of transactions. Courts have been responsive to the need for expanding the framework of the Sales Act warranties; the need for a similar approach in areas other than sales should not be overlooked.

THE 'RIGHT' TO OBSERVE TRIALS—ITS SOURCE AND VINDICATION

Open trial is a well established feature of the Anglo-American judicial process. Few will dispute its desirability in a free society.[1] Open trial has been expressly recognized as a right of an accused in the Sixth Amendment and in state constitutions and statutes.[2] But a similar right of the public has had no express recognition.[3] For many centuries, in England and the United States, the public has attended trials, both civil and criminal; but it is not clear whether the public has a right to attend trials or whether public attendance is merely a way of vindicating the right of the accused.[4]

---

1. A federal court recently named the supposed justifications for the right as: (1) a safeguard against any attempt to employ our courts as instruments of persecution; (2) notice to witnesses who may then voluntarily come forward with valuable evidence; and (3) confidence in judicial remedies instilled in spectators gained through observation of their government in action. *In re* Oliver, 333 U.S. 257 (1948). The first justification may be attributed to the traditional Anglo-Saxon distrust of secret trials ascribed to the Spanish Inquisition, the English Court of the Star Chamber, and to the French Monarchy's abuse of *lettre de cachet*. The second may be attributed to the ancient common law concept of public trials and its particular merits in reference to the quality and quantity of testimony given at the trial. This benefit accruing to the testimonial process relates to civil as well as criminal trials while the first justification seems peculiar to the criminal process. The third justification emphasized by the federal court seems to be an outgrowth of the concept of popular sovereignty and the right of the people to participate in the governmental process.

2. The constitutions of 41 states guarantee a public trial to the accused in criminal cases. For a list of the states, see Note, 35 CORNELL L.Q. 395 n. 8 (1950). Two states, New York and Nevada, provide a statutory guarantee: N.Y. CIVIL RIGHTS LAW § 12; NEV. COMP. LAWS § 10654 (1929).

3. The nearest thing to an express recognition similar to the right of the accused is the Michigan and New York statutory provisions: "The sittings of every court within this state shall be public, and every citizen may freely attend the same, . . ." N.Y. JUDICIARY LAW § 4; MICH. JUDICATURE ACT c. 4, § 604.5. But the N.Y. Court of Appeals, in United Press Ass'n v. Valente, 308 N.Y. 71, 123 N.E.2d 777 (1954), interpreted the provision as not establishing an enforcible right in the public.

The Ohio Court of Appeals construed a more general provision as extending a distinct right in the public to an open trial. E.W. Scripps Co. v. Fulton, 125 N.E.2d 896 (1955). Art. I, § 16 of the Ohio Constitution provides: "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law. . . ."

4. "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 keep his triers keenly alive to a sense of their responsibility

The practice of holding open trials existed in English legal procedure at least two centuries before the United States Constitution was adopted, but the reasons underlying the practice and the protection gained thereby are not well documented.[5] Early English writers stressed the value of publicity as tending to improve the quality and increase the quantity of testimony.[6] It is doubtful that these justifications were made

---

and to the importance of their functions; 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." 1 COOLEY, CONSTITUTIONAL LIMITATIONS 647 (8th ed. 1927). At least one court has indicated that the guarantee of public trial in the state constitution is intended to protect the public as well as the accused. State v. Keeler, 52 Mont. 205, 156 P. 1080 (1916). "Primarily it is for the benefit of the accused. . . . But it likewise involves questions of public interest and concern. The people are interested in knowing, and have the right to know, how their servants—the judge, county attorney, sheriff, and clerk—conduct public's business. . . . But the public is interested in every criminal trial that court officers and jurors are kept keenly alive to a sense of their responsibility and the importance of their functions, and interested spectators by their presence are the most potent influence to accomplish this desired end." *Id.* at 218; 156 P. at 1083.

For a discussion of the common law practice, see generally: HALE, HISTORY OF THE COMMON LAW OF ENGLAND (Runnington ed. 1820); 3 BLACKSTONE, COMMENTARIES 372 (Lewis's ed. 1900); MAITLAND AND MONTAGUE, A SKETCH OF ENGLISH LEGAL HISTORY 56 (1915); JENKS, THE BOOK OF ENGLISH LAW 91 (3d ed. 1932); 6 BENTHAM, RATIONALE OF JUDICAL EVIDENCE 355 (Bowring's ed. 1843); 5 HOLDSWORTH, HISTORY OF ENGLISH LAW 156 (3d ed. 1945); 2 BISHOP, NEW CRIMINAL PROCEDURE § 957-959 (2d ed. 1913); 6 WIGMORE, EVIDENCE § 1834 (3d ed. 1940); Radin, *The Right to a Public Trial,* 6 TEMP. L.Q. 381 (1932). As to open trial practice in Roman and other civilized societies of earlier times, see JOLOWICZ, HISTORICAL INTRODUCTION TO ROMAN LAW 318-27, 407-09 (1932).

5. Sir Thomas Smith's *De Republica Anglorum,* written in 1565, is one of the first writings of English legal history which makes a particular point of the public character of English trials. In his comments on the jury, he states: "Evidences of writinges be shewed, witnesses be sworne and heard before them not after the fashion of the civill law but openly, that not only xii [the jury], the Judges, the parties and as many as be present may heare what ech witnesse doeth say. . . . All the rest is doone openlie in the presence of the Judges, the Justices, the enquest, the prisoner and so manie as will or can come so neare as to heare it." Quoted in Radin, *supra* note 4 at 382.

6. "[T]he excellency of this Open course of evidence to the jury, in presence of the judge, jury, parties and counsel, and even of the adverse witnesses, appears in these particulars. 1st. That it is openly, and not in private before a commissioner or two, and a couple of clerks; where, oftentimes witnesses will deliver that which they will be ashamed to testify publickly." HALE, *op. cit. supra* note 4 at 345.

In 1768, Blackstone stated that "The open examination of witnesses *viva voce,* in the presence of all mankind, is much more conducive to the clearing up of truth than the private and secret examination before an officer or his clerk, in the ecclesiastical courts and all that have borrowed their procedure from the civil law: where a witness may frequently depose that in private which he will be shamed to testify in a public and solemn tribunal. There an artful or careless scribe may make a witness speak what he never meant, by dressing up his depositions in his own forms and language; but he is here at liberty to correct and explain his meaning, if misunderstood, which he can never do after a written deposition is once taken." BLACKSTONE, *op. cit. supra* note 4 at 373.

In 1823, Bentham wrote: "The advantages of publicity are neither inconsiderable deponent. . . . In many cases, . . . the publicity of the examination or deposition operates as a check upon mendacity and incorrectness. However sure he may think himself of

out of solicitude for the accused; it is more likely that the writers were concerned with jury trial and its effectiveness as a process for ascertaining truth.[7] The fact that open trial was practiced in civil as well as criminal cases lends further support to this assertion.[8] It is also conceivable that these supposed merits were mere justifications for the retention of the custom of the community.

Open trials were a necessary incident to the jury system as it existed in Roman law and in early Anglo-Saxon practice. The theory behind the creation of the jury system was to leave the decision of the case to interested persons, preferably those familiar with the matter in dispute. The local community as a whole was charged with responsibility for apprehending criminals and was subject to assessment of damages for permitting a crime to occur in its locale. With significant changes in social conditions, community responsibility for the apprehension of criminals was transformed into a governmental function. The duty of the jury changed from that of reporting to judging facts, and the principal qualification for a juror became impartiality.[9] While incidental benefit to the testimonial process accrued from publicity, it is probable that the practice of open trials was retained as a matter of form more than of substance.

Although open trial was inherited from Anglo-Saxon procedure, it does not follow that the basis for open trial in the United States is a mere codification of the common law practice and purpose.[10] The ex-

---

not being contradicted by the deposition of any percipient witness, the prudence or imprudence, the probity or improbity, of that one original witness may have given birth to derivative and extrajudicial testimonies in any number. Environed as he sees himself by a thousand eyes, contradiction, should be hazard a false tale, will seem ready to rise up in opposition to it from a thousand mouths. Many a known face, and every unknown countenance, presents to him a possible source of detection, from whence the truth he is struggling to suppress may through some unsuspected channel burst forth to his confusion . . . Another advantage of this publicity . . . is the chance it affords to justice of receiving, from hands individually unknown, ulterior evidence, for the supply of any deficiency or confutation of any falsehood, which inadvertency or mendacity may have left or introduced." BENTHAM, *op. cit. supra* note 4 at 355.

7. In the statements of Hale and Blackstone quoted in note 6, *supra,* it is important to note that they are speaking of publicity as related to the jury system and the open examination of witnesses as a part of the system. Blackstone makes a comparison between the open examination of witnesses *viva voce* and the taking of testimony by depositions and written interrogatories and concludes that the former is much more conducive to the clearing up of truth.

8. See, for instance, the statement of Sir John Hawles quoted in note 40, *infra.*

9. For a discussion of the early history of the jury system, see BLACKSTONE, *op. cit. supra* note 4, c. XXIII; MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE, 20-23 (1952); Garret, *Public Trials,* 62 AM. L.R. 1 (1928).

10. "[T]he common law cannot be admitted as the *universal* expositor of American terms. . . . The freedom of conscience and of religion are found in the same instruments which assert the freedom of the press. It will never be admitted that the meaning of the former, in the common law of England, is to limit their meaning in the United States."

perience of secret trials motivated the Sixth Amendment guarantee of open trial to an accused. It is also probable that open trial reflected a new idea of government and its relationship to the individual.

This nation is not a pure democracy but a government by representatives of the people. To retain their sovereignty and control, the people have defined the authority of their representatives in the Constitution.[11] Their dependence upon the judicial process to check abuses of this authority and to preserve sovereign rights against encroachment makes it essential that people know whether the judiciary is fulfilling its obligations.[12]

---

6 WRITINGS OF MADISON 386 (1906).

In the words of Mr. Justice Black: "For, the argument runs, the power of judges to punish by contempt out-of-court publications tending to obstruct the orderly and fair administration of justice in a pending case was deeply rooted in English common law at the time the Constitution was adopted. That this historical contention is dubious has been persuasively argued elsewhere. . . . In any event it need not detain us, for to assume that English common law in this field became ours is to deny the generally accepted historical belief that 'one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press.'" Bridges v. California, 314 U.S. 252, 263-64 (1941).

11. VALE, SOME LEGAL FOUNDATIONS OF SOCIETY 536-37 (1941). The author states that a written instrument was necessary because "the people of America are without the limitations of custom and of tradition, which among older nations may be sufficient to restrain power." *Ibid.*

12. Professor Hall points out that consent of the governed in a democracy means ". . . chiefly, the privilege of all normal adults to vote, the free expression of ideas, and the responsibility of the government to the governed. It implied not mere approval or acquiescence *but active participation in the processes of government.* It implies such a relationship between citizens and officials that the will of the former is necessary to the right of the latter to officiate, i.e., the officials are the agents of the citizens. It means that each person shall potentially have an equal participation in the control of government, with all that that implies for the determination of questions of public policy, law-making, and law enforcing . . . in short, in a democratic society, 'consent of the governed' means self-rule." HALL, LIVING LAW OF DEMOCRATIC SOCIETY 88, 89 (1949) (emphasis added).

In comparing freedom of the press under the First Amendment with that under the English constitutional law, Madison concluded that the First Amendment guarantees a much broader freedom than existed in England at the time. He observes that the standard of "previous restraint" established by the English courts cannot be accepted as the only restriction under the First Amendment, "since a law inflicting penalties on printed publications would have a similar effect with a law authorizing a previous restraint on them." MADISON, *op. cit. supra* note 9 at 386. Herein lies the explanation for the difference in the contempt powers of the English and the American courts as related to suppression of publication. Madison bases the difference on the fact that in England Parliament is omnipotent, while in the United States the people retain absolute sovereignty. "Hence, in the United States the great and essential rights of the people are secured against legislative as well as against executive ambition." *Ibid.*

Thomas Jefferson said: "The basis of our governments being the opinion of the people, the very first object should be to keep that right. The way to prevent [errors of] . . . the people, is to give them full information of their affairs through the channel of the public papers, and to contrive that these papers should penetrate the whole mass of the people." See LASSWELL, NATIONAL SECURITY AND INDIVIDUAL FREEDOM 62 (1950).

"If government is the instrument which they (the people) adopted for the promotion of general good; if it is the creature which they invited with powers for effecting the

In the United States, the question of the existence of a public right to an open trial is primarily a matter of constitutional interpretation; however, the inquiry cannot be restricted to express terminology. That the Consitution is silent should not lead to the conclusion that the right was not intended and therefore should not be recognized. The inquiry must go far beyond this. It requires an understanding of the evolutionary process of English constitutional government and the growth of liberty of Englishmen during the process of change from an absolute to a limited monarchy. The evolution is marked by the transfer of sovereignty to Parliament beginning with the Magna Charta and the growth of individual rights as affirmed by the Bill of Rights, the Act of Settlement, the Petition of Rights, and the Habeas Corpus Act. The result was the greater participation of the individual in government. These are the sources of American constitutional law upon which the structure of a representative democracy has been established;[13] the Declaration of Independence and the Constitution are further events in this evolutionary process. These sources tell us what, for instance, is embodied in the words "due process of law."[14]

The accused's right to a public trial is a part of his broad right to a fair trial.[15] The public's right to observe trials, on the other hand, is

---

benevolent designs of social felicity, it is society which must determine whether these purposes have been realized, or how far they have been departed from." WORTMAN, TREATISE CONCERNING POLITICAL INQUIRY AND LIBERTY OF THE PRESS (1800), quoted in SCHROEDER, FREE PRESS ANTHOLOGY 36 (1909).

13. "The wide gap that separated the individual from his government, the great discrepancy between his political wants and his means for satisfying them and his passion to make real his aspirations, caused him to think of his rights as man; and thus was ushered in the age of reason. The idea of natural rights was as explosive in the sphere of politics as dynamite in the physical world. . . .

"Reason and conciliation applied to revolutionary individual freedom evolved the Great Charter, the Bill of Rights, the Act of Settlement, the Petition of Right and the Habeas Corpus Act. These great compacts of human rights wrung from unwilling kings and granted by reluctant Parliaments, are the sources of English and American constitutional law and are man's priceless heritages. They are the foundations on which the structure of a representative democracy is builded under a fundamental law which promulgates the liberties of man and ordains the form of government which protects and perpetuates his rights." VALE, SOME LEGAL FOUNDATIONS OF SOCIETY 533 1941).

14. This is not to infer, however, that the scope of a particular right is to be restricted by English constitutional history. See note 10 *supra*. The value of resort to English constitutional history lies in the understanding to be gained of the political theory underlying the establishment of a particular form of government.

15. "In view of this nation's historic distrust of secret proceedings, their inherent dangers to freedom, and the universal requirement of our federal and state governments that criminal trials be public, the Fourteenth Amendment's guarantee that no one shall be deprived of his liberty without due process of law means at least that an accused cannot be thus (without a public trial) sentenced to prison." *In re* Oliver, 333 U.S. 257, 273 (1947).

based on the right to participate in the governmental process.[16] The problems growing out of the public's right are, at least in terms of actual litigation, of recent origin.

During the trial of Minot F. Jelke[17] on charges of compulsory prostitution, the trial judge made an order, on his own motion and over the defendant's objection, excluding the general public and the press from the courtroom during the presentation of the People's case. The trial judge stated that "the sound administration of justice and . . . the interests of good morals" compelled the exclusion. On appeal, Jelke obtained a reversal of his conviction and a new trial on the ground that his right to a public trial had been violated.[18] In a separate proceeding the press sought to restrain the trial judge from enforcing his ruling on the theory that it violated freedom of the press and the right to the public to attend trials.[19] In holding against the press, the court of appeals based its decision on two alternative grounds: (1) the New York statute does not confer on the public a right to attend trials distinct from that given to the defendant; and (2) even if the statute were to be interpreted as granting a right to the public, it is conferred on the public-at-large and not on any individual member thereof. Since the

16. The rationale to the public right to observe trials is applicable to civil as well as criminal trials.

17. People v. Jelke, 284 App. Div. 211, 130 N.Y.S.2d 662 (1st Dep't 1954). Counsel for Pat Ward, the state's principal witness, first made application to have the public excluded during her testimony. The request was granted and later recalled pending a hearing. After the arguments were heard the trial judge issued the exclusion order on his own motion.

18. People v. Jelke, 308 N.Y. 56, 123 N.E.2d 769 (1954). The conviction was reversed despite the fact that there was sufficient evidence to sustain the verdict of the jury.

19. United Press Ass'n v. Valente, 308 N.Y. 71, 123 N.E.2d 777 (1954). In holding against the press the court explored the possible consequences of a contrary holding. The court feared that it would deprive an accused of all power to waive his right to a public trial and thereby prevent him from taking a course which he may believe best for his own interest. "To deny the right of waiver in such a situation would be 'to convert a privilege into an imperative requirement' to the disadvantage of the accused"—the court working on the assumption that the primary function of a public trial to be that of safeguarding the accused against possible unjust persecution. *Id.* at 82, 123 N.E. at 781.

Another strange consequence, the court points out, is that the defendant's rights would be determined in proceedings in which he is not a party and has no voice. A contrary holding would also mean that any person denied access to a courtroom, no matter what the reason, could challenge the court's authority and seek to stay proceedings until his asserted right to be present had been finally litigated. The court fears that this would lead to an overwhelming number of collateral proceedings. *Id.* at 83, 123 N.E. at 782.

These harsh and burdensome consequences of a contrary holding, the court asserts, afford persuasive evidence that the legislature never intended to confer an enforcible right of attendance upon every individual member of the public. *Ibid.*

It is interesting to note that the court did not consider a possible violation of the First Amendment freedoms.

interest is common to the public as a whole, the press lacked the individual interest which was requisite for standing in court.[20]

In *State of Ohio v. Baker* the defendant was being tried on the charge of pandering.[21] The trial judge, on defendant's motion, excluded the general public and the press from the courtroom during the cross-examination of a witness. The defendant's counsel claimed that he would be "better able to compel the witness to tell the truth" if cross-examination were conducted in private. In granting the request, and possibly in answer to the objection made by the press, the trial judge commented that "if, in the future," a defendant wishes to waive his right to a public trial and moves for an exclusion, the judge "will deem it his duty to exercise his discretion, in the interest of a fair and orderly trial, to consider the extent to which he should exclude members of the public, including newspapermen," and that he "considers it to be within his jurisdiction and power to exercise his discretion, if circumstances warrant, to exclude entirely from his courtroom all members of the public, including newspapermen."[22] Aroused by this threat of future exclusion as well as the present one, the press instituted a separate proceeding for a writ prohibiting the trial judge from excluding the press and the general public on the ground that the Ohio Constitution confers on the public a right to open trials.[23] A peremptory writ was issued against the judge. On appeal, the Ohio Supreme Court held that the question at issue became moot because the exclusion of spectators ended before the writ was issued and that the declaration of the judge as to his future course of conduct under similar circumstances is not

20. The press brought proceedings in the nature of common law prohibition. Prohibition is usually brought in the name of the state on the theory that where an inferior court proceeds in excess of its lawful jurisdiction, it is in contempt of the sovereign, as well as grievance unlawfully imposed on the parties. For this reason courts are less likely to require the same degree of interest for using mandamus and other extraordinary remedies. Prohibition may be granted on application of any party or even a stranger to the record. No personal interest is required to be shown in the proceedings sought to be prohibited by the relator. For a discussion of the common law extraordinary legal remedies, see HIGH EXTRAORDINARY LEGAL REMEDIES, (2d ed. 1884).

21. State of Ohio v. Baker, as reported in E.W. Scripps Co. v. Fulton, —— Ohio App. ——, 125 N.E.2d 896 (1955). Since the exclusion was made on defendant's request, there was no question of violation of his right to a public trial as in the *Jelke Case.*

22. E.W. Scripps Co. v. Fulton, —— Ohio St. ——, ——, 130 N.E.2d 701, 702 (1955).

23. E.W. Scripps Co. v. Fulton, —— Ohio App. ——, 125 N.E.2d 896 (1955). Art. I, § 10, of the Ohio Constitution provides: "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law."

a proper subject of an action in prohibition.[24]

These cases illustrate the growing clash between two important constitutional principles—freedom of the press and the right to a fair trial.[25] The conflict is between interdependent rights. Fair and impartial trials are necessary to maintain freedom of the press. Free and uncensored press is likewise necessary to maintain fair and impartial trials in our judicial process.[26] Both are attributes of a free society.[27]

But the right of the press is no greater than the interest of the public which it represents. The interest protected by the First Amendment is not primarily that of the press to dispense the news but rather that of the public to acquire it.[28] To retain popular sovereignty, the

---

24. E.W. Scripps Co. v. Fulton, —— Ohio St. ——, 130 N.E.2d 701 (1955). The holding accords with the common law view. Prohibition is a preventive rather than a corrective remedy and issues only to prevent the commission of an act; therefore, if the issuance of the writ would prove unavailing, prohibition did not lie. In this case, since the exclusion terminated before the writ was issued, prohibition was unavailing. Prohibition will not be issued for the sole purpose of establishing a principle to govern other cases in the future. HIGH, *op. cit. supra* note 17, at 606-07. United States v. Hoffman, 4 Wal. 158 (U.S. 1866).

25. See CROSS, THE PEOPLE'S RIGHT TO KNOW, (1953), particularly, Chapter XI, dealing with the judicial process.

26. Hays, *Let Us Beware of Censorship,* 11 BAR BULL. 22 (1953). In the words of Mr. Justice Frankfurter: "Without a free press there can be no free society. Freedom of the press, however, is not an end in itself but a means to the end of a free society. . . . The independence of the judiciary is no less a means to the end of free society, and the proper functioning of an independent judiciary puts the freedom of the press in its proper perspective." Concurring opinion in Pennekamp v. State of Florida, 328 U.S. 331, 334 (1946).

27. "Freedom (in reference to First Amendment freedoms) protects us from those in power. By and large, worse calamities would result if those in power at the moment could manage affairs without having their conduct and policies subjected to a thoroughgoing review." 1 CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 40 (1947). Cooley feels that the purpose of free press is "to guard against repressive measures by the several departments of the government by means of which persons in power might secure themselves and favorites from just scrutiny and condemnation. . . . The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens." 2 COOLEY, CONSTITUTIONAL LIMITATIONS 885 (8th ed. 1927).

Mr. Justice Jackson, in dissent, observed that "the right of the people to have a free press is a vital one, but so is the right to have a calm and fair trial free from outside pressures and influences. Every other right, including the right of a free press itself, may depend on the ability to get a judicial hearing as dispassionate and impartial as the weakness inherent in men will permit. I think this publisher passed beyond the legitimate use of press freedom and infringed the citizen's right to a calm and impartial trial. I do not think we can say that it is beyond the power of the state to exert safeguards against such interference with the course of trial as we have here." Craig v. Harney, 331 U.S. 367, 394 (1947). Mr. Justice Jackson seems to recognize that both free press and fair trial are necessary attributes of a free society. There is a point, however indistinct, at which the freedom of the press ends and the duty to observe the defendant's right to a fair trial begins.

28. Near v. Minnesota, 283 U.S. 697, 722 (1931). This is the so-called *Minnesota Gag Law Case* where the Supreme Court held unconstitutional a statute which had the

public has a right to know, through personal observation or through other media, the occurrences that take place in the courtroom.[29]

As the basis of this right in the public, at least in theory, arises from the concept of popular sovereignty, it is not to be construed as attaching to particular individuals but to the public as a whole. Because it lacks the dignity of an individual right such as the individual's right to personal security or to property, the method of vindication on foreclosure may differ from that of the personal right.

The mere fact that the public interest involved in open trials is not a right in the ordinary acceptation of that word does not justify subordinating the interest to individual rights.[30] When a court decides that no right to an open trial exists in the public and that the only concern, whenever an exclusion is attempted, is the promotion of the

---

effect of suppressing information by providing for injunction against its publication. Five years after this case, in Grosjean v. American Press, 297 U.S. 233, 250 (1936), the Supreme Court held unconstitutional as prior restraint upon publication a statute imposing a license tax on the privilege of engaging in the newspaper business and asserted: "The predominant purpose of the grant of immunity here invoked was to preserve an untrammeled press as a vital source of public information . . . since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern."

29. "Freedom of the press, properly conceived, is basic to our constitutional system. Safeguards for the fair administration of criminal justice are enshrined in our Bill of Rights. Respect for both of these indispensable elements of our constitutional system presents some of the most difficult and delicate problems for adjudication when they are before the court for adjudication. . . . One of the demands of a democratic society is that the public should know what goes on in courts by being told by the press what happens there, to the end that the public may judge whether our system of criminal justice is fair and right. On the other hand our society has set apart court and jury as the tribunal for determining guilt or innocence on the basis of evidence adduced in court, so far as it is humanly possible." State of Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912 (1950).

30. In an organized society consisting of a conglomeration of individual and group interests, no individual right can be absolute and unbounded. In the nature of things every private right must be qualified, and an adjustment process must be devised to define the qualifications. Consider the following quotation: "Man, as with all forms of life, wants to be free to move and to act, to struggle for satisfactions and seek for happiness, to strive for ends of purposive achievement and to aspire to higher levels of commutual relations and human understandings. But his freedom is always conditioned by the limitations of his own innate powers and is circumscribed by the desires of other individuals and the interests of the state, to the security and general welfare of which every need and want of its every member must defer and bend in submissive obedience. Man may and does crave and formally has avowed his natural and inalienable right to 'life, liberty and the pursuit of happiness', but not even life itself has an inherent individual right to continue. . . .

"Man in truth is without indefeasible rights . . . because, as Harrington suggested and Locke concluded, the group-state through its government must survive, must achieve its foundation purpose of order through law and must advance its social ends through definitions of human rights and the consequent control of the sphere of individual power and action." VALE, *op. cit. supra* note 11, at 478-79.

defendant's right to a fair trial,[31] it unduly minimizes the complexity of the issue involved by ignoring pre-constitutional history. In the final analysis, an adjustment must be made between the rights and interests in conflict, whether between the defendant's right to a fair trial and the right of the press and the public in acquiring knowledge of the happenings in court or between the defendant's right and that of a particular witness whose personal safety or reputation may be in danger.[32] The process of weighing the various interests in the determination of the propriety and the scope of any exclusion seems properly a part of the trial judge's discretionary powers, for no standards can be set up to cover the infinite number of circumstances in which the problem may arise. Any attempt to set up categories by legislation might lead to a mechanical resolution of the problem which may prove to be a hindrance rather than an aid to the administration of criminal justice.[33]

It would be meaningless to recognize a right in the public if it had no means of vindicating it.[34] The *Jelke* case shows that where the right of an accused to a public trial is improperly foreclosed, his remedy lies in requesting a new trial.[35] The remedy for improper foreclosure of the public's right is not as easily stated, for the public and the press are not direct parties in a criminal proceeding. The New York court stated that even if a right were recognized in the public it would not

31. This is the theory upon which numerous American cases are based. See, for example, Tanksley v. United States, 145 F.2d 58 (9th Cir. 1944); State v. Callahan, 100 Minn. 63, 110 N.W. 342 (1907).

32. For instances where courts have excluded the public out of special regard for the interest of a witness, see Commonwealth v. Principatti, 260 Pa. 587, 104 A. 53 (1918); Dutton v. State, 123 Md. 373, 91 A. 417 (1914); Beauchamp v. Cahill, 297 Ky. 505, 180 S.W.2d 423 (1944); Hogan v. State, 191 Ark. 437, 86 S.W.2d 931 (1935): State v. Callahan, 100 Minn. 63, 110 N.W. 342 (1907). For the interest of the accused see Moore v. Dempsey, 261 U.S. 861 (1923). For protection of public morals see State v. Croak, 167 La. 92, 118 So. 703 (1928); State v. Johnson, 26 Idaho 609, 144 P. 784 (1914).

Statutes of several states provide for exclusion of the public in prosecutions for rape, adultery, sodomy, fornication and divorce and juvenile proceedings. For a collection of these statutes see WIGMORE, *op. cit. supra* note 4, at 338-343.

33. Legislation providing for closed proceedings in juvenile court cases may be considered as an attempt by the legislature to set up categories. The balancing of interests is done by the legislature, and the welfare of the child is determined to be the overriding interest to be protected. The assumption seems to be that the juvenile's interest will be better protected in a closed trial. In contrast is the trial of adults where the presumption is reversed. As in the cases of an adult, if the circumstances show that the presumption is not valid for the particular case, it seems that the juvenile should be given the opportunity of being heard in open proceedings. The legislative determination should not be held conclusive of the matter.

34. It is a familiar legal principle that "if a person has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it." This is the doctrine of *ubi jus ibi remedium*. "It is a vain thing to imagine a right without a remedy; for want of right, and want of remedy are reciprocal." DICEY, PARTIES TO AN ACTION (1886).

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

be an enforcible one for the right belongs to the public as a whole; the individual interest which is requisite for standing in court is lacking.[36] The rationale appears to be that the prosecutor defends the public interest, and the public or the press has no right to intervene in the criminal proceedings. Any remedy to the public, where the prosecutor fails to assert the public interest, must be through the political process. The public's right, however, is based on the Constitution and deserves more effective means of vindication. Members of the public should at least be permitted to adjudicate the public interest through extraordinary proceedings in mandamus and prohibition. But this approach is not without difficulties.[37]

The Ohio case illustrates that even if the public right is recognized as attaching to individuals or groups such as the press, prohibition is unavailing where the exclusion has terminated.[38] If the trial is in progress and the exclusion order is in operation when the writ is issued, then prohibition is effective to the extent that it keeps the trial open for public observation for the remainder of the proceedings. Its effectiveness depends on the speed with which the writ can be obtained; full effectiveness is an impossibility unless the proceedings can be stopped as soon as the order of exclusion is issued by the trial judge.

Where prohibition will prove unavailing, mandamus may be used effectively in a narrow area. The object of mandamus is to compel action where there is inaction rather than to prohibit action; therefore, it may be invoked where there is inaction on the part of the trial judge in the course of his issuance of the exclusion order. This inaction may be found in the trial judge's refusal to exercise his discretion in making the ruling or in his refusal to hold a hearing as an aid to the exercise of his discretion. For example, if the trial judge orders an exclusion, on motion by the defendant, without a hearing, on the ground that he has no discretion in the matter, mandamus may lie to compel him to hold a hearing or to exercise his discretionary powers. This will not insure an open trial, but, by forcing the trial judge to deliberate on

36. United Press Ass'n v. Valente, 308 N.Y. at 84, 123 N.E.2d at 783.

37. Rigid rules were set up by the early common law courts in the application of the extraordinary writs. The tendency, however, has been toward flexibility in procedural rules by looking to the purpose underlying the remedy. See, e.g., Quimbo Appo v. The People, 20 N.Y. 531 (1860); North Bloomfield G.M. Co. v. Keyser, 58 Cal. 315 (1881). Flexibility has also been achieved through the use of legal fictions. By this method the essence of a given rule is changed while homage is paid to the letter. By the use of either method common law prohibition and mandamus may be employed. Whether they are effective remedies is another problem.

38. E. W. Scripps Co. v. Fulton, —— Ohio St. ——, 130 N.E.2d at 703.

the question, it will tend to infuse responsibility in the judicial process.[39]

Where a hearing is held before an order of exclusion is issued, another method by which the press or other members of the public can assert their right is to appear, by leave of court, as *amicus curiae.*[40] Although it lies within the discretion of the court to accept the advice of *amicus curiae,* their appearance will serve to place the intervener's position into the "hopper" of arguments to be considered by the trial judge in the weighing process before exercising his discretion in the matter.

The fact that the courts have only recently found it necessary to include the press within the scope of exclusionary orders seems siguificant.[41] The impact of "trial by newspaper" on the accused's right to a fair trial coupled with the courts' inability to use the contempt power to curb press abuses may be the reason for this resort to exclusion.[42] "Trial by newspaper" is undesirable because it prejudices

39. For a discussion of the origin and nature of the common law writ of mandamus, see HIGH, *op. cit. supra* note 17, at 4-37.

40. That this was allowed in early common law practice is indicated in the statement of Sir John Hawles made in 1690 when commenting on Cornish's trial. "The reason that all matters of law are, or ought to be, transacted publicly is that any person, unconcerned as well as concerned, may as 'amicus curiae' inform the Court better, if he thinks they are in error, that justice may be done; and the reason that all trials are public is that any person may inform in point of fact, though not subpoena'd, that truth may be discovered, in civil as well as in criminal cases. There is an invitation, to all persons who can inform the Court concerning the matter to be tried, to come into the Court, and they shall be heard."

41. Not until United Press Ass'n v. Valente, was the question of the public's right to a public trial been squarely litigated.

42. The best method of protecting the accused from the prejudicial effect of "trial by newspaper" has been of great concern. In England, such publicity is effectively curbed by free use of the contempt power. See FOX, THE HISTORY OF CONTEMPT OF COURT (1927); Goodhart, *Newspapers and Contempt of Court in English Law,* 48 HARV. L.R. 885 (1935); Note, *Free Speech vs. The Fair Trial in the English and American Law of Contempt by Publication,* 17 U. OF CHI. L. R. 540 (1950). See also Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 921-36 (1950).

In the United States major limitations have been placed upon the courts' power to punish summarily for contempt. So far as the federal courts are concerned, the "in or near" doctrine, interpreted as geographical, physical nearness, effectively bars the traditional contempt for publication proceedings. 18 U.S.C. § 401; Nye v. United States, 313 U.S. 33 (1941). Mr. Justice Jackson stated in Shepherd v. Florida, 341 U.S. 50 (1950): "This court has gone a long way to disable a trial judge from dealing with press interference with the trial practices." Judge Magruder of the First Circuit asserts: "More fundamentally, it has been thought that this modern phenomenon of 'trial by newspaper' is protected to a considerable degree by the constitutional right of freedom of the press. . . . On this view there has been some fatalistic acceptance of 'trial by newspaper,' however unfortunate, 'as an unavoidable curse of metropolitan living (like, I suppose, crowded subways).'" Delaney v. United States, 199 F.2d 107 (1952). Judge Magruder, of course, was referring to Bridges v. California, 314 U.S. 252 (1941); Pennekamp v. Florida, 328 U.S. 331 (1946); and Craig v. Harney, 331 U.S. 367 (1947). As to the state courts, they are effectively limited by the "clear and present danger" doctrine which gives the Supreme Court power to review convictions of state courts to

the minds of the jurors, thus preventing the fair administration of criminal justice. It potentially reverses the presumption of innocence to one of guilt. The effectiveness of the exclusionary order as a remedy for press abuses is, however, open to doubt. Exclusion may tend to preserve the presumption of innocence to a degree, but it fails to counteract the evil of "trial by newspaper" which arises in many cases before the trial begins. The order tends to punish the innocent, for all newspapers are not guilty of this vice in the sensational cases. Thus while the exclusion protects the accused's right to a fair trial, it may unnecessarily encroach on freedom of the press and the public right to know and participate in the governmental process. At the present time, only through the weighing process and a liberal policy towards intervention as *amicus curiae* by representative members of the public, where rights are threatened to be foreclosed, can the public's right to know be protected against arbitrary restriction.

TECHNOLOGICAL CHANGE: MANAGEMENT PREROGATIVE VS. JOB SECURITY

Recent congressional hearings[1] have focused attention on the growing problems wrought by technological changes[2] and consequent displacement. Because its purpose is to increase productivity and profits by reduced labor costs,[3] technological change is opposed by some fearful

determine whether there has been a violation of a constitutional right. Bridges v. California, 314 U.S. 252 (1941). "The courts are then limited to doing what they can to insulate jurors from the prejudicial effect of such publicity, as by cautionary instructions or by the granting of continuances, or in some cases granting a change of venue." Delaney v. United States, *supra,* at 113. The courts have, perhaps, found in exclusion an effective deterrent to "trial by newspaper."

1. H.R. RES. 221, 84th Cong., 1st Sess. (1955). "Resolution creating a select committee to conduct an investigation and study of the effects of increasing automation upon the American economy." 101 CONG. REC. 4180 (daily ed. April 21, 1955). The committee held hearings in October 1955 at which representatives of management and labor testified.

2. Technological change is used in a broad sense and in this note and means the use of labor saving devices and all types of modern manufacturing methods. These methods include automation, mechanization, and improved operational and organizational techniques. The discussion is chiefly related to the mass production manufacturing plants.

3. "The Annual Improvement Factor . . . recognizes that a continuing improvement in the standard of living of employees depends upon technological progress, better tools, methods, processes, and equipment, and a cooperative attitude on the part of all parties in such progress. It further recognizes the principle that to produce more with the same amount of human effort is a sound economic and social objective." 5 CCH LAB. L. REP. (4th ed.) ¶ 59923.095 (1955) (Ford Motor Co.-UAW Contract).