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Witness' Modesty Versus Criminal Defendant's Constitutional Rights: An Accomodation

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At his trial for violation of a Mississippi statute prohibiting vulgarity over the telephone,[1] the defendant admitted phoning the complainant, but denied using vulgar language. On direct examination the judge, on the prosecution's motion, permitted the complaining witness to write down the obscene words allegedly spoken by the defendant, rather than requiring her to utter them aloud. The defense attorney objected to this ruling on the grounds that it violated the defendant's constitutional right to an open, public trial and that the defendant was entitled to hear every word of the testimony. On cross-examination the defense attorney told the witness not to speak the obscene words, and he did not say them himself.

The defendant was found guilty. On appeal the Supreme Court of Mississippi reversed and remanded, in part on the ground that the defendant's constitutional right to a full cross-examination[2] was unduly restricted by the judge's ruling.[3] A vigorous dissent argued that the court was within its sound discretion to protect the witness from embarrassment on direct examination and, in addition, that the defense attorney waived any objection to the written testimony when he told the witness not to speak the words during cross-examination.[4]

This case raises two related problems: first, whether the modesty of a witness, defined here as a witness' extreme embarrassment about giving certain evidence,[5] should be protected by the court in criminal trials, and, second, how such protection can be afforded within practical and constitutional limits.

If modesty of witnesses can be respected without any harm to the defendant's fundamental rights, it would be unfortunate not to do so.[6] Moreover, it is in the public interest to encourage persons to report crimes, to file complaints, and to testify as witnesses. If a modest witness knows that she will have to divulge em-

1. The statute makes the use of "profane, vulgar, indecent, threatening, obscene or insulting language over any telephone" a felony, punishable by fine of $500 and/or six months in the county jail, or two years in the state penitentiary. MISS. CODE ANN. § 2291.5 (Supp. 1964).

2. "In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him." U.S. CONST. amend. VI; *accord*, MISS. CONST. art. 3, § 26.

3. Spears v. State, —— Miss. ——, 175 So. 2d 158 (1965) (alternative holding). The court gave two additional grounds for reversal. First, the trial court should have granted the defendant's motion to quash the indictment on the ground that it did not provide sufficient notice. Second, questions concerning telephone calls to other women made by the defendant should not have been allowed. These grounds are not discussed here.

4. *Id.* at ——, 175 So. 2d at 168–69 (dissenting opinion).

5. The embarrassment is measured subjectively, but to be persuasive there must be understandable reluctance to testify. See, *e.g.*, King v. State, 100 Ala. 85, 14 So. 878 (1894), which held that, despite the witness' protestations, the proposed exhibition could not possibly be embarrassing and thus compelled the exhibition of the witness' wounded arm.

6. Fundamental rights are those to which the United States Constitution demands adherence in a criminal action in order to avoid reversal for denial of "due process of law." See, *e.g.*, Pointer v. Texas, 380 U.S. 400 (1965) (right to confrontation applies to state trials through the fourteenth amendment); *In re* Oliver, 333 U.S. 257 (1948) (secret trials forbidden).

barrassing aspects of a crime without any judicial protection from publicly exposing herself to shame, she may well not come forward. To the extent that their modesty will be protected, more witnesses are likely to testify, and more prosecuting witnesses will report offenses in the first place.[7] To implement this public policy, a court's procedure may properly afford any needed protection of modesty to a witness requesting it.[8]

Modesty should not be protected, however, if the witness' claim of modesty is not genuine,[9] or if the means of protection proposed infringes on the accused's constitutionally protected right to an adequate defense. For example, the modesty claim will frequently be made by female witnesses in sex crime cases. Yet it is especially in such cases, where the fate of the defendant may rest on the uncorroborated or unsubstantiated testimony of his accusers, that the defendant's constitutional rights—cross-examination, confrontation, and his general ability to defend himself—should be most zealously enforced.[10] Without the defendant's acquiescence, these rights may not be infringed upon in order merely to protect an adverse witness from embarrassment.

Having decided that modesty should be protected when constitutionally permissible, the resulting question of how to accomplish such protection can be answered on two levels. On the general level, the trial judge has broad control over the framework of evidence and procedure within which modesty problems arise.[11] For example, judicial discretion can protect modesty by regulating the means of presenting evidence.[12] Thus, if an attorney is dwelling unduly on lurid

7. See, *e.g.*, Commonwealth v. Blondin, 324 Mass. 564, 571, 87 N.E.2d 455, 460 (1949), which discusses the rationale of a statute protecting female witnesses in illegitimacy proceedings and in crimes involving sex: "Doubtless it was thought that female witnesses in particular would come forward, institute complaints, and testify with less reluctance, so that more justice would be accomplished, if they could be relieved from the inhibitions imposed by the presence of a curiosity impelled audience." *Accord*, Spears v. State, —— Miss. ——, ——, 175 So. 2d 158, 168–69 (1965) (dissenting opinion).

8. It is easier to ignore the claim for modesty and insist on the full rights of a defendant when the person claiming modesty is the plaintiff in a civil case. The plaintiff initiated the suit voluntarily and has a personal interest in winning. Although such civil suits should not be discouraged, it is arguable that more consideration should be given to a plea of modesty by a witness or a defendant than by a plaintiff.

9. Although "modesty" is used in the subjective sense, it usually must be presumed from what would be generally accepted as harshly embarrassing evidence. If a witness wishes to prove that she is especially modest, she ought to carry the burden of persuasion.

The defendant should be able to challenge the witness' claim of modesty by showing that the witness would not normally be embarrassed by such evidence. For example, a showing that the witness is a "topless" dancer or a prostitute may be an adequate showing to refute a claim of embarrassment at baring her breasts.

10. See, *e.g.*, People v. Hume, 56 Cal. App. 2d 262, 267, 132 P.2d 52, 54–55 (2d Dist. 1942), which recognizes the unusually important place held by the constitutional right to cross-examination in sex cases: "It can be asserted with confidence that in the entire field of cross-examination there will be found no more compelling occasion for the extension of the right to its broadest reasonable limits than is found in cases where the fate of those accused of sex crimes rests upon the uncorroborated testimony of their accusers. In cases of this nature it has been said that the accused is at such a disadvantage that 'he should be given the full measure of every legal right in an endeavor to maintain his innocence.' "

11. See, e.g., Morgan, *Foreword* to MODEL CODE OF EVIDENCE at 13–15 (1942), which discusses the scope of the trial judge's discretion; McElroy, *Some Observations Concerning the Discretions Reposed in Trial Judges by the American Law Institute's Code of Evidence*, in MODEL CODE OF EVIDENCE at 356 (1942), which praises the flexibility derived from giving the trial judge large discretionary power.

12. *Cf.* People v. Burton, 55 Cal. 2d 328, 343, 359 P.2d 433, 438–39 (1961) (judge has broad discretion to control ultimate scope of cross-examination designed to test credibility or recollection of witness).

aspects of a witness' testimony, the judge may properly restrain such interrogation and protect the witness from harassment. The new California Evidence Code provides: "The court shall exercise reasonable control over the mode of interrogation of a witness so as . . . to protect the witness from undue harassment or embarrassment."[13]

The more specific question of how modesty is to be protected in any particular situation can be answered in several different ways. The witness may be spared embarrassment through expert testimony in lieu of her own, through clearing the courtroom while embarrassing evidence is given, or through written rather than oral testimony. The most effective and simple solution in many cases—especially in rape and assault cases where the question may involve an unwillingness to bare a portion of the body—is to have testimony concerning the allegedly vulgar or embarrassing real evidence given by an expert witness, usually a physician.[14] The jury may also be permitted a limited view of the evidence if a photograph of the embarrassing evidence is submitted in conjunction with expert testimony.[15]

Because a photograph or testimony given by an expert on the embarrassing real evidence is essentially dissociated from the modest witness, her embarrassment should be almost completely avoided. Furthermore, an expert can often give a more meaningful explanation of the evidence than the lay witness, and the expert can be fully cross-examined by the defense attorney. The modest witness is likewise available for direct or cross-examination, but is relieved of the necessity of such things as baring her body. The defendant can request his own expert to examine the embarrassing evidence and testify,[16] or the court may appoint an impartial expert.[17] This method of protecting modesty therefore neither stifles full investigation nor infringes upon the defendant's constitutional rights of cross-examination or public trial.[18]

In the few cases where experts substantially disagree about the type of injury sustained, and where the jury is competent to make a determination, this method of protection might be disallowed as a substitute for the real proof.[19] Except in such cases, if a modest witness asks for the use of expert testimony and photographs in lieu of her own testimony on the embarrassing evidence, her request should be granted. When embarrassing real proof is presented through an expert witness and photographs, the interests of both the witness and the defendant can most often be protected.

Unfortunately, this protection would be limited in scope to real evidence and

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13. CAL. EVIDENCE CODE § 765 (eff. Jan. 1, 1967).

14. See, *e.g.*, People v. Baldwin, 117 Cal. 244, 248, 49 Pac. 186, 187 (1897), where an expert's testimony indicated that the rape complained of by the child was physically impossible to perform. See generally MCCORMICK, EVIDENCE §§ 13–17 (1954).

15. See, *e.g.*, People v. Allen, 220 Cal. App. 2d 796, 34 Cal. Rptr. 106 (3d Dist. 1963) (photographs of assault victim).

16. See, *e.g.*, CAL. EVIDENCE CODE § 733 (eff. Jan. 1, 1967).

17. See, *e.g.*, Fullerton v. Fordyce, 144 Mo. 519, 44 S.W. 1053 (1897) (judge-appointed physician). See generally MODEL CODE OF EVIDENCE rules 402–10 (1942).

18. See generally MCCORMICK, EVIDENCE § 17 (1954), for a discussion of some of the problems of using expert testimony.

19. For example, if the prosecution's expert testifies that a scar on the witness' breast is the result of a knife wound, but the defendant's expert testifies it is merely a birthmark, the jury may be competent to make the necessary determination.

therefore could not apply in all modesty situations.[20] For example, in a rape case where consent was the defense, an expert could cover the real evidence, but much of the questioning would involve personal recollections of the complaining witness, as to which only she would be qualified to testify.[21]

A second method for protecting modesty, and the one most commonly used, is clearing the courtroom while embarrassing evidence is given. However, the defendant's right to a public trial is guaranteed by almost all states[22] and by the sixth amendment to the United States Constitution; therefore, to determine whether this method should be used to protect modesty, consideration should first be given to the reasons for the public trial guarantee,[23] and to the applicability of these reasons in the particular case. Historically, the defendant's right to public trial was established primarily to prevent arbitrary judicial action.[24] Other general purposes are to increase the trustworthiness of testimony[25] and to provide for the possibility that a member of the audience can provide relevant information which may corroborate, contradict, or supplement previous testimony.[26]

Clearing the courtroom is a possible protection for modesty in almost all instances where the modesty claim may occur—where the witness is reluctant to speak vulgar words, to describe an embarrassing event, or to reveal a portion of the body. Whereas expert testimony can be used to protect modesty only in cases involving real proof, clearing the courtroom will allow presentation of the witness' own testimony or real proof.

The witness' embarrassment will be lessened, although not eliminated, when the courtroom is cleared, because a gawking public will not be present to hear or see her offer the vulgar, lurid, or intimate evidence. Moreover, clearing the courtroom gives the defendant several advantages that are not provided by other protections for modesty. Most importantly, it allows the defendant to cross-examine the modest witness. In addition, the jury can observe the witness' demeanor while she testifies on the embarrassing evidence and is questioned about recollections.[27]

20. The hearsay rule or the rule requiring firsthand knowledge would usually block the use of an expert in situations involving vulgar words or intimate personal matters. The witness herself would therefore be required to give such testimony. See, *e.g.*, State v. Vinzant, 200 La. 301, 317–18, 7 So. 2d 917, 923 (1942). *But see* McCORMICK, EVIDENCE § 266 (1954) (certain statements about bodily conditions made to physician-expert in course of treatment excepted from hearsay rule).

21. An expert witness may in some extraordinary cases also be a direct witness to an event, in which case he could supplement the witness' personal recollections. In by far the greater number of cases in which modesty is to be protected, however, the expert's role will be to describe and interpret real evidence.

22. See, *e.g.*, MISS. CONST. art. 3, § 26; *In re* Oliver, 333 U.S. 257, 267–68 (1948).

23. See generally Radin, *The Right to a Public Trial*, 6 TEMP. L.Q. 381 (1932); Wiggins, *The Public's Right to Public Trial*, 19 F.R.D. 25 (1955); Note, 49 COLUM. L. REV. 110 (1949); Comment, 35 MICH. L. REV. 474 (1937).

24. See Note, 49 COLUM. L. REV. 110, 115–16 (1949); Comment, 35 MICH. L. REV. 474, 478–79 (1937). *But see* Radin, *supra* note 23, at 388–89, who sees the origin of public trial as largely "accidental." In *In re* Oliver, 333 U.S. 257, 270 (1948), the Court stated: "Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. 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."

25. See Tanksley v. United States, 145 F.2d 58, 60 (9th Cir. 1944). *But see* Commonwealth v. Principatti, 260 Pa. 587, 104 Atl. 53 (1918).

26. See Tanksley v. United States, 145 F.2d 58, 59 (9th Cir. 1944).

27. See Mattox v. United States, 156 U.S. 237, 242–43 (1895), quoted in text accompanying note 42 *infra*.

If the courtroom is opened immediately after the witness' presentation of the embarrassing evidence, the benefits of public trial can be essentially retained. And if defense counsel describes the real evidence or repeats in open court the essence of the witness' statement, merely asking her if his recital is correct, any member of the audience with relevant information will then know what has been asserted.

The primary disadvantage to the defendant is the possible damage to the flow of the defense attorney's cross-examination caused by the clearing and reopening of the courtroom.[28] An additional difficulty in using this protection for modesty is that a "public trial" might thereby be denied, as this requirement is interpreted under the United States Constitution or state law. The Supreme Court has stated:

> 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 sentenced to prison.[29]

Thus, under the fourteenth amendment standard applicable in all courts, a "public trial" must be at least not secret. It is not clear whether the full body of federal case law interpreting the sixth amendment guarantee is binding upon the states under the fourteenth amendment.[30] Even if it is, however, federal law would permit limited use of clearing the courtroom to protect a witness. A recent federal court case, describing the public trial requirement, said:

> "[T]he term 'public' is a relative one, and its construction depends upon various conditions and circumstances . . . . Hence a trial judge in the exercise of a sound discretion may exclude members of the public as may become reasonably necessary in order to protect a witness from embarrassment by reason of having to testify to delicate or revolting facts, as a child, or where it is demonstrated that the one testifying cannot, without being freed from such embarrassment, testify to facts material to the case."[31]

Even when there is a permissible reason to restrict the audience at a trial, the federal courts require that at least representatives of the press, attorneys, and friends and relatives of the accused be in the courtroom,[32] reasoning that the

28. This disadvantage is largely offset by the avoidance of any prejudice to the defendant from the impression that he is embarrassing the witness in public. It must also be considered whether a public trial really aids the defendant when he is accused of a sex crime. See Sallie v. State, 155 Miss. 547, 124 So. 650 (1929). Some courts, however, argue that the public has a *right* to attend. See Kirstowsky v. Superior Court, 143 Cal. App. 2d 745, 300 P.2d 163 (3d Dist. 1956).

29. *In re* Oliver, 333 U.S. 257, 273 (1948).

30. See *ibid.*, employing only fourteenth amendment "due process" grounds for reversing a state's undue restriction of public trial. The Court also recognized various standards of publicness: "In giving content to the constitutional and statutory commands that an accused be given a public trial, the state and federal courts have differed over what groups of spectators, if any, could properly be excluded from a criminal trial." *Id.* at 271.

31. Geise v. United States, 262 F.2d 151, 157 (9th Cir. 1958), quoting approvingly from the trial court opinion in 158 F. Supp. 821, 824 (D. Alaska 1958).

32. See Radin, *supra* note 23, at 391; *cf. In re* Oliver, 333 U.S. 257, 271–72 (1948).

presence of this portion of the public will prevent the inequities of secret trial.[33] A balance of factual considerations, such as the reason for the judge's order,[34] the extent of the public excluded, and the duration of the exclusion,[35] determines whether the right to public trial has been unduly restricted under federal standards.

Before suggesting clearing the courtroom as a protection for modesty, an attorney should be aware of the jurisdiction's interpretation of "public trial," since some states have a stricter interpretation than the federal rule. For example, some jurisdictions hold that clearing the courtroom in most instances cannot be permitted without contradicting the concept of "public."[36] Most jurisdictions, however, will allow limited clearing of the courtroom under conditions that indicate sufficient need.[37]

Because clearing the courtroom is a technique that can be used with great flexibility,[38] it may be the most effective general means for protecting a modest witness. If the order to clear the courtroom is properly limited,[39] prejudice to the defendant's case should be the only ground for overruling the motion.[40]

A third type of protection for modesty is the allowance of written rather than spoken testimony. This solution is, as a practical matter, applicable only in cases where vulgar words are in issue, and thus only where testimonial evidence is involved.[41]

Since her own utterance of the vulgar words is the primary cause of embarrassment, written testimony substantially protects a witness' modesty. Yet this form of protecting modesty cannot be used in all cases where vulgar words are in issue. True, if the only defense to a charge of vulgarity were that the words were not obscene, forcing the witness to say them would be of no value

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33. See Reagan v. United States, 202 Fed. 488, 490 (9th Cir. 1913). And see Comment, 35 MICH. L. REV. 474 (1937), which argues that the presence of newspapermen at today's trials provides "publicness" which common-law courts could never have achieved, and, therefore, that other members of the public may be excluded without denying the defendant the right to a public trial. *But see* Note, 49 COLUM. L. REV. 110, 118 (1949).

34. Geise v. United States, 262 F.2d 151 (9th Cir. 1958) (complainant in rape case and two witnesses, aged nine, seven, and eleven respectively—clearing upheld); Tanksley v. United States, 145 F.2d 58, 60 (9th Cir. 1944) (dictum) ("pathologic and revolting perversion" may be grounds for clearing courtroom).

35. *Compare* Hogan v. State, 191 Ark. 437, 86 S.W.2d 931 (1935) (ten-minute clearing while child testified about rape—upheld), *with* State v. Bonza, 72 Utah 177, 269 Pac. 480 (1928) (public not readmitted promptly after presentation of vulgar evidence completed—reversed).

36. See Note, 49 COLUM. L. REV. 110, 112–13 (1949), which discusses decisions that interpret "public trial" broadly and thus find almost any barring of the public to be an infringement of "public trial."

37. The "need" asserted in many cases is the protection of public morality. The courts correctly do not consider such a need to be of as much importance as the need to protect a witness from extreme embarrassment. Therefore, the statements made by courts in the former cases on the scope of public trial should not be taken as disallowing exclusions in the latter circumstances. *Compare* Geise v. United States, 262 F.2d 151 (9th Cir. 1958) (protection of witness), *with* United States v. Kobli, 172 F.2d 919 (3d Cir. 1949) (Mann Act case; courtroom cleared because young girls in audience).

38. See, *e.g.*, Hogan v. State, 191 Ark. 437, 86 S.W.2d 931 (1935) (courtroom cleared for ten minutes while child testified).

39. The order is usually unimpeachable if it includes the provision that the defendant may have admitted anyone he chooses. See, *e.g.*, People v. Hall, 51 App. Div. 57, 64 N.Y. Supp. 433 (1900).

40. See, *e.g.*, Reagan v. United States, 202 Fed. 488 (9th Cir. 1913).

41. In rape and other cases where the embarrassment involves lengthy oral descriptions such as the details of a rape, written testimony would be cumbersome. Clearing the courtroom during the embarrassing testimony would be a more appropriate protection for modesty.

to the defense other than as harassment. The words should thus be admitted in writing when only the question of their vulgarity is relevant. But in cases where the defense rests in part on the credibility of the prosecuting witness, oral testimony on the vulgar words may be essential to the defense. For example, suppose the defendant spoke with a lisp and the witness testified that everything said to her by the caller was vulgar. If the defense were that the defendant did not say the words, the defense attorney might wish to determine whether the witness had heard the defendant's lisp by having her say the words exactly as she heard them. In such a case written testimony is much less useful to the defendant than oral testimony. Furthermore, the jury cannot see the witness' demeanor when she is allowed to write. The United States Supreme Court has noted the importance of having a witness on cross-examination "stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and manner in which he gives his testimony whether he is worthy of belief."[42] In addition, if the witness is allowed to write—at least in part—any answer which includes the vulgar words, asking a rapid series of questions on cross-examination is much less effective, if not impossible. Because the jury will evaluate the witness' credibility from her demeanor,[43] such limitations on the effectiveness of cross-examination in order to protect modesty must be rejected whenever the defense puts in issue the witness' credibility as to whether the words were actually said to her.[44]

Any method of protecting the witness' modesty must be chosen to suit the facts of the particular case,[45] striving to maintain the ideal of protecting modesty while not infringing upon the defendant's constitutional rights. The solution adopted by the Mississippi court in *Spears v. State*[46] should be evaluated in terms of these goals and of the means of protection available.

The means by which modesty was protected in *Spears* was unsatisfactory from several points of view. The trial judge correctly realized that he should attempt to protect the witness. He erred, however, in not foreseeing the possible prejudice that allowing the witness to write the words would cause the defendant. If on cross-examination the defense attorney had asked the witness to speak the vulgar words after the judge's ruling on direct examination, the jury might have thought the attorney's action to be in bad taste.[47] By not so cross-examining, however, the defense attorney lost a possibly valuable means of defense: the jury's view of the witness' demeanor while speaking the words. Because the defense was that the accused had not said the words, the judge would have had to force

42. Mattox v. United States, 156 U.S. 237, 242–43 (1895).

43. Presumably the jury can distinguish demeanor representing embarrassment from that which shows that the witness is lying.

44. See People v. Baldwin, 117 Cal. 244, 49 Pac. 186 (1897).

45. See, *e.g.*, Keddington v. State, 19 Ariz. 457, 463, 172 Pac. 273, 275 (1918), an action for contributing to the delinquency of a girl aged sixteen by taking her to a dance and by becoming intoxicated, lewd, and offensive. The court said: "It became her [the prosecuting witness'] duty, under the law, to repeat language and describe conduct that any delicately reared and refined girl would blush and halt to repeat to her most intimate friends and associates."

If the witness must repeat the words, the judge is obligated to protect her from harassment. In *Keddington* the witness was protected by partial clearing of the courtroom.

46. —— Miss. ——, 175 So. 2d 158 (1965). See notes 1–4 *supra* and accompanying text.

47. "Any further efforts on the part of the appellant's attorney to force this witness to speak those words, after the court had ruled she did not have to say them, would have produced nothing more than a violent, hostile reaction on the part of the jury." *Id.* at ——, 175 So. 2d at 164.

the witness to speak them on cross-examination if the defense attorney asked her to; to be consistent, the judge should have ruled on direct examination against writing the words. A more satisfactory procedure, which would have protected the interests of both the defendant and the witness, would have been a suggestion by the judge that the courtroom be temporarily cleared during the direct examination.[48]

Faced with the dilemma of either possibly prejudicing his case by asking the witness to speak the vulgar words on cross-examination or foregoing the right to oral responses to cross-examination, the defense attorney chose the latter. The defense attorney might have completely avoided this dilemma—including whatever jury ill will he created by his objection to written testimony at the direct-examination stage—by asking for a ruling in chambers before trial. Having failed to do so, he could have at least eliminated the dilemma which he faced at the cross-examination stage by demonstrating to the court during the discussion of the plaintiff's motion on direct examination that the witness would have to say the words on cross-examination and that a consistent ruling on direct would prevent any prejudice. At direct examination the defense counsel might himself have suggested clearing the courtroom to protect the witness, a procedure which would be repeated to enable oral responses on cross-examination.

The Supreme Court of Mississippi held that the judge's ruling deprived the defendant of his right to cross-examination under the United States and Mississippi constitutions because of this practical dilemma it created.[49] The court's holding will prevent the occurrence of such dilemmas in the future, but only at a potentially severe cost to witnesses and, consequently, to the administration of justice. By failing to recognize any possible value in protecting a witness' modesty,[50] the court conveyed the impression that any such protection afforded by a trial judge would not only be unnecessary, but possibly unconstitutional as well.

However, several procedures for protecting modesty have been suggested here

48. See Keddington v. State, 19 Ariz. 457, 172 Pac. 273 (1918). MISS. CONST. art. 3, § 26, provides: "In all criminal prosecutions the accused shall have a right to . . . a speedy and public trial . . . ; but in prosecutions for rape, adultery, fornication, sodomy or the crime against nature the court may, in its discretion, exclude from the courtroom all persons except such as are necessary in the conduct of the trial."

The enumeration of specific actions during which the trial judge may at his discretion clear the courtroom might by a negative implication exclude the use of his discretion to clear the courtroom in any other type of case. This reasoning may have influenced the trial judge not to order the courtroom cleared as an alternative to having the witness write the words. On the other hand, the constitutional provision may be viewed as setting forth the state's general policy of protecting parties from embarrassment, thus permitting discretionary action by the trial judge. However, the record does not indicate whether this provision was even brought to the court's attention, so its impact in this case is speculative.

49. Since the lower court's ruling itself created the dilemma, it can be distinguished from many of the other dilemmas involving constitutional rights an attorney must face in the trial process that are not grounds for reversal. For example, when evidence that threatens conviction is before a jury, the defendant must choose between leaving the adverse evidence unexplained and subjecting himself to the danger of disclosure of his past convictions through cross-examination if he testifies in person. In such a case, however, the dilemma is inherent in the privilege against self-incrimination, and cannot be attributed to the trial court's actions; it is therefore not grounds for reversal. *Compare* GRISWOLD, THE FIFTH AMENDMENT TODAY (1955), *with* HOOK, COMMON SENSE AND THE FIFTH AMENDMENT (1957), as to the inferences which juries may rationally draw from the claim of the privilege against self-incrimination.

50. For example, the court stated that "there is no legal or rational basis upon which the refusal of the trial court to require the witness to speak the vulgar and obscene words can be predicated." —— Miss. at ——, 175 So. 2d at 163.

which, when used in appropriate circumstances and with proper restraint and wisdom, can mitigate embarrassment without depriving the defendant of his rights. Trial judges should be encouraged to employ their sound discretion to implement such procedures.

Furthermore, although the court's reversal on constitutional grounds can be justified, it would have been much preferable to reverse under the court's supervisory power over procedure. The court should have followed the generally sound rule of appellate court process that constitutional questions are not to be reached when the case can be decided on adequate, independent, nonconstitutional grounds.[51]

Along with a reversal on procedure, the court should have spelled out suggested procedures for future modest-witness cases. The failure of the judge and counsel in *Spears* to find any suitable means of protecting modesty without infringing on the defendant's rights further suggests that appellate court guidance concerning such procedure was needed. By realizing the public policy to be promoted by protecting a witness' modesty and the possible means of affording that protection without depriving the defendant of his rights, the court could have provided a legitimate and helpful guide to trial court procedure. As the decision stands, however, trial judges will be unduly discouraged from granting any protection to a witness' modesty. Such a result is not in the interest of Mississippi trial court justice.

Eric W. Wright

51. See Mr. Justice Brandeis' well-known concurrence in Ashwander v. TVA, 297 U.S. 288, 346–48 (1936), in which he sets forth general rules under which the Supreme Court has avoided passing upon a large part of all the constitutional questions pressed upon it for decision. For a discussion of the rule that advises the Court not to pass upon a constitutional question if there is also some other ground upon which the case may be disposed of see Fay v. Noia, 372 U.S. 391, 428–30 (1963); Herb v. Pitcairn, 324 U.S. 117, 125–26 (1945).