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Fair Trial and Free Press: Exclusion of the Press from Pretrial Hearings

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FAIR TRIAL AND FREE PRESS: EXCLUSION OF THE PRESS FROM PRETRIAL HEARINGS—*State ex rel. Dayton Newspapers v. Phillips*, 46 Ohio St. 2d 457, 351 N.E.2d 127 (1976).

Sensational crimes are often the focal point of extensive news coverage. If the media's reporting is objective, it may not significantly infringe upon the defendant's right to a fair trial as guaranteed by the fifth[1] and sixth[2] amendments. Extensive pretrial publicity, however, necessarily raises the possibility of prejudice,[3] even though the information reported may be true. Despite the fact that the coverage may have resulted from the defendant's misdeeds, he is nevertheless entitled to be tried by persons who have not prejudged his case.[4] It is the duty of the trial judge to determine whether the news coverage raises the possibility of prejudice in the community from which the jury is to be selected.[5] If the trial judge finds that the defendant's right to a fair trial is in jeopardy, there are several possible remedies.[6] One method which has been resorted to infrequently is the exclusion of the press from the court proceedings. Given that the press has the right to publish news concerning criminal cases, it is questionable whether the news media can be excluded without infringing upon its first amendment right.[7] In *State ex rel. Dayton Newspapers v. Phillips*,[8] the Supreme Court of

1. The fifth amendment to the Constitution of the United States in pertinent part provides: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law. . . ."

2. The sixth amendment to the Constitution of the United States provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ." This is applicable to state criminal prosecutions via Duncan v. Louisiana, 391 U.S. 145, 149, *rehearing denied*, 392 U.S. 947 (1968).

3. *See, e.g.*, Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532, *rehearing denied*, 382 U.S. 875 (1965); Rideau v. Louisiana, 373 U.S. 723 (1963); Irvin v. Dowd, 366 U.S. 717 (1961).

4. Irvin v. Dowd, 366 U.S. 717 (1961).

5. *Id. See* Sheppard v. Maxwell, 384 U.S. at 362-63; see the following cases for an analysis of the standard to be employed in determining whether the published utterances substantially interfere with the orderly administration of justice: Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941); Schenck v. United States, 249 U.S. 47 (1919).

6. The Court in *Sheppard*, 384 U.S. at 358-63 discussed the various methods the trial judge may use to assure the defendant a fair trial. The following are illustrative: change of venue, continuances, sequestering the jury, extensive voir dire, contempt sanctions, limitations on court personnel and media presence, dismissal, and new trial.

7. The first amendment to the Constitution of the United States provides that: "Congress shall make no law . . . abridging the freedom . . . of the press." The due process clause of the fourteenth amendment protects this liberty from invasion by state action. Schneider v. State, 308 U.S. 147, 160 (1939). Near v. Minnesota, 283 U.S. 697, 707 (1931).

8. 46 Ohio St. 2d 457, 351 N.E.2d 127 (1976).

Ohio held that the first amendment right is absolute,[9] and exclusion of the press from pretrial hearings is an unacceptable method of protecting the defendant's right to a fair trial.[10] The court held that methods other than those likely to inhibit the exercise of the first amendment must be used to protect the defendant's right to a fair and impartial trial.[11]

I. STATEMENT OF FACTS

Lester Emoff, the owner of a chain of furniture stores in the Dayton area, was kidnapped and held for ransom on September 23, 1975. Shortly thereafter, it was discovered that Emoff had been brutally murdered. Herman Lee Moore and two others were arrested and charged with the murder. From September 24, 1975 through November 4, 1975, a total of forty-two days, over seventy newspaper accounts appeared. The coverage included details of the murder, the payment of ransom, the police investigation, and the court proceedings, as well as the defendants' backgrounds. Local television also covered the incident extensively.

Due to the allegedly prejudicial pretrial publicity, defendant Moore moved that the pretrial hearing concerning suppression of evidence, statements, and pretrial identification of the accused be closed to the general public and to the news media. In addition, Moore requested a change of venue. The Common Pleas Court of Montgomery County found that "the publicity in this matter has been and would appear to continue to be extremely intense." On this basis, the court reasoned, a clear and present danger of a serious and imminent threat to the administration of justice had been created, and in order to prevent the possibility of further prejudicial pretrial publicity which might affect the right of the defendant to a fair and impartial trial, the court issued an exclusionary order.[12] The newspapers then sought a writ of prohibition[13] which was ruled upon by the Supreme Court of Ohio.

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9. *Id.* at 459, 351 N.E.2d at 130.

10. *Id.* at 466, 351 N.E.2d at 133.

11. *Id.* at 464, 351 N.E.2d at 132.

12. It is therefore, ORDERED that the public be excluded from the pretrial suppression motion hearings scheduled to commence Wednesday, November 5, 1975. Those persons directly involved in this case may be present and no others. Those entitled to attend shall be the court personnel, the defendant, his attorneys, the Prosecuting Attorney, the necessary witnesses, and counsel for the co-defendants in these cases.

State of Ohio v. Herman Lee Moore, No. 75-CR-1353 (C.P. Ct. of Montgomery County, Nov. 4, 1975).

13. A writ of prohibition is an extraordinary writ which prevents the trial court from enforcing an order it has issued. The newspapers filed an original writ of prohibition in the

II. DECISION OF THE COURT

The Ohio Supreme Court was confronted with three distinct issues in this case: first, whether a writ of prohibition was an appropriate remedy for the newspapers' alleged injury; second, whether the newspapers had standing; and third, the conflict which flowed from the exclusionary order; *i.e.*, fair trial versus free press. Although the court split 5-2 in its decision, there were four separate opinions.[14]

The court was primarily concerned with the approach the lower court should use in this type of case: "[W]hat action should the court take to guarantee the defendant an impartial jury and preserve unabridged the freedom of the press?"[15] The majority believed that the answer was clear. When confronted with motions for hearings on a change of venue, suppression of evidence, and exclusion of the public at such hearings, the trial court must remain open to the public. Only after the completion of a public hearing on the motions to suppress should a ruling be made on the motion for a change of venue. If the trial judge then concludes a fair and impartial jury cannot be obtained, the motion for a change of venue should be granted.[16] The court found that a change of venue was the most appropriate remedy since it protected the rights of the defendant without infringing on the freedom of the press. Although the possibility of prejudice may be created by extensive pretrial publicity, the court held that any restriction upon the press' ability to gather and disseminate news is intolerable.[17] "The polestar in this case is the constitutional provisions that the freedom and liberty of the press shall not be abridged or restrained by any law."[18] Exclu-

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Court of Appeals for Montgomery County after the exclusionary order was granted. The newspapers' action in the court of appeals was then voluntarily dismissed in order to seek an alternative writ of prohibition in the Supreme Court of Ohio which has original jurisdiction. OHIO CONST. art. IV, § 2.

14. The majority and Justice Celebreeze, dissenting, held that prohibition was the appropriate remedy under the circumstances of the case. Those justices were also in agreement on the issue of standing. The newspapers were held to have sufficient interest in the vindication of first amendment guarantees to qualify them as legitimate litigants. Neither the concurring opinion of Justice Stern nor the separate dissent of Justice Corrigan dealt with the initial obstacles of prohibition and standing, but rather focused immediately upon the fair trial—free press controversy.

15. 46 Ohio St. 2d at 461, 351 N.E.2d at 130.

16. *Id.* The majority relied on State *ex rel.* Beacon Journal Publishing Co. v. Kainrad, 46 Ohio St. 2d 349, 348 N.E.2d 695 (1976); Irvin v. Dowd, 366 U.S. 717 (1961); Rideau v. Louisiana, 373 U.S. 723 (1963).

17. The court found that the first amendment to the Constitution of the United States and article I, § 2 of the Ohio Constitution prohibit any abridgement of the freedom of the press. 46 Ohio St. 2d at 460, 351 N.E.2d at 130.

18. *Id.* at 466, 351 N.E.2d at 133.

sion of the press from the court proceedings prevents the newspapers from gathering information at its source and thereby inhibits the press from exercising its constitutional guarantee fully. Therefore, the court ruled, an exclusionary order even at the pretrial hearing stage was inappropriate.

Justice Celebreeze, in a lengthy dissent, said that the exclusionary order was a legitimate method for protecting the defendant's rights. Although he recognized that a change of venue could be used to protect the defendant's rights, the Justice felt that the defendant had a constitutional right to be tried in the locale where the crime was allegedly committed.[19] He stated that the press could be excluded, although only where highly prejudicial publicity was shown to endanger the defendant's right to a fair trial. Therefore, he felt that the court should have recognized an exclusionary order limited to pretrial hearings as a viable method for guaranteeing the defendant a fair trial.

III. ANALYSIS

A. *The Totality of the Circumstances Test*

The majority in *Dayton Newspapers* sought to avoid the fair trial—free press controversy by sanctioning the use of a change of venue. The court correctly recognized that the Supreme Court of the United States has placed its imprimatur upon change of venue as a proper alternative for protecting the defendant's right to a fair trial.[20] The court, however, failed to recognize that the Supreme Court has also acknowledged the trial court's inherent authority to use other, appropriate means for protecting the defendant's rights.[21] As the Seventh Circuit stated:

> That Courts have the duty to ensure fair trials—"the most fundamental of freedoms"—is beyond question. The Supreme Court made

19. The majority held that the defendant waived any right to be tried in the locale where the alleged crime was committed because of his motion for a change of venue. OHIO REV. CODE ANN. § 2901.12(I) (Page 1975), cited by the majority, provides:

> Notwithstanding any other requirement for the place of trial, venue may be changed upon motion of . . . defense, . . . to any court having jurisdiction of the subject matter outside the county in which trial would otherwise be held, when it appears that a fair and impartial trial cannot be held in the jurisdiction in which trial would otherwise be held. . . .

Nevertheless, Justice Celebreeze stated: "We do not believe that the interests of justice countenance the waiver of one constitutional right in order to secure another." 46 Ohio St. 2d at 526-27, 351 N.E.2d at 168. *See* Ohio v. Nevius, 147 Ohio St. 263 (1947) *citing* OHIO CONST. art. I, § 10.

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

21. *Id. See also* Note, 21 DE PAUL L. REV. 822 (1972).

> this clear in *Sheppard v. Maxwell*. . . . Moreover, the Court in that case settled the corollary proposition that Courts have the power to "take such steps by rule and regulation that will protect their processes from prejudicial outside interferences."[22]

The court in *Dayton Newspapers* found it significant that the claims of prejudice by the defendant appeared to be only speculative in nature. In *Sheppard v. Maxwell*,[23] however, the Supreme Court held that identifiable prejudice is not needed, if the totality of circumstances raises the possibility of prejudice.[24] The Sixth Circuit in *Stone v. United States*[25] stated the applicable rule:

> The question is, not whether any actual wrong resulted . . . , but whether [the circumstances] created a condition from which prejudice might arise. . . . [T]he law concerning juries . . . presumes that [outside] influence may act on some of them . . . so as to be beyond detection.[26]

To preserve the defendant's rights in the instant case, the trial judge decided that based upon the totality of the circumstances, the exclusion of the press was necessary. The facts surrounding *Dayton Newspapers* provide justification for the trial court's action. The victim was a prominent citizen of the Dayton community. The case attracted not only local, but national news coverage. The local coverage was intense; *i.e.*, over seventy-five articles appeared concerning the case in a period of forty-two days. The television media actually engaged in a debate as to who was covering the event more accurately. Furthermore, the media speculated on the admissibility of evidence, various rules of law, and the defendant's background and previous record.[27] The rules of evidence confine the jury only to

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22. Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 248 (7th Cir. 1975), *cert. denied*, 96 S. Ct. 3201 (1976).

23. 384 U.S. 333 (1966).

24. *Id.* at 352-53. Evidence exposed by the media may very well have been inadmissible in court. If evidence which is unfavorable to the defendant is held to be inadmissible, such evidence is very likely to be prejudicial. Marshall v. United States, 360 U.S. 310 (1959); United States v. Accardo, 298 F.2d 133 (7th Cir. 1962); Delaney v. United States, 199 F.2d 107 (1st Cir. 1952). *See also* Comment, *The Case Against Trial by Newspaper*, 57 Nw. U.L. REV. 217 (1962).

25. 113 F.2d 70 (6th Cir. 1940); *accord*, Briggs v. United States, 221 F.2d 636, 638 (6th Cir. 1955).

26. 113 F.2d at 77.

27. As stated by the dissent in *Dayton Newspapers*:

> In the Thursday, October 2, 1975 edition of the Dayton Daily News appeared the following paragraphs:
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> "It also has been learned that Scott [on] Wednesday failed to pass a lie detector test to determine if he has told investigators the truth that he was involved in the kidnapping but had no knowledge that Emoff would be killed and no role in the slaying.

those facts which are presented at trial.[28] The accused will not have a fair trial "unless the jury's verdict is based upon what they have witnessed in the courtroom, not upon uncensored comments from outside the court's walls."[29] Under this test, then, it was clearly established that the judicial process would be subverted by an open hearing. As the Supreme Court stated in *Estes v. Texas*:[30] "[T]he criminal trial under our Constitution has a clearly defined purpose, to provide a fair and reliable determination of guilt, and no procedure or occurrence which seriously threatens to divert it from that purpose can be tolerated."[31] Therefore, the trial judge's primary obligation was to preserve the fairness and integrity of the judicial process.

Although exclusion of the press and public has been used infrequently to protect a defendant's rights, those decisions[32] using this method do not necessarily downgrade the guarantees of the first amendment. It is not every case in which the accused can convince the court that publicity has jeopardized his right to a fair trial. The burden is on the defendant to show "*that a serious and imminent*

The polygraph test which will not be admissible as evidence in court was administered Wednesday afternoon at the Dayton Police Department."

46 Ohio St. 2d at 517, 351 N.E.2d at 162.

The October 3rd and 4th editions of the Journal Herald had excerpts relating to the lie detector. Furthermore, the newspapers alleged conspiracy, while also revealing the defendant's prior criminal record and linking him to unsolved crimes.

Most seriously damaging to the defendant's chance to receive a fair trial was a series of articles appearing in both papers disclosing that the defendant was expected to file motions "aimed at suppressing evidence against the men * * * includ[ing] statements given by at least two of the suspects to the FBI." In this regard the November 5, 1975 edition of the Journal Herald reported that "[a]ttorneys are especially fearful of public hearing on a statement that defendant Herman Lee Moore gave to police in which he allegedly implicated himself and the two other defendants," while the Dayton Daily News on October 28, 1975 disclosed that "[a]ttorneys for a defendant in the Lester C. Emoff kidnap-murder case today asked that pretrial hearings which will challenge the admissibility of evidence in the case, including a confession, be closed to the public." 46 Ohio St. 2d at 518, 351 N.E.2d at 163.

Comparison of the publicity in the instant case and that in Irvin v. Dowd, 366 U.S. 717, at 725-26 shows remarkable similarity.

28. Patterson v. Colorado, 205 U.S. 454, 462 (1907).

29. Comment, *The Press in a Black Robe*, 45 CHI. KENT L. REV. 170 (1968). *See* Patterson v. Colorado, 205 U.S. 454, 462 (1907).

30. 381 U.S. 532 (1965).

31. *Id.* at 564 (Warren, C.J., concurring).

32. The following cases found in 49 A.L.R.2d 1014 held that the press could be excluded where there is a clear and present danger to the orderly administration of justice: Phoenix Newspapers, Inc. v. Jennings, 107 Ariz. 557, 490 P.2d 563 (1971); United Press Assns. v. Valente, 308 N.Y. 71, 123 N.E.2d 777 (1954); State v. Meek, 9 Ariz. App. 149, 450 P.2d 115, *cert. denied*, 396 U.S. 847 (1969); People v. Elliot, 54 Cal.2d 498, 354 P.2d 225, 6 Cal. Rptr. 753 (1960); People v. Pratt, 27 App. Div. 2d 199, 278 N.Y.S.2d 89 (1967); Azbill v. Fisher, 84 Nev. 414, 442 P.2d 916 (1968).

threat to the fair administration of justice exists which upon balance, outweighs the particular First Amendment guarantee asserted."[33] In *Dayton Newspapers*, the substantive evil to be eliminated was the interference with impartial adjudication. The threat was imminent and serious, thus justifying the trial court's action. Nevertheless, the Ohio Supreme Court was unwilling to accept such a finding because an exclusionary order seemed to violate the freedom of the press as a form of prior restraint.

B. *Prior Restraint and the Right of Access to Information*

A prior restraint upon the press carries a heavy presumption against constitutionality.[34] Although the United States Supreme Court has found direct prior restraints on the press to be unconstitutional,[35] it has not acknowledged as absolute the first amendment right of access to information.[36] Justice Celebreeze in his dissent noted:

> The distinction between prior restraint cases and the cause at bar is thus apparent: although the Constitution, except in limited circumstances, absolutely protects the right of the press to publish such information as it possesses, the protection afforded by the Constitution to the concomitant right of the press to gather news for the purpose of publication is not nearly so pervasive.[37]

The view that limits the right of access to information is based upon the holdings of *Branzburg v. Hayes*[38] and *Pell v. Procunier*.[39] In those cases the Supreme Court held that the press has no greater status in regard to accessibility than does the general public. Furthermore, the first amendment guarantees to speak and publish do not encompass the absolute right to gather information. Although an exclusionary order may curtail the amount of information the press is able to report, such an order does not infringe on the press' right to print information obtained from other sources. The Court in *Branzburg* was well aware of the fact that the news media's efforts to report were hampered by its exclusion from grand jury proceed-

33. 46 Ohio St. 2d at 515, 351 N.E.2d at 161 (court's emphasis).

34. N.Y. Times v. United States, 403 U.S. 713 (1971); Organization for a Better Austin v. O'Keefe, 402 U.S. 415, 419 (1971); Bantam Books Inc. v. Sullivan, 372 U.S. 58, 70 (1963); Near v. Minnesota, 283 U.S. 697 (1931).

35. *Id.*

36. Pell v. Procunier, 417 U.S. 817 (1974); Branzburg v. Hayes, 408 U.S. 665 (1972); *see* Tribune Review Publishing Co. v. Thomas, 254 F.2d 883 (3d Cir. 1958); United Press Assns. v. Valente, 308 N.Y. 71, 123 N.E.2d 777 (1954).

37. 46 Ohio St. 2d at 509, 351 N.E.2d at 158 (citations omitted).

38. 408 U.S. 665 (1972).

39. 417 U.S. 817 (1974).

ings, judicial conferences, and meetings of other official bodies. Nevertheless, the Court noted: "Newsmen have no constitutional right of access to scenes of crime or disaster when the general public is excluded, and they may be *prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial jury.*"[40]

The Supreme Court in its most recent pronouncement, *Nebraska Press Association v. Stuart*,[41] retreated somewhat from that position, but only as to restrictions on actual publication. In that case the Court held that a "gag order," which prohibited the press from publishing accounts of confessions made by the accused to law enforcement officials, was tantamount to a direct prior restraint and therefore constitutionally impermissible. The Court ruled that measures short of an order restraining all publication could insure the defendant a fair trial. *Nebraska Press* expressly left open the issue of whether the press could be constitutionally excluded from pretrial hearings.[42] Justice Celebreeze's dissenting opinion is thus consistent with *Nebraska Press* which was decided after *Dayton Newspapers*. It should be noted that *Dayton Newspapers* involved access to information on matters of public concern rather than a direct prohibition on freedom of expression in the form of news publications. Therefore, an exclusionary order is, at least arguably, not equivalent to a prior restraint, nor an infringement of the first amendment.

Since *Dayton Newspapers* involved a *pretrial* suppression hearing, there is additional justification for the exclusion of the press. The Supreme Court has recognized the importance of the pretrial period. In *Estes v. Texas*[43] the Court noted that "[p]retrial can create a major problem for the defendant in a criminal case. Indeed it may be more harmful than publicity during trial for it may well set the community opinion as to guilt or innocence." In *White v. Maryland*[44] and *Hamilton v. Alabama*[45] the Court held that an accused is entitled to procedural due process protections not only at

40. *Branzburg*, 408 U.S. at 684-85. (emphasis added).
41. 96 S. Ct. 2791 (1976).
42. *Id.* at 2805 n.8:

> Closing of pretrial proceedings with the consent of the defendant when required is also recommended in guidelines that have emerged from various studies. At oral argument petitioners' counsel asserted that judicially imposed restraints on lawyers and others would be subject to challenge as interfering with the press' right to news sources . . . *We are not now confronted with such issues.* (emphasis added).

43. 381 U.S. 532 at 536.
44. 373 U.S. 59 (1963).
45. 368 U.S. 52 (1961).

his trial and conviction but also at pretrial hearings. Inadequate protection at the pretrial stage can have a devastating impact on a defendant's right to a fair trial.[46] Exclusion of the public at pretrial suppression hearings is consistent with the fact that a number of judicial proceedings are closed to the public and the press. Preliminary hearings,[47] grand jury proceedings,[48] and juvenile hearings[49] can be closed for the benefit of the parties involved because of their potential for prejudicial publicity. Since both preliminary hearings and grand jury proceedings act as screening devices to ferret out unjustified prosecutions, it is necessary that they be held in secret. In a similar sense, a suppression hearing is used to ferret out questionable evidence and rule upon its admissibility at trial as a matter of law. Because of speculation by the press, the public may prejudge the evidence without the benefit of well-established rules of evidence. Acceptable jurors must not have formed conclusions as to evidence before the start of the trial; publicity works against that end by narrowing the group of potential jurors.

The American Bar Association has recognized the hazards of pretrial publicity and has recommended standards[50] which would accomodate the press as well as protect the rights of the defendant. ABA standard 3.1[51] recommends that in pretrial hearings, including a hearing on a motion to suppress evidence,

> the defendant may move that all or any part of the hearing be held in chambers or otherwise closed to the public [including representatives of the news media] on the ground that dissemination of the evidence or argument adduced at the hearing may disclose matters that will be inadmissible in evidence at the trial and is therefore likely to interfere with his right to a fair trial by an impartial jury.

The standards require that a complete record of all proceedings be

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46. Pointer v. Texas, 380 U.S. 400 (1964).

47. State v. Meek, 9 Ariz. App. 149, 450 P.2d 115, *cert. denied*, 396 U.S. 847 (1969). *See also* Comment, *Fair Trial and Free Press: Preliminary Hearing—Gateway to Prejudice*, 1973 LAW AND THE SOCIAL ORDER 903 (1973).

48. OHIO R. CRIM. P. 6(D), 6(E).

49. OHIO R. JUV. P. 27. OHIO REV. CODE ANN. § 2151.35 (Page 1975) provides:

> The juvenile court may conduct its hearings in an informal manner and may adjourn such hearings from time to time. In the hearing of any case the general public may be excluded and only such persons admitted as have a direct intereot in the case
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> . . . .

50. ABA LEGAL ADVISORY COMM. ON FAIR TRIAL AND FREE PRESS, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS. (Approved Draft 1968).

51. *Id.* PART III: RECOMMENDATIONS RELATING TO THE CONDUCT OF JUDICIAL PROCEEDINGS IN CRIMINAL CASES. Standard 3.5(d) of this report further provides for closing portions of the actual trial when necessary.

kept and made available to the public following the completion of the trial.

C. *Public Trial*

The press also argued against the exclusionary order on the basis of the constitutional guarantee of a "public trial." Criminal defendants are guaranteed a public trial by the sixth amendment to the United States Constitution[52] and similar provisions in the Ohio Constitution.[53] The newspapers contended that this right embodied not only the right of the accused, but also a concomitant right of the public to be present at judicial proceedings. The right to a public trial is grounded in the historical abhorrence of secret trials. Since the right is based upon the theory that the defendant's rights may be abused if the trial were held in secret, it is more accurately viewed as a right of the accused rather than the right of the public.[54] It is the accused who would suffer if the public were excluded from all judicial proceedings, for the public would be denied the opportunity to scrutinize the operation of the judicial system and voice objection to miscarriages of justice. Further, our scheme of justice allows the accused to confront his accusers in open court before an unbiased jury. At a pretrial suppression hearing, the defendant should be able to waive the right to a public trial when highly prejudicial publicity casts a shadow over his right to a fair trial.

Upon the defendant's motion to close the hearings, the court must determine whether a clear and present danger to the orderly administration of justice is present based upon the totality of the circumstances. If the court finds such danger to be serious and imminent, it is then justified in exercising its inherent authority to

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52. The sixth amendment right to a "public trial" has yet to be applied to the individual states. *See* Gaines v. Washington, 277 U.S. 81 (1928).

53. OHIO CONST. art. I, § 16 provides:

> All courts shall be open, and every person, for an injury done him in his land, goods, persons, or reputation, shall have remedy by due course of law and shall have justice administered without denial or delay. . . .

OHIO CONST. art. I, § 10 further provides:

> In any trial, in court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses . . . in his behalf, and a speedy trial by an impartial jury of the county in which the offense is alleged to have been committed. . . .

54. Estes v. Texas, 381 U.S. at 536-44; Geise v. United States, 265 F.2d 659, 660 (9th Cir. 1959), *cert. denied*, 361 U.S. 842 (1959); United States v. Sorrentino, 175 F.2d 721, 722-23 (3d Cir.), *cert. denied*, 338 U.S. 868 (1949); *cf.* People v. Blanco, 170 Cal. App. 2d 758, 339 P.2d 906 (1959); Henderson v. State, 207 Ga. 206, 60 S.E.2d 345 (1950).

close the courtroom. This does not mean that the defendant can choose a private trial to the detriment of the public's right to know. Rather, the defendant's right to a fair trial simply outweighs the public's right to know. The public interest is adequately protected by the power of the trial judge to deny the defendant's motion if it is determined that the case is not a proper one for exclusion.[55] Moreover, a complete record of the proceedings must be kept and made available at the disposition of the case. Thus, public awareness is kept intact.[56] To hold that the media could demand a public trial would be "[t]o deny the right of waiver [and] . . . 'convert a privilege into an imperative requirement' to the disadvantage of the accused."[57]

IV. CONCLUSION

Although the Ohio Supreme Court recognized the validity of using change of venue as a method for protecting the defendant's right to a fair trial, it failed to accept the viability of an exclusionary order limited to pretrial hearings. The court hesitated to add to the traditional curative techniques one of equal effectiveness. Though the court sanctioned change of venue, it refused to accept the fact that such a procedure involves unnecessary delay, expense, inconvenience, as well as abrogation of the defendant's right to a speedy trial. Likewise, certain crimes tend to attract nationwide coverage regardless of the location of the trial. For those crimes, "spatial separation from the locus of the crime does not necessarily guarantee isolation from prejudicial news coverage."[58]

An exclusionary order at the pretrial stage can be easily administered, guaranteeing at least in part the defendant's right to a fair trial. The order can be granted without infringing upon the right of the press while at the same time curbing prejudicial publicity at its inception. The Supreme Court of Ohio failed to bear in mind the admonition of the nation's highest Court in *Sheppard v. Maxwell*: "[T]he presence of the press at judicial proceedings must be limited when it is apparent that the accused might otherwise be prejudiced or disadvantaged."[59]

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55. United Press Assns. v. Valente, 308 N.Y. 71, 81-82, 123 N.E.2d 777 (1954).
56. ABA LEGAL ADVISORY COMM., *supra* note 50, § 3.1 at 113.
57. United States v. Sorrentino, 175 F.2d 721, 723 (3d Cir. 1949).
58. United States *ex rel.* Rosenberg v. Mancusi, 445 F.2d 615, 617 (2d Cir. 1971).
59. *Sheppard*, 384 U.S. at 358. *See also* Warren and Abell, *Free Press-Fair Trial*, 45 S. CAL. L. REV. 51 (1972).