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The Right to a Public Trial

Thomas S. Schattenfield

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Much has also been written about the claim that a navigable body of water must have a terminus at each end.⁴⁶ In other words, there must be a point of ingress where one enters the waterway and some other place of egress where one leaves it. Reflection leads one to the conclusion that, instead of a separate test, this statement is merely a metaphysical analysis of the concept of highway. Just as the human mind cannot conceive of a stick with only one end, so, it seems, a highway must come from one place and lead to another.

CONCLUSION

This, then, is maritime jurisdiction with respect to water. The present test—navigability—is a marked improvement over the older rules because it reaches the heart of the matter with which admiralty is concerned. It is a practical and realistic standard and through it the federal courts of this country enjoy the traditional maritime powers and authority.

RICHARD J. CUSICK, JR.

The Right to a Public Trial

One of the fundamental guarantees of individual liberty granted us by the Bill of Rights¹ is that contained in the sixth amendment:² "In all criminal prosecutions, the accused shall enjoy the right to a public trial." The real import of this provision is better appreciated when we realize that it is through the agency of public trials that the freedoms most evident to the average individual, those of speech, press, religion and assembly, are enforced. We have witnessed the failure of international organizations to achieve world peace because no provision was made for enforcement of the precepts of peace. So, too, the guarantees of freedom of speech, press, religion, and assembly would be mere historical mementoes of the Eighteenth Century if some provision had not been incorporated along with the guarantees to insure their protection and punish their abuse. The enforcement agency is our system of courts,³ and an integral part of this system is the public trial.

HISTORICAL BACKGROUND

Although the civil liberties of man are characterized by many as inherent, they are in reality the culmination of a gradual growth having roots in no one definitive act or proclamation. While we can give exact

⁴⁶ *Manigault v. S. M. Ward & Co.*, 123 Fed. 707 (C.C.D.S.C. 1903); *Chisholm v. Caines*, 67 Fed. 285 (C.C.D.S.C. 1894)

dates for the ratifying of Constitutions or signing of Magna Charta, the principles which they promulgate are not inventions of the moment, but rather a product of the gradual evolution of social thought. Thus, it is not difficult to understand why there is some disagreement as to the source of the "public trial" principle.⁴

Although the Romans are known to have had public trials in certain cases,⁵ there is no evidence that the Anglo-American public trial evolved from the Roman law. Professor Radin feels that its adoption in our system of jurisprudence is an historical accident. According to him, it evolved from the large panels which were part of the early English jury trial system and was strengthened by years of tradition.⁶

Whether the right was established as early as 1267, a scant fifty-two years after Magna Charta, seems to be unsettled.⁷ However, Sir Thomas Smith in 1565⁸ and Sir Matthew Hale in 1670⁹ made open reference to the public nature of the English trial and it is certain that in the Seventeenth Century the accused could demand such a trial in England.¹⁰ Whatever its source, it is well-established that the principle is an integral part of our common law heritage.¹¹

¹ First ten amendments to the United States Constitution.

² Sixth amendment to the United States Constitution.

³ The importance of the courts to individual liberty was expressed by Mr. Justice Davis in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) when he stated, "when peace prevails, and the authority of the government is undisputed, there is no difficulty of preserving the safeguards of liberty; for the ordinary modes of trial are never neglected." Later in his opinion, Mr. Justice Davis, commenting on the alleged right of the military to suspend the right of civil trial in an unthreatened area, said, "if true, republican government is a failure, and there is an end of liberty regulated by law."

⁴ "Informal commentators do not agree as to when and why the right to a public trial was first developed. Probably this disagreement is due to the great age of the right and to the fact that it has long been taken for granted." Shapiro, *Right to a Public Trial*, 41 J. CRIM. L. 782 (1950)

⁵ ESMERIN, A HISTORY OF CONTINENTAL CRIMINAL PROCEDURE 23 (1913 ed.).

⁶ Radin, *The Right to a Public Trial*, 6 TEMP. L. Q. 381, 388-389 (1932).

⁷ Judge Froessel in his dissent in *United Press Associations v. Valente*, 308 N.Y. 71, 123 N.E.2d 777 (1954) cites Sir Edward Coke as authority for the interpretation of the Statutum de Marleberge, 52 Hen. 3 (1267), as including the concept of public trial. Professor Radin, *The Right to a Public Trial*, 6 TEMP. L. Q. 381 (1932), says that Coke made no mention about publicity of trials in the section of his work pertaining to that period, SECOND INSTITUTE, MAGNA CARTA, chap. 29 (Ed. 1797, 2d part). Judge Frossel in citing this work, Vol. 1, p. 103, says, "These words are of great importance (referring here to the Statutum de Marleberge), for all causes ought to be heard, ordered, and determined before the judges of the kings' courts openly in the kings' courts, whither all persons may resort."

⁸ SIR THOMAS SMITH, DE REPUBLIC ANGLORUM (1565)

⁹ HISTORY OF THE COMMON LAW OF ENGLAND 347 (Runnington's ed. 1829)

¹⁰ Lilburne's Trial, 4 How. St. Tr. 1273 (1649).

¹¹ "the right of an accused defendant to a public trial, stems from the deep roots

As a result of what Professor Radin calls the reverence accorded the traditional English concepts,¹² the right to a public trial was incorporated into the American system. Mention first appeared in a state constitution in 1776¹³ and later, as the sixth amendment,¹⁴ it became a part of the Federal Constitution. Today the right to a public trial is guaranteed by the constitutions of forty-one states,¹⁵ by statutes in two,¹⁶ by judicial decision in one¹⁷ and by implication in another.¹⁸

The development of the public trial in early England is almost without exception attributed by our courts to the distrust of justice meted out in secret by the English Court of Star Chamber, the Spanish Inquisition and the French monarchy's *lettre de cachet*.¹⁹ Apparently the inclusion of the Court of Star Chamber is not warranted by the history of that court²⁰ and Professor Radin feels that the abuse of the *lettre de cachet* by the French monarchy could well be the prime motivation.²¹

HOW PUBLIC IS "PUBLIC"?

If the word "public" as used in the sixth amendment and comparable state provisions were construed as an absolute, there would be no prob-

of the common law." *United Press Associations v. Valente*, 120 N.Y.S.2d 174, 123 N.E.2d 777 (1954), from the dissenting opinion of Judge Froessel. *In re Oliver*, 333 U.S. 257, 68 Sup. Ct. 499 (1948). Bishop ascribes the incorporation of the right into our system to "immemorial usage." 2 Bishop, *NEW CRIMINAL PROCEDURE* § 957 (2d ed. 1913)

¹² Radin, *The Right to a Public Trial*, 6 TEMP. L. Q. 381 (1932)

¹³ Pennsylvania Constitution, Declaration of Rights IX (1776); North Carolina Constitution, Declaration of Rights IX (1776)

¹⁴ Ratified in 1791.

¹⁵ Ala., Ariz., Ark., Cal., Colo., Conn., Del., Fla., Ga., Idaho, Ill., Ind., Iowa, Kans., Ky., La., Me., Mich., Minn., Miss., Mo., Mont., Neb., N.J., N.M., N.C., N.D., Ohio, Okla., Ore., Pa., R.I., S.C., S.D., Tenn., Tex., Utah, Vt., Wash., W Va., Wis.

¹⁶ Nev., N.Y.

¹⁷ Md.

¹⁸ Massachusetts has a statute permitting the exclusion of spectators in a limited category of cases. New Hampshire and Wyoming make no mention of a public trial in statute, constitution, or decision. Virginia has a statute providing for the exclusion of all persons whose presence is not deemed necessary.

¹⁹ *In re Oliver*, 333 U.S. 257, 68 Sup. Ct. 499 (1948) Almost without exception a reference to the Spanish Inquisition, the French *lettre de cachet* and the English Court of Star Chamber appears in the decisions concerning public trial.

²⁰ 5 HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 156 (1924) "Like other courts of justice it (the Court of Star Chamber) heard cases in public."

²¹ Radin, *The Right to a Public Trial*, 6 TEMP. L. Q. 381, 388 (1932) "It may well be that the thing that so profoundly affected the minds of earnest Republicans of the Constitutional period was something quite different, that grim emblem of the Ancien Regime, the *lettre de cachet*." This document was used by the French king to order, arbitrarily, indefinite imprisonment of opponents. Professor Radin feels

lem for the courts to resolve. In nearly all trials there are present others than those directly interested and taking part in the proceedings, for example judge, jury, court officers and witnesses. The public nature of a trial requires some "disinterested" spectators.²² However, there are several well-recognized instances in which it is permissible to exclude part or all of the public without prejudicing the defendant's rights.²³ The trial need not be held in an auditorium capable of accommodating all who want to attend. People may be excluded because of the limited capacity of the courtroom,²⁴ or in order to prevent overcrowding for health and sanitary reasons and for the purpose of providing freedom of movement.²⁵ The trial judge may take whatever precautionary measures are necessary when, in the reasonable exercise of his discretion, he feels there is sufficient evidence to warrant a suspicion that there will be open violence in the court due to the nature of the case, threats of retaliation against a witness to prevent him from testifying or an attempt to rescue the defendant.²⁶ Persons whose conduct is disorderly or would tend to interfere with the orderly administration of the court proceedings may also be excluded.²⁷ Minors may be excluded if the trial is of a salacious nature and likely to produce testimony as to obscene matters deemed harmful to their moral development.²⁸ If testimony relates to such mat-

that it is likely that Mirabeau's book, *DES LETTRES DE CACHET ET LES PRISONS D'ETAT*, concerning the abuses of this document was known to Jefferson, Franklin, and Silas Deane.

²² *People v. Hartman*, 103 Cal. 242, 37 Pac. 153 (1894); *Neal v. State*, 192 P.2d 294 (Okla. 1948); *State v. Jordan*, 57 Utah 612, 196 Pac. 565 (1921). *Grimmett v. State*, 22 Tex. App. 36, 2 S.W. 631 (1886) takes a contrary view which would seem to make a provision for a public trial redundant especially if there is a provision for a jury trial.

²³ *People v. Hartman*, 103 Cal. 242, 37 Pac. 153 (1894); *State v. Smith*, 90 Utah 482, 62 P.2d 1110 (1936).

²⁴ *Wendling v. Commonwealth*, 143 Ky. 587, 137 S.W. 205 (1911), *Commonwealth v. Trinkle*, 279 Pa. 564, 124 Atl. 191 (1924); *Kugadt v. State*, 38 Tex. Crim. Rep. 681, 44 S.W. 989 (1898)

²⁵ *Davis v. United States*, 247 Fed. 394 (8th Cir. 1917); *Bishop v. State*, 19 Ala. App. 326, 97 So. 169 (1923); *Tate v. Commonwealth*, 258 Ky. 685, 80 S.W.2d 817 (1935); *State v. Saale*, 308 Mo. 573, 274 S.W. 393 (1925).

²⁶ *Davis v. United States*, 247 Fed. 394 (8th Cir. 1917); *United States v. Buck*, 24 Fed. Cas. 1289, No. 14,680 (D. Pa. 1860); *Pierpont v. State*, 49 Ohio App. 77, 195 N.E. 264 (1934); *Makley v. State*, 49 Ohio App. 359, 197 N.E. 339 (1934); *Commonwealth v. Principatti*, 260 Pa. 587, 104 Atl. 53 (1918) The judge may even require admission by ticket in extreme cases.

²⁷ *Wade v. State*, 207 Ala. 1, 92 So. 101 (1921); *People v. Tugwell*, 32 Cal. App. 520, 163 Pac. 508 (1917); *State v. Scruggs*, 165 La. 842, 116 So. 206 (1928); *State v. Genese*, 102 N.J.L. 134, 130 Atl. 642 (1925).

²⁸ *Beauchamp v. Cahill*, 297 Ky. 505, 180 S.W.2d 423 (1944); *State v. Adams*, 100 S.C. 43, 84 S.E. 368 (1914); *State v. Hensley*, 75 Ohio St. 255, 79 N.E. 462 (1906). Four states, Arizona, Michigan, Minnesota and Nevada, have statutes which provide for the exclusion of minors in such cases.

ters that the witness or party testifying is prevented because of emotional difficulties from testifying in the presence of spectators, the judge may, in his sound discretion, clear the courtroom in order to obtain the testimony.²⁹

This, then, lays the basis for the privilege and its exceptions. The next problem involves the rights of the accused when he has not been accorded a public trial, and his case does not fall within one of the exceptions. In such an event there are two views. They are best exemplified by two cases at the federal court of appeals level, *Davis v. United States*³⁰ in the Eighth Circuit and *Reagan v. United States*³¹ in the Ninth. The *Reagan* court held that it was not reversible error to exclude the public where the accused could not show he was prejudiced thereby, "or deprived of the presence, aid, or counsel of any person whose presence might have been of advantage to him."³² The court declared that constitutional rights should be accorded a reasonable construction and not followed literally.³³ The contrary view is expressed in the *Davis* case.³⁴ Here the court held that if the defendant is deprived of a public trial, prejudice will be implied and there need be no affirmative showing of harm to the defendant's cause to justify reversal. The court said that to require the defendant to show prejudice would be, in effect, a judicial bypass of the constitutional privilege.³⁵

²⁹ *Hogan v. State*, 191 Ark. 437, 86 S.W.2d 931 (1935); *Green v. State*, 135 Fla. 17, 184 So. 504 (1938); *Beauchamp v. Cahill*, 297 Ky. 505, 180 S.W.2d 423 (1944); *State v. Damm*, 62 S.D. 123, 252 N.W. 7 (1933). When the witness is a child the courts are more inclined to grant exclusion. However, in the dissenting opinion of *State v. Callahan*, 100 Minn. 63, 110 N.W. 342 (1907), the Judge indicates that in the case of an adult witness there must be something more than nervousness to justify exclusion.

³⁰ 247 Fed. 394 (8th Cir. 1917)

³¹ 202 Fed. 488 (9th Cir. 1913)

³² *Id.* at 490. "The only conceivable benefit the defendant might have been deprived of by the order of the court in this case was the presence in the courtroom of a crowd of idle, gaping loafers, whose morbid curiosity would lead them to attend such a trial."

³³ *Accord*, *Callahan v. United States*, 240 Fed. 683 (9th Cir. 1917); *People v. Stanley*, 33 Cal. App. 624, 166 Pac. 596 (1917); *State v. Johnson*, 26 Idaho 609, 144 Pac. 784 (1914); *Grimmett v. State*, 22 Tex. App. 36, 2 S.W. 631 (1886)

³⁴ *Davis v. United States*, 247 Fed. 394 (8th Cir. 1917)

³⁵ *Id.* at 398. "It was urged that no prejudice to defendant was shown. A violation of the constitutional right necessarily implies prejudice and more than that need not appear. Furthermore, it would be difficult, if not impossible, in such cases for a defendant to point to any definite, personal injury. To require him to do so would impair or destroy the safeguard." *Accord*, *United States v. Kobli*, 172 F.2d 919 (3d Cir. 1949); *Tanksley v. United States*, 145 F.2d 58 (9th Cir. 1944), expressly overruling the *Reagan* and *Callahan* cases in the 9th Circuit; *Tilton v. State*, 5 Ga. App. 59, 62 S.E. 651 (1908); *People v. Yeager*, 113 Mich. 228, 71 N.W. 491 (1897); *State v. Hensley*, 75 Ohio St. 255, 79 N.E. 462 (1906) In view of the *Davis*,

"PUBLIC TRIAL" AND THE FEDERAL CONSTITUTION

The sixth amendment is applicable only to the Federal Government and in no way limits the power of the states.³⁶ But a vital question remains: Is the right to a "public trial" merely a federal right, or is it guaranteed to all citizens against state action by the "due process" clause of the fourteenth amendment? The issue arose in the Supreme Court of the United States for the first time in 1928 in *Games v. Washington*.³⁷ The Court said that even if the fourteenth amendment did guarantee trials of a public nature in state courts, the defendant in this case had been accorded one and therefore the issue was moot.³⁸ The Supreme Court did not answer the question until 1947.³⁹ But in the interim, based on decisions of the Court concerning other portions of the Bill of Rights, speculation developed to the effect that the right to a "public trial" could be infringed by a state court without interference by the federal judiciary.⁴⁰ But this speculation was in error. The Court held in the case of *In re Oliver*⁴¹ that the public trial aspect of the sixth amendment is within the due process clause of the fourteenth and is thus protected against violation by the states, at least in cases of complete denial of the privilege. Having brought the issue of public trial within its purview, it now remains for the Court to evolve a working principle for testing whether the accused has been accorded a public trial by the state courts.⁴² It is entirely possible that all the Court meant here was that a secret trial

Tanksley, and *Kobli* decisions, the Third, Eighth and Ninth Circuits are all in accord on the "presumption of prejudice" doctrine.

³⁶ In the matter of *Spies*, 123 U.S. 131, 8 Sup. Ct. 22 (1887). "That the first ten articles of Amendment were not intended to limit the powers of the state government in respect to their own people, but to operate on the National Government alone, was decided more than a half century ago, and that decision has been steadily adhered to since."

³⁷ 277 U.S. 81, 48 Sup. Ct. 468 (1928).

³⁸ The order of the trial judge was oral and apparently never executed. Therefore, from the record presented to the Supreme Court it appeared that the accused had a fair trial.

³⁹ *In re Oliver*, 333 U.S. 257, 68 Sup. Ct. 499 (1948)

⁴⁰ "The due process clause of the fourteenth amendment, however, does not draw all the rights of the federal Bill of Rights under its protection." *Adamson v. California*, 332 U.S. 46, 67 Sup. Ct. 1672 (1947); *Palko v. Connecticut*, 302 U.S. 319, 58 Sup. Ct. 149 (1937). FRANK, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 587 (1952 Revision) Mr. Frank says, "The situation thus is that some of the liberties of the Bill of Rights are also liberties of citizens as against the states, and some are not. The situation is seriously complicated by the fact that the liberties of the Bill of Rights cannot, under the decisions, be put easily into one category or the other. Many of them are in an intermediate category, depending upon the circumstances of the particular case."

⁴¹ 333 U.S. 257, 68 Sup. Ct. 499 (1948).

⁴² Such as the "clear and present danger" doctrine utilized in cases involving the first

violated due process and not that it will hear all cases involving public trials and formulate a working principle for the state courts.

BENEFITS OF A PUBLIC TRIAL

Granting that the right of a public trial evolved to combat the inequities inherent in secret proceedings, and that essentially the right is solely for the benefit of the accused,⁴³ it is none the less apparent that the public nature of a trial serves many purposes, any of which is important enough in its own right to justify the guarantee. In a very large measure it helps to insure the trustworthiness of testimony, subjectively and objectively, by insuring the presence of a "conscience in the courtroom." Subjectively, a witness is less inclined to lie in the face of public opinion, symbolized by the spectators,⁴⁴ in part because of the fear of being "caught up" by persons present who know the truth or by persons who hear of the testimony from one who was present.⁴⁵ The same factors which insure the trustworthiness of testimony of witnesses act upon the officers of the court, the judge, jury, and counsel to insure a competent and conscientious approach to their respective duties and to deter them from arbitrary action.⁴⁶ Objectively, it provides an opportunity for the discovery of additional witnesses who may be able to provide important testimony or contradict false testimony.⁴⁷

While the above benefits may be characterized as pertaining to the trial proper and to its search for truth in the specific matter in controversy, the public as a whole derives certain benefits from trials of a pub-

amendment and set out in *Schneck v. United States*, 249 U.S. 47, 39 Sup. Ct. 247 (1919).

⁴³ COOLEY, CONSTITUTIONAL LIMITATIONS 441 (7th ed. 1903) "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 the importance of their functions."

⁴⁴ 6 WIGMORE, EVIDENCE § 1834 (3rd ed. 1940) On the other hand, it is also true that the presence of certain spectators may keep a witness from testifying for fear of some of those in attendance at the trial. In *Commonwealth v. Principatti*, 260 Pa. 587, 104 Atl. 53 (1918) a witness refused to testify, out of fear of retaliation from the Black Hand, until all Italians were cleared from the courtroom.

⁴⁵ *Tanksley v. United States*, 145 F.2d 58 (9th Cir. 1944); *People v. Jelke*, 125 N.Y.S.2d 244, 123 N.E.2d 769 (1954); *State v. Osborne*, 54 Ore. 289, 103 Pac. 62 (1909); 6 WIGMORE, EVIDENCE § 1834 (3rd ed. 1940).

⁴⁶ *People v. Murray*, 89 Mich. 276, 50 N.W. 995 (1891); *State v. Osborne*, 54 Ore. 289, 103 Pac. 62 (1909); 6 WIGMORE, EVIDENCE § 1834 (3rd ed. 1940)

⁴⁷ *In re Oliver*, 333 U.S. 257, 68 Sup. Ct. 499 (1948); *Tanksley v. United States*, 145 F.2d 58 (9th Cir. 1944); *People v. Jelke*, 125 N.Y.S.2d 244, 123 N.E.2d 769 (1954); *State v. Osborne*, 54 Ore. 289, 103 Pac. 62 (1909); 6 WIGMORE, EVIDENCE § 1834 (3rd ed. 1940)

lic nature. First of all, these trials give the people an opportunity to see how their government functions in enforcing and protecting their rights and instills in them confidence in and respect for the judicial process.⁴⁸ Secondly, many persons may have a direct or indirect interest in the proceedings, although not as parties, or may be involved in similar litigation, and have a right to see how the court does, or will, deal with such interests.⁴⁹ Lastly, there is the educational effect upon the public of witnessing the punishment accorded criminal behavior by the judicial process.⁵⁰

WAIVER

While the advantages which naturally flow from a public trial cannot be minimized, it is primarily a privilege "accorded to the individual member of the public who has been accused of crime."⁵¹ Since it is a right which belongs to the accused, he has the power to waive it.⁵² The conflict as to waiver demonstrates the existence of a liberal view and a restricted view as to the privilege itself. The restricted view holds that the accused waives his rights by a failure to make timely objection to the exclusion order.⁵³ The liberal courts presume prejudice to the rights of the defendant and hold that the privilege is not waived by a failure to object to the exclusion order.⁵⁴ Now that the Supreme Court has held

⁴⁸ *In re Oliver*, 333 U.S. 257, 68 Sup. Ct. 499 (1948); *U.S. v. Kobl*, 172 F.2d 919 (3rd Cir. 1949); *State v. Keeler*, 52 Mont. 205, 156 Pac. 1080 (1916); 6 WIGMORE, EVIDENCE § 1834 (3rd ed. 1940).

⁴⁹ *Daubney v. Cooper*, 10 B & C 237 (1829); 6 WIGMORE, EVIDENCE § 1834 (3rd ed. 1940).

⁵⁰ *Auld, The Comparative Jurisprudence of Criminal Process*, 1 U. OF TORONTO L. J. 82 (1935).

⁵¹ *U.S. v. Sorrentino*, 175 F.2d 721, 722-723 (3rd Cir. 1949)

⁵² "A defendant may well conclude that in his particular situation his interests will be better served by foregoing the privilege than by exercising it. 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." *United States v. Sorrentino*, as quoted in *United Press Associations v. Valente*, 120 N.Y.S.2d 174, 123 N.E.2d 777 (1954).

⁵³ "If he (the accused), by his conduct, leads the court to believe he is satisfied with the order in that regard and the court acts in good faith, and not arbitrarily, it would seem that, in all fairness and justice, he should be precluded after conviction from urging for reversal in (sic) order that he invited, or tacitly consented to, by remaining silent. Not having objected to the modified order, we conclude that it was satisfactory, and that his conduct constituted a waiver of any right of his involved." *Keddington v. State*, 19 Ariz. 457, 172 Pac. 273 (1918). *People v. Letoile*, 31 Cal. App. 166, 159 Pac. 1057 (1916); *Benedict v. People*, 23 Colo. 126, 46 Pac. 637 (1896); *State v. Smith*, 90 Utah 482, 62 P.2d 1110 (1936).

⁵⁴ *Wade v. State*, 207 Ala. 1, 92 So. 101 (1921); *Stewart v. State*, 18 Ala. App. 622, 93 So. 274 (1922); *State v. Marsh*, 126 Wash. 142, 217 Pac. 705 (1923); *State v.*

that the right to a public trial is protected in state courts by the fourteenth amendment⁵⁵ it is probable that the Court will take a definitive approach to the waiver problem as soon as the issue is specifically presented.⁵⁶

CONCLUSION

It is readily apparent that the right of the accused to a public trial carries with it numerous advantages, both to the accused and the public as a whole.⁵⁷ It is true that trials of a sensational nature will draw people whose interests are not wholly dictated by seeing that justice is done in the courtroom. But it is also possible that the "apparently idle spectator may turn out to be the one person who directs public attention to acts of judicial oppression which are overlooked by the more seasoned but sometimes blase professional gatherer of news," or that one of the curious may "prove to be the unknown witness vital to the defense of the accused."⁵⁸ The evil inherent in allowing the sensation seeker in the courtroom is small in comparison with the good which may ensue.

The inequitable nature of public trial in this country has no relation to the right itself but rather flows from the forty-nine separate approaches to the privilege. Since the concept of public trial is so deeply ingrained in our system of jurisprudence it would be more in keeping with justice to allow an accused in state A the same rights to a public trial as an accused in state B. The Supreme Court could effectuate this in the future, by exercising the same degree of control over sixth amendment cases as they do in cases arising under the first amendment. The possibility of such control is apparent since the *Oliver*⁵⁹ decision.

THOMAS S. SCHATTENFIELD

Hensley, 75 Ohio St. 255, 79 N.E. 462 (1906) (The *Wade* court intimated that the accused's right to a public trial was so basic that he could not even waive it expressly.)

⁵⁵ *In re Oliver*, 333 U.S. 257, 68 Sup. Ct. 499 (1948)

⁵⁶ Interesting as a problem in logic is the approach the federal courts used in a case involving four defendants among whom was one Elizabeth Kobli. The trial judge's exclusion order was carried out over the objection of counsel for Kobli and her conviction was reversed and remanded for new trial. *United States v. Kobli*, 172 F.2d 919 (3rd Cir. 1949) The conviction as to the other three was upheld since their counsel stated in the trial court that they did not object to the exclusion order and they were thus deemed to have waived the right. *United States v. Sorrentino*, 175 F.2d 721 (3rd Cir. 1949), *cert. demed.*, 338 U.S. 868, 70 Sup. Ct. 143 (1949). The Supreme Court has never ruled on what constitutes a public trial in the federal courts.

⁵⁷ As to the right of an individual member of the public to institute proceedings to restrain a judge from excluding him from a trial, see *United Press Associations v. Valente*, 120 N.Y.S.2d 174, 123 N.E.2d 777 (1954)

⁵⁸ *United States v. Kobli*, 172 F.2d 919, 923 (3rd Cir. 1949)

⁵⁹ *In re Oliver*, 333 U.S. 257, 68 Sup. Ct. 499 (1948)