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A Public Trial

The right to a public trial by an accused is secured throughout the country both by the Federal Constitution¹ and by most of the Constitutions of the various States.² Even in the absence of such provisions in the State Constitutions the accused could not be deprived of this fundamental right, for the United States Supreme Court has held that the Sixth Amendment of the Federal Constitution guaranteeing a public trial is incorporated in the due process clause of the Fourteenth Amendment.³ There has been an abundance of material and a wealth of cases dealing with the accused's right to a public trial and it is generally conceded that the right belongs primarily to the accused and is for his protection.⁴ While the right to a public trial in criminal cases is well established, there is disagreement as to the limitations of this right, that is, disagreement as to what constitutes a public trial or the absence of one. Currently the question has been raised whether the right is solely for the benefit of the accused, or is shared by the public.⁵ The argument advanced by those who interpret the right to a public trial literally is that, at common law, a criminal trial was public in its true sense and everyone who could find room was admitted to the proceedings; and that it is fair to assume that this is what the framers had in mind when the provision for a public trial was included in the various State and Federal Constitutions.

The history of a defendant's right to a public trial has been traced back to the early beginning of the English Common Law. Although its exact origin

¹ U. S. CONST., AMEND. VI. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ." See *Tanklesley v. U. S.*, 145 F. 2d 58 (9th Cir. 1944); *U. S. v. Kobli*, 172 F. 2d 919 (3rd Cir. 1949).

² Ala. Const., Art. I, §6; Ariz. Const., Art. II, §24; Ark. Const., Art. II, §10; Cal. Const., Art. I, §13; Colo. Const., Art. II, §16; Conn. Const., Art. I, §9; Del. Const., Art. I, §7; Fla. Const., Declaration of Rights, §11; Ga. Const., Art. I, §1, par. V; Idaho Const., Art. I, §13; Ill. Const., Art. II, §9; Ind. Const., Art. I, §13; Iowa Const., Art. I, §10; Kan. Const., Bill of Rights, §10; Ky. Const., §11; La. Const., Art. I, §9; Me. Const., Art. I, §6; Mich. Const., Art. II, §19; Minn. Const., Art. I, §6; Miss. Const., Art. 3, §26; Mo. Const., Art. I, §18; Mont. Const., Art. III, §16; Neb. Const., Art. I, §11; N. J. Const., Art. I, §8; N. M. Const., Art. II, §14; N. C. Const., Art. I, §13 ("open court"); N. D. Const., Art. I, §13; Ohio Const., Art. I, §10; Okla. Const., Art. II, §20; Ore. Const., Art. I, §11; Pa. Const., Art. I, §9; R. I. Const., Art. I, §10; S. C. Const., Art. I, §18; S. D. Const., Art. 6, §7; Tenn. Const., Art. I, §9; Texas Const., Art. I, §10; Utah Const., Art. I, §12; Vt. Const., ch. I, Art. 10th; Wash. Const., Art. I, §22; W. Va. Const., Art. III, §14; Wis. Const., Art. I, §7.

³ *In re Oliver*, 333 U. S. 257 (1948).

⁴ See 156 A. L. R. 257; Radin, *The Right to a Public Trial*, 6 Temp. L. Q. 381 (1932); 49 Col. L. Rev. 110 (1949); 35 Cornell L. Q. 395 (1949-50); 25 Temp. L. Q. 91 (1951-52); 28 Texas L. Rev. 265 (1949-50); and, CROSS, THE PEOPLE'S RIGHT TO KNOW (1953).

⁵ *United Press Ass'n v. Valente*, 281 App. Div. 395, 120 N. Y. S. 395 (1953). Also see: *People v. Hartman*, 103 Cal. 242, 37 Pac. 153 (1894); *State v. Keeler*, 52 Mont. 205, 156 Pac. 1080 (1916); *State v. Hensley*, 75 Ohio St. 255, 79 N. E. 462 (1906); *State v. Bonza*, 72 Utah 177, 269 Pac. 480 (1928).

is not known, the right has always been closely allied with the right to a jury trial.⁶ The reasons given for the requirement that a trial be public are that "Star Chamber" proceedings are eliminated, and that "the knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power."⁷ Professor Wigmore states that a public trial is desirable because: (1) publicity makes for trustworthiness and completeness of testimony, (2) a wholesome effect is produced upon all the officers of the court, (3) a public trial informs those who are likely to be affected by the proceedings, and (4) a public trial has an educative effect upon the public in that respect for the law is increased and confidence is secured in judicial remedies.⁸

The requisite that a trial be public has been held by some courts to mean that the public or part of the public cannot be excluded from the courtroom.⁹ Other cases have held that a public trial does not mean that every person who wishes must be admitted to the courtroom.¹⁰ The basis for exclusion of the public by the courts that interpret the right broadly rests upon the fact that the requirement of a public trial is for the benefit of the accused and that the public merely has the privilege to attend.¹¹ The demand for a public trial in these jurisdictions is fulfilled merely if a reasonable proportion of the public is allowed to attend and the remainder of the public may be excluded without impairing the accused's right.¹² The requirement of a public trial was fulfilled at common law even though those persons were excluded who were attracted by curiosity.¹³ It is held in almost all jurisdictions that the public may be excluded when administration of justice is interfered with,¹⁴ or because of limitations of space,¹⁵ or because of the conduct of the spectators.¹⁶ There is also substantial agreement that the public may be excluded when their presence may embarrass a young girl who may be called as a witness in cases involving rape or scandalous and indecent matter.¹⁷

When we move over into the area where the character of the evidence determines the admission or exclusion of the public from the courtroom, it is difficult

⁶ See CROSS, *THE PEOPLE'S RIGHT TO KNOW* (1953), p. 155; Radin, *The Right to a Public Trial*, 6 Temp. L. Q. 381 (1932). Also see *In re Oliver*, *supra* note 5, for a short history of the right to a public trial.

⁷ *In re Oliver*, *supra* note 5, at 270.

⁸ 6 WIGMORE, *EVIDENCE* §1834 (3rd ed. 1940).

⁹ 14 Am. Jur. §141, n. 12.

¹⁰ *Id.* n. 11.

¹¹ See Radin, *The Right to a Public Trial*, 6 Temp. L. Q. 381 (1932).

¹² COOLEY, *CONSTITUTIONAL LIMITATIONS* (7th ed. 1903), p. 441.

¹³ 6 WIGMORE, *EVIDENCE* §1835 (3rd ed. 1940).

¹⁴ *Davis v. Smith*, 247 Fed. 394 (8th Cir. 1917); *Makley v. State*, 490 Ohio App. 359, 197 N. E. 339 (1934).

¹⁵ *Wendling v. Commonwealth*, 143 Ky. 587, 137 S. W. 205 (1911); *Kugadt v. State*, 38 Tex. Crim. Rep. 691, 44 S. W. 989 (1898); *Commonwealth v. Trinkle*, 297 Pa. 564, 124 Atl. 191 (1924).

¹⁶ *Wade v. State*, 207 Ala. 1, 92 So. 101 (1921); *People v. Hartman*, 103 Cal. 242, 37 Pac. 153 (1894).

¹⁷ See 4 Stanford Law Review 101 (1951-52).

to state a general rule for it is here that the cases are in greatest conflict. While a number of cases have raised the question whether the courts have the power, in the absence of a statute, to exclude everyone from the courtroom because of the character of the evidence, nevertheless, much depends upon the interpretation of the word "public" and who is excluded.¹⁸ Some courts have held that a trial is public even though only the relatives of the accused are present, while other courts have held to the contrary if members of the press were not included in the small coterie of spectators permitted to attend.¹⁹

Jurisdictions that hold the exclusion of the public is dependent upon the nature of the evidence can be divided into two groups. A majority of jurisdictions, supported by statutes, state that the courts can exclude the greater portion of the audience because of the character of the evidence, but only as long as no actual prejudice results to the defendant from the exclusion.²⁰ A limited number of jurisdictions, on the other hand, hold that a trial must be public in a literal sense regardless of the character of the evidence.

The majority of jurisdictions interpret the guarantee of a public trial broadly and hold that a trial is public as long as it is not secret.²¹ Thus, as long as there is a special or limited group of spectators in attendance at a trial, such as, members of the bar, newspapermen, or friends and relatives of the accused, the right to a public trial is met, even though the general public is excluded.²² In these jurisdictions the accused must show actual prejudice as a result of the exclusion of the general public before the court will consider whether there has been a violation of the constitutional right.²³ These courts that regard this right with less vigor hold that failure to interpose an objection to the exclusion of the public constitutes a waiver of the right.²⁴

A minority of jurisdictions, namely, those that adhere to the literal view of a public trial and insist that a trial be truly public, hold that the right to a public trial is not waived by the defendant by mere failure to object to the exclusion of spectators.²⁵ Cases have been overturned in these jurisdictions even when attendance at a trial was limited to a group of a special class. Thus, in cases where attendance at a "public trial" was limited to only those "having

¹⁸ 156 A. L. R. 257, 276 (1945).

¹⁹ *Davis v. U. S.*, 247 Fed. 394 (8th Cir. 1917). But see: *Commonwealth v. Blondin*, 324 Mass. 564, 87 N. E. 2d 455 (1949); *State v. Marsh*, 126 Wash. 142, 217 Pac. 705 (1923).

²⁰ See 28 Texas L. Rev. 265 (1949-50).

²¹ *Reagan v. U. S.*, 202 Fed. 488 (9th Cir. 1913); *Keddington v. State*, 19 Ariz. 457, 172 Pac. 273 (1918); *People v. Hall*, 51 App. Div. 57, 64 N. Y. S. 433 (1914).

²² *Reagan v. U. S.*, 202 Fed. 488 (9th Cir. 1913); *Grimmett v. State*, 22 Tex. Crim. Rep. 36, 2 S. W. 631 (1886); *State v. Nypphus*, 19 N. D. 326, 124 N. W. 71 (1909).

²³ *Reagan v. U. S.*, 202 Fed. 488 (9th Cir. 1913); *Benedict v. People*, 23 Colo. 126, 46 Pac. 637 (1896); *State v. Nypphus*, 19 N. D. 326, 124 N. W. 71 (1909).

²⁴ *People v. Swafford*, 65 Cal. 223, 3 Pac. 809 (1889); *Benedict v. People*, 23 Colo. 126, 46 Pac. 637 (1896).

²⁵ *Stewart v. State*, 18 Ala. App. 662, 93 So. 274 (1922); *State v. Marsh*, 126 Wash. 142, 217 Pac. 705 (1923).

an interest in the case,"²⁶ members of the press,²⁷ or relatives or designated friends of the defendant,²⁸ the courts have held that the publicity of the proceeding was not sufficient.

The case of *United States v. Kolbi*²⁹ is a good example of the second group of cases, that is, cases that interpret literally the constitutional guarantee of a public trial. In the *Kolbi* case the defendant was on trial for conspiring to violate the Mann Act. The Judge ordered the exclusion of all persons (including many young girls) from the courtroom, except those having an interest in the case and except the press, because of the character of the evidence to be presented. The defendant was subsequently found guilty as charged. On appeal the Court held that attendance only of the newspapermen, aside from those having an interest in the case, was not sufficient to meet the requirement for a public trial. The Court also held that it is reversible error without a showing of prejudice to exclude the public from the courtroom.³⁰

Some courts in these jurisdictions have placed such a high value on the constitutional guarantee of a public trial that they consider the right also to be shared by the public.³¹ These courts that regard the right so highly almost unanimously hold that the public's right is co-existent³² with the right of the accused, and that the right must be accorded a construction not inconsistent with the rule laid down in Cooley's Constitutional Limitations.³³ The contention in these cases is that unless the public is admitted to the courtroom, the public cannot see that the accused is fairly dealt with.

In the case of *State v. Keeler*³⁴ the court stated that, while the purpose of the right was primarily for the accused, it likewise involves questions of public interest and concern. The court went on to say that "the people are interested in knowing and have the right to know how their servants—the judge, county

²⁶ *People v. Byrnes*, 84 Cal. App. 2d 72, 190 P. 2d 290 (1948).

²⁷ *State v. Keeler*, 52 Mont. 205, 156 Pac. 1080 (1918); *State v. Hensley*, 75 Ohio St. 255, 79 N. E. 462 (1906).

²⁸ *Wade v. State*, 207 Ala. 1, 92 So. 101 (1921); *People v. Yeager*, 113 Mich. 228, 71 N. W. 491 (1897).

²⁹ 172 F. 2d 919 (3rd Cir. 1949); see 35 Cornell L. Q. 395 (1949-50).

³⁰ *Tanksley v. U. S.*, 145 F. 2d 58 (9th Cir. 1944). See *Davis v. U. S.*, 247 Fed. 394 (8th Cir. 1917); *Wade v. State*, 207 Ala. 1, 92 So. 101 (1921); *People v. Byrnes*, 84 Cal. App. 2d 72, 190 P. 2d (1948); *People v. Yeager*, 113 Mich. 228, 71 N. W. 491 (1897); *State v. Hensley*, 75 Ohio St. 255, 79 N. E. 462 (1906); 156 A. L. R. 257.

³¹ *People v. Hartman*, 103 Cal. 242, 37 Pac. 153 (1894); *State v. Keeler*, 52 Mont. 205, 156 Pac. 1080 (1916); *State v. Copp*, 15 N. H. 212 (1844); *State v. Hensley*, 75 Ohio St. 255, 79 N. E. 462 (1906); *State v. Bonza*, 72 Utah 177, 269 Pac. 480 (1928).

³² *State v. Bonza*, 72 Utah 177, 269 Pac. 480 (1928), "anything short of such requirements cannot well be said to be a public trial."

³³ "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 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." COOLEY, CONSTITUTIONAL LIMITATIONS 441 (7th ed. 1903).

³⁴ 52 Mont. 205, 156 Pac. 1080 (1916).

attorney, sheriff, and clerk—conduct the public's business."

In *People v. Hartman*⁸⁵ it was stated that the trial should be "public" in the ordinary sense of the term and that "the doors of the courtroom are expected to be kept open, the public entitled to be admitted."

In a suit by an ejected spectator against the judge who ordered his removal, it was held that, even though the evidence might have been salacious, spectators could not be arbitrarily ejected from the courtroom.⁸⁶ It was pointed out that the right to have the courts open is the right of the public.⁸⁷

In *State v. Hensley*⁸⁸ the court stated that the term "public", in its enlarged sense, takes in the entire community and does not limit or restrict attendance to any particular class but that the courtroom is open to the free observation of all.

Similarly, in the case of *Davis v. United States*⁸⁹ the court stated that a public trial is a trial at which the public is free to attend. The court went on to say: "It is not essential to the right of attendance that a person be a relative of the accused, an attorney, a witness, or a reporter for the press, nor can those classes be taken as the exclusive representatives of the public."

As a result of this view, that is, that the public also has an interest in a public trial, the members of the press, as representatives of all the people, challenge any exclusion of the public from the courtroom. There are, however, relatively few instances where the press has been excluded. Even in jurisdictions that maintain the right to a public trial is solely for the accused, provisions are usually made to allow the members of the press to remain after all other spectators have been excluded. In these jurisdictions, the courts have justified the attendance of the press on the grounds that as representatives of the public they "have an interest in the case" and have a legitimate reason for being present.⁴⁰

The most recent State Court decision involving "public trials" and the right of the public to attend, in particular, the right of the press as representatives of the public to attend, was the case of *United Press Assn's v. Valente*.⁴¹ The case involved pandering and everyone (including the press) was excluded from the courtroom except such persons as the defendant deemed necessary for his comfort and protection, including friends and relatives. The newspaper publishers challenged the trial judge's order alleging that this was a violation of the guarantee of public trial in criminal actions and that the press, as members of the public, had a right to attend the trial.

⁸⁵ 103 Cal. 242, 245, 37 Pac. 153, 154 (1894).

⁸⁶ 86 Me. 80, 29 Atl. 943 (1893). The action was one of trespass against the trial Judge for ordering plaintiff's forcible removal after he ignored the Judge's order excluding all the spectators from the courtroom. After upholding the spectator's right to be present the court held that the defendant Judge acted from honest motive and cannot be held liable while acting within his jurisdiction.

⁸⁷ *State v. Copp*, 15 N. H. 212 (1844).

⁸⁸ 75 Ohio St. 255, 79 N. E. 462 (1906).

⁸⁹ 247 Fed. 394 (8th Cir. 1917).

⁴⁰ See *Commonwealth v. Blondin*, 324 Mass. 564, 87 N. E. 2d 455 (1949); *State v. Marsh*, 126 Wash. 142, 217 Pac. 705 (1923).

⁴¹ 281 App. Div. 395, 120 N. Y. S. 395 (1953).

The Supreme Court of New York held that although every citizen could freely attend the sittings of every court, nevertheless, the public is not endowed with an independent right and could not assert the accused's right to a public trial for him. A statute gave the judge permission to exclude the public (press included) at his discretion in certain types of trials. The court went on to say that the contention of the press that they had a right to attend the proceedings was closely interwoven with the defendant's right to a public trial. The right, however, belonged solely to the accused and he alone could assert the right.

Thus, the New York case was the first decision on the precise question of the right of the public in a public trial. Any right that the public may have does not come from the constitutional provision that criminal trials must be public. Prior cases grouped New York with those jurisdictions that adopted the broader view of public trials, namely, that the public may be excluded, with or without a statute, when in the discretion of the judge the character of the evidence warrants such an exclusion. The decision of the case of *United Press Assn's v. Valente*⁴² was consistent with the earlier New York cases and merely a logical extension of the earlier decisions.⁴³

Even though the guarantee to a public trial is couched in general terms in the various State and Federal Constitutions, it is fair to assume that the framers included the provision for a public trial for the benefit of the accused without any thought of the public sharing this right. While it may be true that at common law a trial was public in a literal sense, nevertheless, the right is not an absolute one. Discretion should be vested in the trial judge to limit attendance in certain types of cases when the ends of justice warrant such exclusion. Undoubtedly specific instances can be conjured when restricted attendance could lead to inequities. It is to be noted, however, that no jurisdiction excludes everyone from the courtroom, but, at most, the courts bar only the general public and allow some "spectators" to remain in attendance. A majority of the States have avoided the problem of public trials by taking the middle ground and have enacted statutes permitting a judge, in his discretion, to restrict admission in certain types of cases. Thus, by limiting the exercise of the judges' discretion to merely those cases in which the character of the evidence is salacious, the objection to the exclusion of the general public is even less valid. The objection to restricting admission to the courtroom to a special group on the grounds that such a group is not truly representative of the public is without merit. The fact that a special group is permitted to attend a criminal trial should more than satisfy the requirement of publicity for there is no necessity that those in attendance be a true cross-section of the public.

While a limited number of jurisdictions require unrestricted attendance at public trials, an overwhelming number of jurisdictions limit attendance at public

⁴² *Ibid.*

⁴³ *People v. Hall*, 51 App. Div. 57, 64 N. Y. S. 433 (1914); *People v. Miller*, 257 N. Y. 54, 177 N. E. 306 (1931).

trials by statute or vest the trial judge with discretion to exclude the public from the courtroom. It cannot be denied that the public has an interest in public trials, however, the public right in a public trial is not derived from the constitutional guarantee of a public trial, but rather is an independent right bestowed on the public so that they may see and know how justice is administered. The right to a public trial, as provided for in the Federal and State Constitutions, is for the benefit of the accused and the public merely has a privilege to attend.

JOSEPH M. KOLMACIC

Espionage Prosecutions In The United States

The great dispute over the legality of the death sentence for the Rosenbergs, convicted of conspiracy to commit espionage in violation of the 1917 Espionage Act,¹ has now entered that collection of controversies which will always be a subject for study, particularly to legal minds, of the extreme care exercised in American judicial processes to assure that no person, however guilty, however heinous his crime, shall be condemned except by due process of law.

In the entire record of espionage against the United States, there has been no case of its magnitude and drama.² The case attracted the attention of the

¹ 50 U. S. C. §§32 (a), 34. The Act as now reads is 18 U. S. C. §§794 et seq., the pertinent parts of which are:

(a) Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits or attempts to communicate, deliver, or transmit, to any foreign government, . . . or to any representative, officer, agent, employee, subject, or citizen thereof, either directly, or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be imprisoned not more than twenty years.

(b) Whoever violates subsection (a) in time of war shall be punished by death or by imprisonment for not more than thirty years.

(c)

(d) If two or more persons conspire to violate this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy.

² The literature by partisans of opposing viewpoints is voluminous, of which the following are a few examples: America, *Atomic-age Executions*, July 4, 1953, p. 353; America, *The Rosenberg Case: A Cause Celebré*, June 27, 1953, p. 329; Christian Century, *No Executive Clemency for the Rosenbergs*, Feb. 25, 1953, p. 213; Commonweal, *Regarding the Rosenbergs*, Jan. 9, 1953, p. 344; Life, *The Case of the World's Greatest Secret*, April 16, 1953, p. 53; Look, *Red Spies in the United States*, June 19, 1951, p. 31; New Republic, *The Crime and Punishment of the Rosenbergs*, June 29, 1953, p. 6; Scholastic, *Atom Spies: Last Round?*, Feb. 25, 1953, p. 14; Time, *Mercy and Justice*, Feb. 23, 1953, p. 24; The Nation, *Rosenberg Case*, Nov. 8, 1952, p. 422; US News and World Report, *How the Law Protected the Rights of the Rosenbergs*, June 26, 1953, p. 32.