the Press to Gather Information*, 71 COLUM. L. REV. 838 (1971); Note, *The American Bar Association Suggests an Answer to the "Fair Trial-Free Press" Dilemma*, 1967 DUKE L.J. 593; Note, *Procedural Compromise and Contempt: Feasible Alternatives in the Fair Trial Versus Free Press Controversy*, 22 U. FLA. L.J. 650 (1970).

15. Estes v. Texas, 381 U.S. 532, 584 (1965) (concurring opinion); Geise v. United States, 265 F.2d 659, 660 (9th Cir. 1959); United States v. Sorrentino, 175 F.2d 721, 722 (3d Cir. 1949); United Press Ass'ns v. Valente, 308 N.Y. 71, 81, 123 N.E.2d 777, 785 (1954); People v. Jelke, 308 N.Y. 56, 61, 123 N.E.2d 769, 770 (1954); James v. Powell, 51 Misc. 2d 705, 706, 273 N.Y.S.2d 730, 731 (Sup. Ct. Special Term 1966); New York Licensed Bail Agents' Ass'n v. Murtagh, 200 Misc. 1095, 107 N.Y.S. 2d 380, *appeal denied*, 303 N.Y. 1009, 106 N.E.2d 284 (1952). *See* Douglas, *The Fair Trial and Free Press*, 46 A.B.A.J. 840, 841 (1960); Douglas, *The Public Trial and Free Press*, 33 ROCKY MTN. L. REV. 1, 5 (1960); Note, *The Accused's Right to a Public Trial*, 42 NOTRE DAME LAW. 499, 501 (1967); Note, *Free Press and Fair Trial: An Evolving Controversy*, 19 U. FLA. L. REV. 660 (1967).

The *Oliver* court considered itself bound by the New York Court of Appeals decision of *In re* United Press Ass'ns v. Valente, 308 N.Y. 71, 123 N.E.2d 777 (1954). *Valente* was a companion case similar to *Oliver* in that it was an action brought to compel the opening of a criminal trial, People v. Jelke, 308 N.Y. 56, 123 N.E.2d 769 (1954). *See* 67 HARV. L. REV. 344 (1953); 1 N.Y.L.F. 105 (1954).

The *Oliver* majority explicitly stated that the *Valente* decision foreclosed the issue. Oliver v. Postel, 37 App. Div. 2d 498, 500, 327 N.Y.S.2d 444, 446 (1971). The dissent argued that the majority's adherence to *Valente* was erroneous because of the subsequent applicability of the sixth amendment public trial guarantee to the states. Although in both cases the concern of the courts was with the New York statutory provision for a public trial, the effect of the decisions based upon the sixth amendment might have possibly influenced the *Valente* court in its interpretation of the statute. The dissent also argued that the *Jelke-Valente* situation was factually distinguishable from *Persico-Oliver*. *Id.* at 504, 327 N.Y.S.2d at 450.

The issue presented in *Oliver* has been considered in other New York cases. *See, e.g.*, New York v. Hagan, 24 N.Y.2d 395, 248 N.E.2d 588, 300 N.Y.S.2d 835, *cert. denied*, 396 U.S. 886 (1969); New York Post Corp. v. Leibowitz, 2 N.Y.2d 677, 143 N.E.2d 256, 163 N.Y.S.2d 409 (1957); People v. Miller, 257 N.Y. 54, 177 N.E. 306 (1931); James v. Powell, 52 Misc.2d 705, 273 N.Y.S.2d 730 (Sup. Ct. Special Term 1966); New York Licensed Bail Agents' Ass'n v. Murtagh, 200 Misc. 1095, 107 N.Y.S.2d 380 (Sup. Ct. Special Term 1951).

portable claims by defendants that their constitutional right to a fair trial cannot be realized without foregoing the right to an open trial, those courts have respected defendants' preference for the fair trial. They have concluded that the public has no right to compel an open trial, rather the public interest must give way to the defendant's right to a fair trial.[16]

The minority view is that the public interest in access to judicial proceedings is sufficiently important to grant it status as an enforceable right.[17] Creation of the right in the public has been thought necessary to effectuate at least some of the historical purposes of the constitutional guarantee, *i.e.*, that the public may learn about and have confidence in government processes.[18] Because there is no right explicitly granted the public by the Constitution, some minority courts have relied on extra-constitutional considerations to formulate a public "right to know."[19]

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16. *See* cases cited in note 15 *supra.*

17. The *Oliver* dissent favored the majority view:

> I interpret this Amendment [the sixth] as requiring the state in a criminal trial to conduct the trial in a forum open to any member of the public who wishes to attend.

Oliver v. Postel, 37 App. Div. 498, 504, 327 N.Y.S.2d 444, 451 (1971). *See also* note 19 *infra.*

18. See 7 J. WIGMORE, EVIDENCE § 1934, at 33 (3d ed. 1940); 31 N.Y.U.L. REV. 611 (1956); The reasons for a public trial were succinctly stated in 36 ORE. L. REV. 345, 346 (1957):

> At present, it is generally agreed that the right to a public trial is supported by some or all of the following arguments:
> (1) Open proceedings improve the quality of testimony, in that the witness is less likely to testify falsely in the presence of spectators who may stand ready to expose him.
> (2) The presence of the public moves the judge, jury, and counsel to a more conscientious performance of their duties.
> (3) The accused is better able to prove unfair treatment at the hands of the court if the proceeding is public.
> (4) A spectator at the trial may be reminded of some past event he has observed which may be relevant to an issue in the case.
> (5) Open proceedings inspire public confidence in the courts.
> (6) Persons not directly involved in an action have an opportunity to learn whether or not the proceedings in that action may have an effect upon their rights.

19. Estes v. Texas, 381 U.S. 532, 614 (1964) (Stewart dissenting):

> The suggestion that there are limits upon the public's right to know what goes on in the courts causes me great concern. The idea of imposing upon any medium of communications the burden of justifying its presence is contrary to where I had always thought the presumption must lie in the area of the First Amendment freedoms.

A typical judicial statement as to the right of the public is found in United States v.

Because the addressee of the sixth amendment is "the accused," the text of the amendment lends support to the majority position. Further, it is arguable that substantial control of the right to a public trial should be vested in the defendant; otherwise its assertion may interfere with his right to a fair trial.[20] Finally, since judges clearly have discretion to exclude the public from the courtroom to facilitate the administration of justice in other situations, the use of that power here is neither novel nor drastic.[21]

Lopez, 328 F. Supp. 1077, 1087 (E.D.N.Y. 1971):

> The public has an independent right to be present to see that justice is fairly done. It is important that our citizens be free to observe court proceedings to insure a sense of confidence in the judicial process. Conducting trials behind closed doors might endanger an apprehension and distrust of the legal system which would, in the end destroy its ability to peacefully settle disputes.

See Lewis v. Peyton, 352 F.2d 791, 792 (4th Cir. 1965):

> The right to a public trial is not only to protect the accused but to protect as much the public's right to know what goes on when men's lives and liberty are at stake, for a secret trial can result in favor as well as prosecution of a defendant.

Cf. Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 920 (1950); Craig v. Harney, 331 U.S. 367, 374 (1947); Pennekamp v. Florida, 328 U.S. 331, 347 (1946). *See also* United States v. Kobli, 172 F.2d 919, 923 (3d Cir. 1949); Davis v. United States, 247 F. 394, 395 (8th Cir. 1917). *See generally* H. CROSS, THE PEOPLE'S RIGHT TO KNOW 155-75 (1953); Radin, *The Right to a Public Trial*, 6 TEMP. L.Q. 381, 392 (1932); Taylor, *Crime Reporting and Publicity of Criminal Proceedings*, 66 COLUM. L. REV. 34 (1966); Note, *The Accused's Right to a Public Trial*, 42 NOTRE DAME LAW. 499 (1967); Note, *Exclusion of the General Public from a Criminal Trial—Some Problem Areas*, 1966 WASH. U.L.Q. 458.

20. United States v. Sorrentino, 175 F.2d 721, 723 (3d Cir. 1949); 31 N.Y.U.L. REV. 611, 612 (1956); Note, *The Accused's Right to a Public Trial*, 42 NOTRE DAME LAW. 499, 505 (1967). *Contra*, Cowley v. Pulsifer, 137 Mass. 392 (1884) (Holmes, J. quoted in *Oliver*, 37 App. Div. 2d at 506, 327 N.Y.S.2d at 452):

> Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings.

21. In many cases the court's authority to exclude certain individuals has been discussed in relation to the defendant's right to a public trial. *See, e.g.*, United States *ex rel.* Bennett v. Rundle, 419 F.2d 599 (3d Cir. 1969); United States *ex rel.* Bruno v. Herold, 408 F.2d 125 (2d Cir. 1969); United States *ex rel.* Orlando v. Fay, 350 F.2d 967 (2d Cir.), *cert. denied*, 384 U.S. 1008 (1965); United States v. Sorrentino, 175 F.2d 721 (3d Cir. 1949); United States v. Kobli, 172 F.2d 919 (3d Cir. 1949); Tanksley v. United States, 145 F.2d 58 (9th Cir. 1944); Davis v. United States, 247 F. 394 (8th Cir. 1917); Reagan v. United States, 202 F. 488 (9th Cir. 1913).

The exclusion of certain members of the public is frequent in cases involving sex crimes. *See, e.g.*, United States v. Kolbi, 172 F.2d 919 (3d Cir. 1949) (Mann Act

Although the minority view lacks express constitutional authority, the "right to know" is arguably within the "penumbra" of express and implied rights inherent in the Constitution. Indeed, the Supreme Court in *Griswold v. Connecticut*[22] established a right of privacy on that theory. However, reliance upon *Griswold* may be misplaced: there the Court relied upon other, though more general, provisions to imply a right of privacy.[23] It is more difficult to find any analogous constitutional provisions from which to imply a public "right to know."[24] Further, courts have consistently held that the defendant's waiver of the right to a public trial does not create a converse right to a private trial.[25] The strongest argument for the minority position,

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violation); Tanksley v. United States, 145 F.2d 58 (9th Cir. 1944) (adult raped); Reagan v. United States, 202 F. 488 (9th Cir. 1913) (rape). The exclusion may be validly predicated upon the limited ability of the court to physically accommodate all who wish to be present. *See, e.g.*, Estes v. Texas, 381 U.S. 532 (1965). Another valid basis for excluding individuals is the effect upon the proceedings brought about by a spectator's presence or conduct. *See, e.g.*, United States *ex rel.* Bruno v. Herold, 408 F.2d 125 (2d Cir. 1969) (witness intimidated by spectators); United States *ex rel.* Orlando v. Fay, 350 F.2d 967 (2d Cir. 1965) (defendant himself was disruptive); Davis v. United States, 247 F. 394 (8th Cir. 1917) (relatives of defendant had a fight with witness); State v. Mancini, — R.I. —, 274 A.2d 742 (1971) (spectators intimidated the witness). Sometimes the order of exclusion issued by the court allows the relatives of the defendant, or any parties the defendant selects, to remain in the courtroom. Davis v. United States, 247 F. 394 (8th Cir. 1917) (relatives of the defendant remained); People v. Hall, 51 App. Div. 57, 6 N.Y.S 756 (1900) (court allowed defendant to select persons he wanted to remain).

In consideration of all of the above, a viable definition of a public trial was tendered by Chief Justice Warren in Estes v. Texas, 381 U.S. 532, 584 (1965):

> [A] trial is public in the constitutional sense, when a courtroom has facilities for a reasonable number of the public to observe the proceedings, which facilities are not so small as to render the openness negligible and not so large as to distract the trial participants from their proper function, when the public is free to use those facilities, and when those who attend the trial are free to report what they observed at the proceedings.

22. Griswold v. Connecticut, 381 U.S. 479 (1965).

23. *Id.* at 484.

24. *But see* Maryland v. Baltimore Radio Show Inc., 338 U.S. 912, 920 (1950); Lewis v. Peyton, 352 F.2d 791 (4th Cir. 1965); Brief for Appellant at 31, Oliver v. Postel, 37 App. Div. 2d 498, 327 N.Y.S.2d 444 (1971); Warren, *Free Press—Fair Trial: The "Gag Order" A California Aberration*, 45 S. CAL. L. REV. 51, 78 (1972).

25. Singer v. United States, 380 U.S. 24 (1965); United States v. American Radiator & Standard San. Corp., 274 F. Supp. 790 (W.D. Pa. 1967); Schavey v. Roylston, 8 Ariz. App. 574, 448 P.2d 418 (1968); Oxnard Publishing Co. v. Superior Court, 68 Cal. Rptr. 83 (Ct. App. 1968); Cox v. State, 3 Md. App. 173, 238 A.2d 157 (1968); E.W. Scripps Co. v. Fulton, 100 Ohio App. 157, 125 N.E.2d 896, *appeal dismissed*, 163 Ohio St. 261, 130 N.E.2d 701 (1955). The fallaciousness of the existence of converse rights is presented by analogy in Kirstowsky v. Superior Court, 143 Cal.

however, appears to be that in a democratic society the public should be able to observe the manner in which their judicial system functions.[26]

Even though the clash between the defendant's right to a fair trial and the public's right to compel a public trial may not be of constitutional magnitude, courts must deal with the problem of prejudicial publicity. The "clear and present danger" doctrine limits use of the contempt power. A change of venue, and for the most part, *voir dire,* only alleviate the effect of pre-trial publicity, while sequestering the jury or closing the courtroom are only useful once the trial has begun. Since an unsequestered jury may still be subject to publicity based upon information gathered outside the courtroom, the trial judge, without interfering with public access to the courtroom, could have more effectively handled the problem in the instant case by sequestering the jury.

App. 2d 745, 300 P.2d 163 (1956) (quoted by the dissent in *Oliver,* 37 App. Div. 2d at 505, 327 N.Y.S.2d at 453).

26. *See In re* Oliver, 333 U.S. 257, 270 (1948); E. W. Scripps Co. v. Fulton, 100 Ohio App. 157, 125 N.E.2d 896 (Ohio App. 1965); State v. Holm, 67 Wyo. 360, 224 P.2d 500 (1950) (dictum); 20 HARV. L. REV. 489 (1907). *See also* note 18 *supra* and accompanying text.