



NOTE

Close Calls: Defining Courtroom Closures Under the Sixth Amendment

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Abstract. The Sixth Amendment right to a public trial enjoys a rich historical heritage and occupies a special place in the hierarchy of constitutional protections, as the Supreme Court continues to recognize it as one of a “very limited class” of rights subject to structural error treatment. Nonetheless, lower courts regularly undermine the public trial right by manipulating the definition of courtroom closure required for Sixth Amendment claims. Three splits have emerged among lower courts on the constitutional meaning of “closure”: i) whether a defendant must demonstrate that a specific person was excluded from the courtroom, ii) whether a temporary closure can be too trivial to trigger Sixth Amendment concerns, and iii) whether the exclusion of a select group of spectators (dubbed a “partial closure”) warrants reversal as structural error. This Note explores these splits and their consequences—the creation, in effect, of distinct strong and weak forms of the constitutional public trial right. Part I discusses the historical origins of the public trial right and its treatment by the Court in recent decades. Part II examines the trifecta of splits related to this right and assesses the reasoning that has led to the courts’ divergent conclusions. Finally, Part III proposes a resolution to the conflicts through the use of the Supreme Court’s balancing test for analyzing closures, laid out in *Waller v. Georgia*. This test adequately respects the right to an open trial while acknowledging the need for efficient and consistent judicial administration.

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Introduction

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial”

—Sixth Amendment to the U.S. Constitution

The Sixth Amendment represents the “heartland of constitutional criminal procedure,” preserving in its compactly constructed clauses no fewer than ten fundamental rights for criminal defendants.¹ Its three main clusters of rights—the guarantees of a speedy trial, a public trial, and a fair trial—serve enduring values at the core of the American justice system: “the protection of innocence and the pursuit of truth.”² And yet judges, lawyers, and scholars “have often lost their way” when applying the Sixth Amendment’s lofty objectives to real trials.³ The result is a body of constitutional criminal procedure with significant parts that are, at best, unclear and, at worst, plainly “bad.”⁴

Of the various controversial twists and turns that Sixth Amendment interpretation has undergone,⁵ the doctrinal missteps surrounding the public trial right⁶ have received the least attention. Perhaps this is because the benefits flowing from public trials are somewhat less tangible than those arising from the Sixth Amendment’s more concrete procedural rights, or perhaps it stems

1. Akhil Reed Amar, *Foreword: Sixth Amendment First Principles*, 84 GEO. L.J. 641, 641-42 (1996) (describing the Sixth Amendment as protecting within the speedy trial right “a physical liberty interest in avoiding prolonged pretrial detention,” “a mental liberty and reputational interest in minimizing unjust accusation,” and “a reliability interest in assuring that the accuracy of the trial itself is not undermined by an extended accusation period”; within the public trial right, the right to “a trial held in public,” “featuring an impartial jury of the people,” “who come from the community where the crime occurred”; and within the fair trial right, the right to “be informed of the nature and cause of accusation,” “be confronted with prosecution witnesses,” “compel the production of defense witnesses,” and “enjoy the assistance of counsel in defending against the accusation”).

2. *Id.* at 642.

3. *Id.* at 641.

4. *Id.*

5. Among these controversies are, for example, the upheaval in the Confrontation Clause doctrine initiated by *Crawford v. Washington*, 541 U.S. 36 (2004), which overruled *Ohio v. Roberts*, 448 U.S. 56 (1980), or the reformulation of the relationship between criminal sentencing and the Sixth Amendment’s trial-by-jury guarantee in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), which “further plunge[d] the world of criminal sentencing into turmoil,” Jason Colin Cyrulnik, Case Comment, *Overlooking a Sixth Amendment Framework*, 114 YALE L.J. 905, 905 (2005).

6. By “public trial right,” I mean the right to have a trial open to the public. For purposes of this Note, I do not include in this term any of the guarantees surrounding trial by jury, although they are sometimes grouped under the same general category of “public trial rights.” See, e.g., Amar, *supra* note 1, at 642.

from the fact that the Supreme Court has heard so few cases on this right,⁷ leaving the elaboration of the public trial guarantee largely to lower appellate and state courts.

Though it has decided few public trial right cases, the Supreme Court has consistently categorized violation of the right as “structural error,”⁸ a rare designation granted to defects that “relate to fundamental rights involving the structure of the trial.”⁹ These errors in basic trial mechanisms are “so intrinsically harmful” as to cast doubt on the entirety of the proceedings.¹⁰ In addition to the public trial right, other structural error rights include such essential safeguards as the right to counsel,¹¹ the right to self-representation,¹² and the right to an impartial trial judge.¹³

While appellate review of nonstructural errors, termed “trial errors,”¹⁴ is “well-trod ground,” the exact parameters for review of structural errors are less clear.¹⁵ Although the Court has repeatedly indicated that structural errors require automatic reversal,¹⁶ almost all of its cases regarding structural error

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7. The Court’s entire public trial jurisprudence spans ten cases: *Presley v. Georgia*, 558 U.S. 209 (2010) (per curiam); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986); *Waller v. Georgia*, 467 U.S. 39 (1984); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979); *Estes v. Texas*, 381 U.S. 532 (1965); *Levine v. United States*, 362 U.S. 610 (1960); *In re Oliver*, 333 U.S. 257 (1948); and *Gaines v. Washington*, 277 U.S. 81 (1928).
 8. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 & n.4 (2006); see also, e.g., *Neder v. United States*, 527 U.S. 1, 8 (1999) (describing *Waller*, 467 U.S. 39, as a structural error case).
 9. *Gibbons v. Savage*, 555 F.3d 112, 119 (2d Cir. 2009); see *Johnson v. United States*, 520 U.S. 461, 468 (1997) (recognizing that structural errors are of a “very limited class”).
 10. *Neder*, 527 U.S. at 7-8.
 11. See, e.g., *Johnson*, 520 U.S. at 468-69 (describing *Gideon v. Wainwright*, 372 U.S. 335 (1963), as a structural error case).
 12. See, e.g., *id.* (describing *McKaskle v. Wiggins*, 465 U.S. 168 (1984), as a structural error case).
 13. See, e.g., *id.* (describing *Tumey v. Ohio*, 273 U.S. 510 (1927), as a structural error case).
 14. Properly preserved trial errors generally receive “harmless-error review,” an assessment of whether the error affected the outcome of the proceeding. See, e.g., *United States v. Poole*, 640 F.3d 114, 119-20 (4th Cir. 2011).
 15. See Benjamin E. Rosenberg, *Appellate Review of Structural Errors in Criminal Trials*, 242 N.Y. L.J. (July 29, 2009), <http://www.dechert.com/files/publication/51e78ec7-9ada-40eb-9b09-0a3e111aa50a/presentation/publicationattachment/7d6fa546-4f4d-4709-9a35-10517a77088b/0700709444dechert.pdf>. For example, various complications have arisen with categorizing minimal violations of the *Gideon* right to counsel as structural error warranting automatic reversal. See, e.g., *United States v. Roy*, 761 F.3d 1285, 1287, 1291, 1293 (11th Cir.) (finding seven-minute absence of counsel during inculpatory testimony as structural error), *reh’g en banc granted*, 580 F. App’x 715 (11th Cir. 2014).
 16. See, e.g., *Washington v. Recuenco*, 548 U.S. 212, 218 (2006) (“Only in rare cases has this Court held that an error is structural, and thus requires automatic reversal.”); *Neder v. United States*, 527 U.S. 1, 8 (1999) (“[W]e have found an error to be ‘structural,’ and thus

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have involved errors of significant impact¹⁷—for example, denial of counsel for an entire trial¹⁸ or, in the public trial right context, the closure of an entire weeklong suppression hearing.¹⁹ Lower courts faced with less serious infringements of the public trial right—like accidental, temporary closures or the exclusion of only some spectators—have struggled to reconcile the Court’s precedent with the practical reality of these seemingly de minimis violations.

In the Court’s seminal public trial right case, *Waller v. Georgia*, it laid out a flexible, four-part balancing test to identify the exceptional circumstances in which courtroom closures might be warranted.²⁰ *Waller*’s test weighs not only the countervailing interests threatened by an open courtroom (like national security or witness protection) but also the court’s ability to narrowly tailor the closure or implement alternative measures that would keep the courtroom open.²¹ This established a high but adaptive bar for closures.

Rather than apply this test to every closure circumstance, however, lower courts have created an ad hoc approach that varies by jurisdiction and, as this Note argues, seriously denigrates the public trial right. This patchwork evasion of *Waller* consists of three splits among federal and state courts around the meaning of “closure”: i) whether a defendant must demonstrate that a specific person was excluded from the courtroom, ii) whether a temporary closure can be too “trivial” to trigger the Sixth Amendment, and iii) whether the exclusion of a select group of spectators (dubbed “partial closure”) warrants reversal as structural error.

These conflicts implicate questions at the very heart of defendants’ public trial rights: When is a courtroom closed for Sixth Amendment purposes? What else does a defendant have to show when the record reflects that the doors to his courtroom were closed? Although a few scholars have begun to analyze lower courts’ bungling of public trial doctrine,²² the conversation is strikingly incomplete. No other scholarship discusses the trifecta of conflicts that has

subject to automatic reversal, only in a ‘very limited class of cases.’” (quoting *Johnson*, 520 U.S. at 468)).

17. See Rosenberg, *supra* note 15.

18. See *Gideon v. Wainwright*, 372 U.S. 335, 337 (1963).

19. See *Waller v. Georgia*, 467 U.S. 39, 42 (1984).

20. See *id.* at 48 (“[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.”); see also *id.* at 45 (“[T]he balance of interests must be struck with special care.”).

21. See *id.* at 48.

22. Two student-written pieces deal with issues peripheral to this topic, but neither offers a comprehensive analysis of closures under the Sixth Amendment. See Zach Cronen, Case Note, *Behind Closed Doors: Expanding the Triviality Doctrine to Intentional Closures*, 40 WM. MITCHELL L. REV. 252 (2013); Daniel Levitas, Comment, *Scaling Waller: How Courts Have Eroded the Sixth Amendment Public Trial Right*, 59 EMORY L.J. 493 (2009).

surreptitiously redefined the contours of the public trial right. This Note aims to fill that gap through a comprehensive treatment of these conflicts and their consequences. Part I describes the historical development and purpose of the public trial right. Part II explores the three conflicts in detail, explaining the reasoning and factual scenarios underlying each of the opposing doctrines. Finally, Part III discusses why the scope of the public trial right should not be redrawn and proposes a resolution to these conflicts. Instead of evading *Waller*, lower courts should employ a fuller understanding of *Waller*'s versatile test that would handle all types of closure events. Universal application of *Waller* would more effectively safeguard the public trial right while promoting much-needed consistency across jurisdictions.

I. Background and History of the Public Trial Right

The Sixth Amendment's right to a public trial represents a deeply rooted tradition in Anglo-American society.²³ Open legal proceedings function to keep judges and lawyers honest and competent, as well as to assure society that our judiciary operates without deceit or duplicity. As the Supreme Court has repeatedly proclaimed, we value open courtrooms so "that the public may see [the defendant] is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions."²⁴ Public trials provide a fundamental safeguard against the use of our courts as "instruments of persecution" because the watchful eyes of the public—or even just the possibility thereof—provide "an effective restraint on possible abuse of judicial power."²⁵

The American open trial guarantee has manifested as a dual right of the accused and of the public.²⁶ The Supreme Court has recognized a constitutional right of access to trials on the part of the public, located not in the Sixth Amendment's defendant-specific text but in the First Amendment's protections of free speech and press.²⁷ As Justice Blackmun recognized, society's interest in open trials exists "separately from, and at times in opposition to, the interests

23. See *In re Oliver*, 333 U.S. 257, 267 n.14 (1948) ("By immemorial usage, wherever the common law prevails, all trials are in open court, to which spectators are admitted." (quoting 2 JOEL PRENTISS BISHOP, *NEW CRIMINAL PROCEDURE* § 957, at 767 (2d ed. 1913))).

24. *Gannett Co. v. DePasquale*, 443 U.S. 368, 380 (1979) (quoting *In re Oliver*, 333 U.S. at 270 n.25).

25. *In re Oliver*, 333 U.S. at 270.

26. See Steven A. Engel, *The Public's Vicinage Right: A Constitutional Argument*, 75 N.Y.U. L. REV. 1658, 1666 (2000) (describing the development of the public's right of access to criminal trials).

27. See, e.g., *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) (describing the right of access as "not unambiguously enumerated" in the First Amendment but "nonetheless necessary to the enjoyment of other First Amendment rights").

of the accused.”²⁸ While innocent defendants benefit from the potential advantages of public trials identified by the Court—for example, witnesses discouraged from perjury or bystanders proffering new exculpatory evidence²⁹—a guilty defendant may prefer secret proceedings where bribes, intimidation, or unfavorable verdicts can pass without “the bracing sunshine of publicity.”³⁰ Society, however, has an interest in fair outcomes in both situations. Relatedly, public trials can serve an important therapeutic function for communities outraged by shocking crimes by providing a nonviolent means for grief and closure.³¹

A. English Common Law Origins

As the Supreme Court has repeatedly noted, the public trial right is grounded in over a millennium of “unbroken, uncontradicted history,”³² reflected in common law dating back to pre-Norman Conquest England.³³ Prior to the twelfth century, English law required all freemen to attend trials held in their community, as the freemen of each town rendered judgment in a communal antecedent to the jury system.³⁴ When the Norman kings introduced the Frankish procedure of trial by a smaller jury chosen from the town, required attendance was eventually phased out, but criminal trials continued to be public community events.³⁵ Records from a prominent fourteenth-century court, the Eyre of Kent, demonstrate that open trial proceedings represented a fundamental means of ensuring the smooth administration of justice:

[T]he King’s will was that all evil doers should be punished after their deserts, and that justice should be ministered indifferently to rich as to poor; and for the better accomplishing of this, he prayed the community of the county by their attendance there to lend him their aid in the establishing of a happy and certain peace that should be both for the honour of the realm and for their own welfare.³⁶

In 1565, English scholar and diplomat Sir Thomas Smith noted that criminal trials were

28. *Gannett*, 443 U.S. at 427 (Blackmun, J., concurring in part and dissenting in part).
29. See, e.g., *Waller v. Georgia*, 467 U.S. 39, 46 (1984); *In re Oliver*, 333 U.S. at 270 n.24.
30. Amar, *supra* note 1, at 677-78.
31. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980) (plurality opinion).
32. *Id.* at 573.
33. See *id.* at 565.
34. See *id.*
35. See *Gannett Co. v. DePasquale*, 443 U.S. 368, 419 (1979) (Blackmun, J., concurring in part and dissenting in part).
36. 1 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 268 (4th ed. 1927) (emphasis added) (quoting 1 THE EYRE OF KENT: 6 & 7 EDWARD II, at 2 (Frederic William Maitland et al. eds., 1910)).

doone openlie in the presence of the Judges, the Justices, the enquest, the prisoner, and so manie as will or can come so neare as to heare it, and all depositions and witnesses given aloude, that all men may heare from the mouth of the depositories and witnesses what is saide.³⁷

This common law tradition continued unabated into the seventeenth and eighteenth centuries, praised by notable juridical commentators like Matthew Hale and William Blackstone.³⁸

Although some courts and commentators have referenced the notorious Court of the Star Chamber³⁹ as the impetus for a strong public trial right in England,⁴⁰ others argue that the common law protecting open criminal proceedings was already well established by the time the Star Chamber came into existence.⁴¹ Those commentators note that public outrage toward the special court focused not on any secrecy in its proceedings (indeed, hearings were described as “open,” albeit in a limited sense of the word) but on the prerogatives the Crown reserved for itself (including the exclusive right to call witnesses)⁴² and the targeting of outspoken nobility as defendants.⁴³ Inclusion

37. THOMAS SMITH, *DE REPUBLICA ANGLORUM: A DISCOURSE ON THE COMMONWEALTH OF ENGLAND* 101 (L. Alston ed., 1906) (1583).

38. See 3 WILLIAM BLACKSTONE, *COMMENTARIES* *373 (“[T]he open examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination before an officer, or his clerk . . .”); MATTHEW HALE, *THE HISTORY OF THE COMMON LAW OF ENGLAND, AND AN ANALYSIS OF THE CIVIL PART OF THE LAW* 343, 345 (Charles Runnington ed., London, Henry Butterworth 6th ed. 1820) (describing the “excellency” of the “open course of evidence to the jury,” given “in the open court and in the presence of the parties, counsel, and all by-standers”); see also Max Radin, *The Right to a Public Trial*, 6 TEMP. L.Q. 381, 382-83 (1932) (referring to the works of Hale and Blackstone).

39. The Star Chamber was a fifteenth- through seventeenth-century English court, established and staffed by the King, that sat without a jury and was notorious for its arbitrary procedural methods and harsh sentencing practices. See generally E.P. Cheyney, *The Court of Star Chamber*, 18 AM. HIST. REV. 727 (1913) (describing the Court of the Star Chamber in detail).

40. E.g., *In re Oliver*, 333 U.S. 257, 268-69 (1948) (“The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy’s abuse of the *lettre de cachet*.” (footnotes omitted)); Levitas, *supra* note 22, at 502; cf. *Davis v. United States*, 247 F. 394, 395 (8th Cir. 1917) (per curiam) (recognizing that the Sixth Amendment’s public trial right was deemed necessary “due to the historical warnings of the evil practice of the Star Chamber in England”).

41. See Eric J. Walz, Note, *The Star-Spangled Chamber: The Venire’s Role in Satisfying the Sixth Amendment to the United States Constitution*, 46 SUFFOLK U.L. REV. 701, 704-05 (2013).

42. See *id.* (noting that the Star Chamber “initially received widespread support” but that “certain practices . . .—specifically the crown’s exclusive right to call witnesses—began to shock the public, resulting in increased disdain”); see also Erwin Chemerinsky, *Foreword* to SUSAN N. HERMAN, *THE RIGHT TO A SPEEDY AND PUBLIC TRIAL: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION*, at xi, xviii (2006) (noting that the Star Chamber “seems not to have held its proceedings in secret”); Radin, *supra* note 38, at 386-87 (“There was apparently nothing secret about the action of [the Star Chamber]

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of the public trial right in the Bill of Rights has thus been seen both as a recognition of longstanding English common law⁴⁴ and a targeted reaction to judicial abuses such as the Star Chamber.⁴⁵

Indeed, records of the debates surrounding the adoption of the Bill of Rights reveal little controversy among the First Congress about including the right to a public trial; although the Framers discussed the location and timing of criminal trials when the Sixth Amendment was proposed, none questioned the idea of open proceedings.⁴⁶ Justice Story, in his *Commentaries on the Constitution of the United States*, describes how “in declaring, that the accused shall enjoy the right to a speedy and public trial . . . [the Sixth Amendment] does but follow out the established course of the common law in all trials for crimes.”⁴⁷ Scholar Max Radin similarly explains the Framers’ adoption of the public trial right as the carryover of “a traditional feature of English trials,” “treated with the reverence which so many other elements of the common law received.”⁴⁸

court, and the grievance the Parliament had against it was rather its power, than the method in which that power was exercised.”).

43. Thomas Y. Davies, *Correcting Search-and-Seizure History: Now-Forgotten Common-Law Warrantless Arrest Standards and the Original Understanding of “Due Process of Law,”* 77 MISS. L.J. 1, 70 (2007) (discussing Parliament’s abolishment of the Star Chamber in reaction to its targeting of the King’s political opponents); Nathaniel Koppel, Note, *Nails in the Coffin of the Vampire: Personal Sovereign Immunity and Its Timely but Incomplete Death*, 2014 U. ILL. L. REV. 1293, 1303 n.51 (noting that the Star Chamber was “used to punish nobles for both real torts and crimes and as well sometimes as a façade for political punishments”); cf. Elizabeth Samson, *The Burden to Prove Libel: A Comparative Analysis of Traditional English and U.S. Defamation Laws and the Dawn of England’s Modern Day*, 20 CARDOZO J. INT’L & COMP. L. 771, 778 (2012) (noting that the Star Chamber’s purpose was to try “nobles [who] were too powerful’ to be tried in lower courts” (alteration in original) (quoting MARTIN L. NEWELL, *THE LAW OF SLANDER AND LIBEL IN CIVIL AND CRIMINAL CASES* 22 (4th ed. 1924))).
44. See 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 934, at 664 (Ronald D. Rotunda & John E. Nowak eds., Carolina Acad. Press 1987) (1833) (“[I]n declaring, that the accused shall enjoy the right to a speedy and public trial . . . [the Sixth Amendment] does but follow out the established course of the common law in all trials for crimes. The trial is always public . . .”).
45. Walz, *supra* note 41, at 718-20 (comparing incorporation theories describing a reaction to the Star Chamber and a recognition of longstanding common law tradition). Some scholars have noted that the Star Chamber court was brought up at other points in the debates, indicating that it was a negative precedent that the Founders possibly had in mind more generally when drafting the Bill of Rights. See, e.g., 1 J. KENDALL FEW, *IN DEFENSE OF TRIAL BY JURY* 73 (1993) (detailing discussions leading up to ratification of the Bill of Rights).
46. See 1 ANNALS OF CONG. 784-85 (1789) (Joseph Gales ed., 1834).
47. 3 STORY, *supra* note 44, § 934, at 664.
48. Radin, *supra* note 38, at 388.

B. Supreme Court Jurisprudence on the Public Trial Right

The Supreme Court has issued relatively few decisions concerning the public trial right,⁴⁹ but its consistent message has been that open proceedings represent an essential safeguard protecting both the individual accused⁵⁰ and broader societal interests in fairness and the pursuit of truth.⁵¹ Although “the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance,” they are “nonetheless real”;⁵² accordingly, the Court continues to consider the public trial guarantee one of a “very limited class” of rights subject to structural error treatment.⁵³

The Court held the Sixth Amendment’s right to a public trial applicable to state criminal prosecutions in 1948, relying heavily on the historical common law tradition of open courts in England and early America.⁵⁴ *In re Oliver* held that the secrecy of Michigan’s “one-man grand jury”—closed proceedings wherein the defendant was convicted and jailed for criminal contempt in the presence of only a judge—violated the Constitution’s public trial guarantee.⁵⁵ Citing English accounts from the sixteenth and seventeenth centuries and descriptions of early American criminal procedure, the Court declared that “[b]y immemorial usage, wherever the common law prevails, all trials are in open court, to which spectators are admitted.”⁵⁶

Almost four decades later, in the landmark case of *Waller v. Georgia*, the Court held that a violation of the public trial right requires reversal without any showing of prejudice.⁵⁷ *Waller* considered the closing of a seven-day suppression hearing to all but the parties, witnesses, court personnel, and attorneys.⁵⁸ The Court held that the Sixth Amendment public trial right applied to evidentiary hearings and was not outweighed by third-party privacy

49. See Chemerinsky, *supra* note 42, at xii (“[T]here are many Supreme Court decisions defining the requirement for a speedy trial, but virtually none interpreting the ‘public trial’ requirement of the Sixth Amendment.”).

50. See, e.g., *Presley v. Georgia*, 558 U.S. 209, 213 (2010) (per curiam); *Waller v. Georgia*, 467 U.S. 39, 46 (1984).

51. See, e.g., *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 7 (1986); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980) (plurality opinion); *In re Oliver*, 333 U.S. 257, 271 (1948); see also Amar, *supra* note 1, at 642.

52. *Waller*, 467 U.S. at 49 n.9.

53. See *Johnson v. United States*, 520 U.S. 461, 468-69 (1997).

54. *In re Oliver*, 333 U.S. at 266-69, 273.

55. *Id.* at 258-59, 278.

56. *Id.* at 266 n.14 (quoting 2 BISHOP, *supra* note 23, § 957, at 767).

57. 467 U.S. at 48-50; see also *Levine v. United States*, 362 U.S. 610, 627 n.* (1960) (Brennan, J., dissenting) (“[T]he settled rule of the [lower] federal courts [is] that a showing of prejudice is not necessary for reversal of a conviction not had in public proceedings.”).

58. 467 U.S. at 42.

interests implicated by the wiretap evidence at issue.⁵⁹ The *Waller* Court established a careful balancing test for determining when a closure is warranted, acknowledging that the public trial right may be outweighed in rare circumstances by other significant interests, such as the government's interest in preventing disclosure of sensitive intelligence.⁶⁰ *Waller's* four-part test lays out exactly what a trial court must ascertain before closing its courtroom: i) the party seeking to close the proceeding must proffer an overriding interest likely to be prejudiced by public access; ii) the closure must be no broader than necessary to protect that interest; iii) the trial court must consider reasonable alternatives to closure; and iv) the court must make findings on the record adequate to support such closure.⁶¹ However, no matter the nuances of these inquiries, the Court made clear that "the defendant should not be required to prove specific prejudice in order to obtain relief for a violation of the public-trial guarantee."⁶² *Waller* thus not only gave trial judges specific guidelines to protect a high bar for closures but also "unequivocally instructed appellate courts that they could not review any failure to follow the four-part test using harmless error analysis."⁶³

The foundation for the *Waller* test came from the Court's earlier cases establishing the public's First Amendment right of access to criminal trials. In *Richmond Newspapers, Inc. v. Virginia*, the Court faced for the first time the question whether a criminal trial could be closed to the public, upon an unopposed request of the defendant, without a showing of some other

59. *Id.* at 43.

60. *See id.* at 45.

61. *Id.* at 48.

62. *Id.* at 49-50.

63. Levitas, *supra* note 22, at 519. There is some disagreement on whether appellate courts can apply *Waller* post hoc using facts culled from the record if the trial judge did not explicitly apply the *Waller* test. Compare *Bowden v. Keane*, 237 F.3d 125, 132 (2d Cir. 2001) ("[I]n the case of a 'partial, temporary closure,' *Waller's* fourth prong is satisfied when 'information' that supports the closure can be 'gleaned' . . . from the record developed by the trial court . . ." (quoting *Woods v. Kuhlmann*, 977 F.2d 74, 77-78 (2d Cir. 1992))), and *United States v. Farmer*, 32 F.3d 369, 371 (8th Cir. 1994) ("[S]pecific findings by the district court are not necessary if we can glean sufficient support for a partial temporary closure from the record."), with *Carter v. State*, 738 A.2d 871, 878 (Md. 1999) ("An appellate court may not provide a post hoc rationale for why the trial judge would have closed the trial had it held a hearing . . ."). Logistically, the appellate court could remand or issue a judicial writ to the trial court to expressly apply *Waller*, without reversing, but if sufficient information to specifically answer all of *Waller's* prongs had already been obtained by the trial judge and preserved on the record, then explicitly applying *Waller* at the appellate level would seem to fulfill *Waller's* purposes. Cf. *State v. Filholm*, 848 N.W.2d 571, 577 (Neb. 2014) ("[T]he fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved. The determining factor is whether the record is sufficient to adequately review the question.").

overriding interest warranting closure.⁶⁴ Acknowledging the Sixth Amendment public trial right as personal to the defendant, the Court also found a correlative right of the public in the First Amendment: “In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees. . . . Free speech carries with it some freedom to listen.”⁶⁵ A few years after *Richmond Newspapers*, the Court articulated the applicable test for public access claims in *Press-Enterprise v. Superior Court*:

The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.⁶⁶

The *Waller* Court’s adoption of the same basic test for Sixth Amendment claims thus aligned the two discrete public trial rights, “succinctly synthesiz[ing] the Court’s prior jurisprudence to arrive at a coherent set of rules for uniformly enforcing the public trial right” under two different Amendments.⁶⁷

In the thirty years since *Waller*, the Supreme Court has not wavered in its commitment to protecting the public trial right. The Court’s most recent public trial right decision in *Presley v. Georgia* confirmed the centrality of open trials under the Constitution, explicitly extending the Sixth Amendment right to the pretrial voir dire proceeding.⁶⁸ Even as *Chapman v. California*⁶⁹ dramatically changed the landscape of constitutional review, ushering in harmless error analysis for an ever-growing number of constitutional violations,⁷⁰ the public trial right has remained uncompromised in the Court’s jurisprudence. The Court has repeatedly referred to violations of this right as belonging to “a limited class of fundamental constitutional errors” that are “so intrinsically harmful” as to trigger automatic reversal.⁷¹

64. 448 U.S. 555, 564 (1980) (plurality opinion).

65. *Id.* at 564, 575-76.

66. 464 U.S. 501, 510 (1984).

67. Levitas, *supra* note 22, at 518.

68. *See* 558 U.S. 209, 212-13 (2010) (per curiam).

69. 386 U.S. 18, 23 (1967) (applying harmless error analysis to Fifth Amendment right against self-incrimination).

70. *See, e.g., Arizona v. Fulminante*, 499 U.S. 279, 306, 308-10 (1991) (applying harmless error analysis to admission of involuntary confessions); *Rose v. Clark*, 478 U.S. 570, 579-80 (1986) (applying harmless error analysis to erroneous jury instructions).

71. *See, e.g., Neder v. United States*, 527 U.S. 1, 7-8 (1999); *Johnson v. United States*, 520 U.S. 461, 468 (1997).

However, because the Court has heard only a handful of cases on the right (all of which involved relatively significant closures), some lower courts faced with closures of limited length or apparent impact have chosen to ignore *Waller* to avoid reversal. Part II describes these ad hoc patterns of evasion—the creation, in effect, of a strong and weak form of the constitutional public trial right. Part III details the negative effects of this evasion and offers a proposal for consistent treatment of closure events under *Waller*.

II. Divergent Conceptions of “Closure”: Lower Court Conflicts on When and How to Apply *Waller*

Instead of consistently applying *Waller*’s test, lower courts are scrutinizing closures with increasingly stringent approaches not approved by the Supreme Court. A trio of splits has emerged among federal courts of appeals and state supreme courts on the constitutional meaning of “closure”: i) whether a defendant must demonstrate a specific person was excluded from the courtroom, ii) whether temporary closures can be too trivial to trigger Sixth Amendment concerns, and iii) whether the exclusion of a select group of spectators (dubbed a “partial closure”) warrants reversal as a structural error. While some courts have erected new and demanding hurdles for defendants asserting public trial right violations, other courts faithfully apply *Waller* to even the most trivial of closed doors. Because no other scholarship yet offers a comprehensive treatment of these conflicts, I examine in detail their reasoning and circumstances.

A. The “Excluded Individual” Split

In the Supreme Court’s most recent public trial case, *Presley v. Georgia*, the trial court summarily excluded the public from voir dire because “[t]here just [wa]sn’t space for them to sit in the audience.”⁷² Because the trial judge neglected to apply the four-part *Waller* test, the Supreme Court held that the defendant’s public trial right had been violated: under *Waller*’s third prong, it was “incumbent upon [the trial court] to consider all reasonable alternatives to closure. It did not, and that is all this Court need[ed] to decide.”⁷³

In Eddie Salazar’s 2010 (post-*Presley*) criminal trial in Missouri state court, the same scenario occurred: the trial judge found that the venire would fill the entire courtroom and subsequently excluded the public from voir dire for lack of space.⁷⁴ As in *Presley*, the trial judge neglected to engage in the *Waller* test,

72. 558 U.S. at 210 (first alteration in original) (quoting *Presley v. State*, 674 S.E.2d 909, 910 (Ga. 2009)).

73. *Id.* at 216.

74. *State v. Salazar*, 414 S.W.3d 606, 610-12 (Mo. Ct. App. 2013), *cert. denied*, 134 S. Ct. 2875 (2014).

failing to consider reasonable alternatives to closure.⁷⁵ When Mr. Salazar appealed the violation of his public trial right, the Missouri court of appeals acknowledged that the case mirrored *Presley* and agreed that “the trial court did not follow the [*Waller*] procedure necessary to close a courtroom to the public.”⁷⁶ It also recognized a violation of the public trial right as structural error that does not require the defendant to show prejudice.⁷⁷

However, instead of following the Supreme Court’s directly controlling precedent and reversing, the court of appeals then delved into an analysis of whether the closure “*actually* infringed on Defendant’s right to a public trial.”⁷⁸ It concluded that, because Mr. Salazar had failed to show that “any specific person was denied entry,” his Sixth Amendment right had not “*actually*” been violated.⁷⁹ Under Missouri’s reasoning, defendants now have an extra hurdle: the only closures to which *Waller* applies—the only route to relief in public trial right cases—are those where the defendant can present a specific person who could not enter the courtroom.

Missouri sits on one side of a split regarding the imposition of this extra hurdle on defendants. Massachusetts, Minnesota, New Jersey, and Rhode Island have also held that a defendant has no viable public trial claim without evidence of a particular individual denied entry.⁸⁰ On the other side of the split, the Second and Third Circuits, Texas, and Washington have held that

75. *See id.*

76. *Id.* at 613. The Missouri Supreme Court denied review in an unpublished opinion. *Id.* at 606.

77. *Id.* at 612.

78. *Id.* at 613 (emphasis added).

79. *Id.* at 613, 616.

80. *See, e.g., Commonwealth v. Williams*, 401 N.E.2d 376, 378 (Mass. 1980) (concluding that “the defendant ha[d] not demonstrated that his trial was impermissibly closed” because, although the trial judge stated on the record that he was closing the courtroom, “we do not know whether in fact . . . [anyone] was excluded from the courtroom”); *State v. Brown*, 815 N.W.2d 609, 616, 617-18, 618 n.5 (Minn. 2012) (holding that defendant’s public trial right was not violated because, while the courtroom was locked, the “trial remained open to the public and press already in the courtroom” and there was no “factual support for any claim that any particular person was denied entrance”); *State v. Venable*, 986 A.2d 743, 749 (N.J. Super. Ct. App. Div. 2010) (rejecting defendant’s public trial right claim as “hypothetical” because, in part, the court could not “say with any assurance that any actual person who desired to be present during jury selection was excluded”); *State v. Barkmeyer*, 949 A.2d 984, 1002 (R.I. 2008) (“[F]atal to defendant’s Sixth Amendment challenge, there has been no showing that anyone . . . was, in fact, excluded from this portion of the trial.”). Although *Commonwealth v. Williams* predates *Waller*, lower courts in Massachusetts have continued to rely on this holding post-*Waller*. *See, e.g., Commonwealth v. Rodenmacher*, 958 N.E.2d 1181, 1181 (Mass. App. Ct. 2011).

producing a specific person who was barred from the courtroom is *not* required under the Sixth Amendment.⁸¹

Like Missouri, the Supreme Court of Rhode Island has long held that defendants must produce a member of the public actually excluded in order to warrant application of *Waller* and the possibility of reversal.⁸² In its most recent case on the right, *State v. Barkmeyer*, the trial judge closed the courtroom during the testimony of a young victim of child molestation.⁸³ Although the circumstances potentially implicated an overriding interest justifying closure, the trial judge did not apply any part of the *Waller* test, so no consideration of alternative measures or narrow tailoring occurred. The Supreme Court of Rhode Island, despite noting that the “woefully inadequate” record did “not support the [closure] ruling that the trial justice made,” nonetheless concluded that “[a]bsent a showing that a member of the public was prevented from attending the trial,” the court could not find a constitutional violation.⁸⁴ “[F]atal to [the] defendant’s Sixth Amendment challenge,” the court explained, “there has been no showing that anyone, whether court personnel or the citizenry, was, in fact, excluded from [the closed] portion of the trial.”⁸⁵ Similarly, Minnesota, New Jersey, and Massachusetts have considered lack of evidence of excluded individuals as a factor resulting in a nonclosure finding.⁸⁶

On the other side of the conflict, the Texas Court of Criminal Appeals (the state court of last resort for criminal matters) has held that defendants do not need to demonstrate that particular individuals were excluded in order to claim a public trial right violation. In *Lilly v. State*, the court overturned a lower appellate court that had held that a trial inside a prison was not closed to the

81. See, e.g., *Peterson v. Williams*, 85 F.3d 39, 44 & n.7 (2d Cir. 1996) (rejecting argument that courtroom was not closed because no one knocked during closure but finding no constitutional violation “where the closure was 1) extremely short, 2) followed by a helpful summation, and 3) entirely inadvertent”); *United States ex rel. Bennett v. Rundle*, 419 F.2d 599, 608 (3d Cir. 1969) (en banc) (“The record does not show whether any spectators in the courtroom were in fact removed from it by the exclusionary order. Nor . . . does it reveal whether any persons sought admittance to the courtroom after the exclusionary order was made. But a defendant who invokes the constitutional guarantee of a public trial need not prove [that.]”); *Lilly v. State*, 365 S.W.3d 321, 331 (Tex. Crim. App. 2012) (“When determining whether a defendant has proved that his trial was closed to the public, the focus is not on whether the defendant can show that someone was actually excluded.”); *State v. Brightman*, 122 P.3d 150, 156 (Wash. 2005) (“[A] defendant claiming a violation to the public trial right is not required to prove that the trial court’s order has been carried out.”).

82. See *State v. Lerner*, 308 A.2d 324, 342 (R.I. 1973) (dismissing defendant’s contention that he was denied his right to a public trial because “[w]hile it [was] suggested that the public would be excluded from the trial, nothing in the record establishe[d] that the public actually was excluded”).

83. 949 A.2d at 1001 & n.15.

84. *Id.* at 1003.

85. *Id.* at 1002.

86. See *supra* note 80.

public because “no one was actually prohibited from attending.”⁸⁷ In reversing, the *Lilly* court specifically noted that “[w]hen determining whether a defendant has proved that his trial was closed to the public, the focus is not on whether the defendant can show that someone was actually excluded.”⁸⁸ Instead, the court emphasized that a reviewing court must ensure that the trial judge had fulfilled the obligation laid out by the Supreme Court “to take every reasonable measure to accommodate public attendance at criminal trials.”⁸⁹ Likewise, the Supreme Court of Washington has rejected arguments that, after a trial judge’s closure order, the courtroom was in fact closed.⁹⁰ Instead, a trial judge’s closure order without the *Waller* analysis and its state law equivalent constitutes reversible error, and “the burden is on the State to overcome the strong presumption that the courtroom was closed.”⁹¹

The Second and Third Circuits have also specifically held that defendants need not present a specific person excluded from the courtroom. In *United States ex rel. Bennett v. Rundle*, the Third Circuit concluded that, although the record did not “reveal whether any persons sought admittance to the courtroom after the exclusionary order was made,” the defendant did not have to make such a showing, as that would amount to proving actual prejudice.⁹² “Such a requirement would in most cases deprive [the defendant] of the [public trial] guarantee, for it would be difficult to envisage a case in which he would have evidence available of specific injury.”⁹³ The Second Circuit, even while adopting the triviality doctrine described below, has also held that whether or not specific individuals were actually excluded is not relevant to whether a courtroom was closed for Sixth Amendment purposes.⁹⁴ In response to arguments to the contrary, Judge Calabresi wrote: “We reject the State’s argument. The fact that no one knocked is of no significance. Spectators do not have the burden of banging on closed courtroom doors during trial.”⁹⁵

B. The “Triviality” Split

Courts have also divided on how serious the closure must be to trigger Sixth Amendment treatment. A majority of federal courts of appeals, including

87. 365 S.W.3d 321, 331 (Tex. Crim. App. 2012).

88. *Id.*

89. *Id.* (quoting *Presley v. Georgia*, 558 U.S. 209, 215 (2010) (per curiam)).

90. *See State v. Brightman*, 122 P.3d 150, 155 (Wash. 2005) (en banc).

91. *Id.* at 154-55.

92. 419 F.2d 599, 608 (3d Cir. 1969). Although *Rundle* predated *Waller*, the Third Circuit has continued to rely on it post-*Waller*. *See, e.g., Virgin Islands v. Leonard A.*, 922 F.2d 1141, 1144 (3d Cir. 1991).

93. *Rundle*, 419 F.2d at 608.

94. *See Peterson v. Williams*, 85 F.3d 39, 44 & n.7 (2d Cir. 1996).

95. *Id.* at 44 n.7.

the Second, Third, Fourth, Sixth, Seventh, Ninth, Tenth, and D.C. Circuits, has held that closures that are brief, inadvertent, or both can be “too trivial” to constitute Sixth Amendment closures.⁹⁶ In contrast, a minority of courts has rejected the triviality doctrine, including the high courts of Washington and Texas,⁹⁷ and a handful of U.S. circuit courts has repeatedly held that even temporary total closures require Sixth Amendment treatment.⁹⁸

The Second Circuit established the triviality doctrine almost two decades ago in *Peterson v. Williams*, where a trial judge inadvertently left a courtroom closed for twenty minutes during which the defendant testified.⁹⁹ Judge Calabresi, declaring “[t]he point . . . an obvious one,” paraphrased a Samuel Johnson anecdote: just as a truthful man may accurately state that there is no fruit in the orchard, despite the “poring man” who finds there two apples and three pears, courts should not blindly fixate on the letter of constitutional precepts to the detriment of their basic meaning.¹⁰⁰ “Plain language to the contrary notwithstanding, for most purposes, absence of fruit aptly describes the orchard. And so it is with the words of the Constitution.”¹⁰¹ Thus, he concluded, despite the plain words of the Sixth Amendment, in some circumstances, “an unjustified closure may, on its facts, be so trivial as not to violate the charter.”¹⁰²

The Second Circuit has since extended this standard to a variety of circumstances. In *Gibbons v. Savage*, where the trial judge excluded the public generally (and the defendant’s mother specifically) from an afternoon of voir dire, the court found such an exclusion too trivial to constitute a closure implicating the Sixth Amendment.¹⁰³ Finding “unimaginable” the contention that “a brief and trivial mistake could require voiding a criminal trial of many months['] duration,” the court did not apply *Waller*.¹⁰⁴ Instead, the court analyzed whether the conduct at issue “subvert[ed] the values the drafters of the Sixth Amendment sought to protect”: i) ensuring a fair trial, ii) reminding

96. See, e.g., *Gibbons v. Savage*, 555 F.3d 112, 121 (2d Cir. 2009); *United States v. Patton*, 502 F. App’x 139, 142 (3d Cir. 2012); *United States v. Izac*, 239 F. App’x 1, 4 (4th Cir. 2007) (per curiam); *United States v. Rivera*, 682 F.3d 1223, 1229 (9th Cir. 2012); *United States v. Perry*, 479 F.3d 885, 890 (D.C. Cir. 2007).

97. See, e.g., *State v. Easterling*, 137 P.3d 825, 831 (Wash. 2006) (en banc); *Harrison v. State*, No. 02-10-00432-CR, 2012 WL 1034918, at *13 (Tex. App. Mar. 29, 2012) (per curiam).

98. See, e.g., *United States v. Agosto-Vega*, 617 F.3d 541, 548 (1st Cir. 2010); *Judd v. Haley*, 250 F.3d 1308, 1316 (11th Cir. 2001).

99. 85 F.3d at 41.

100. *Id.* at 40 (quoting Charles L. Black, Jr., *Mr. Justice Black, the Supreme Court, and the Bill of Rights*, HARPER’S MAG., Feb. 1, 1961, at 63, 67).

101. *Id.* at 41.

102. *Id.* at 40.

103. 555 F.3d 112, 121 (2d Cir. 2009).

104. *Id.* at 120.

court officers and attorneys of the importance of their responsibilities, iii) allowing new witnesses to make themselves known, and iv) discouraging perjury.¹⁰⁵ None of these values, the court found, was compromised by the trial judge's closure of voir dire.¹⁰⁶ The Second Circuit has been careful to distinguish this analysis as "very different" from a harmless error inquiry: instead of looking to whether defendants suffered "prejudice" or "specific injury," the triviality standard assesses "whether the actions of the court and the effect that they had on the conduct of the trial deprived the defendant . . . of the protections conferred by the Sixth Amendment."¹⁰⁷ Whether this is actually a meaningful difference is discussed in Part III.

Numerous other courts have adopted *Peterson's* triviality doctrine. The Ninth Circuit has held that "in some circumstances, exclusion of members of the public from a judicial proceeding does not implicate the constitutional guarantee,"¹⁰⁸ depending on "whether the closure involved the values that the right to a public trial serves."¹⁰⁹ The Ninth Circuit, like the Second Circuit, conducts a holistic analysis of the closure circumstances, assessing factors like the identity of those excluded,¹¹⁰ the brevity¹¹¹ and inadvertence¹¹² of the closure, and the "importance" of the proceedings that occurred during the closure.¹¹³ Thus, for example, the exclusion of spectators during a midtrial questioning of jurors to determine if they were concerned for their safety was too trivial to implicate the Sixth Amendment.¹¹⁴ In contrast, the exclusion of a

105. *Id.* at 121 (quoting *Smith v. Hollins*, 448 F.3d 533, 540 (2d Cir. 2006)).

106. *Id.*

107. *United States v. Gupta*, 699 F.3d 682, 688 (2d Cir. 2012) (quoting *Peterson*, 85 F.3d at 42); see also *Gibbons*, 555 F.3d at 121.

108. *United States v. Rivera*, 682 F.3d 1223, 1229 (9th Cir. 2012).

109. *United States v. Ivester*, 316 F.3d 955, 960 (9th Cir. 2003); see also *id.* ("We conclude we should apply the wise and widely-accepted *Peterson* test . . .").

110. See *Rivera*, 682 F.3d at 1230 (noting that the presence of a defendant's family is "particularly effective" at "reminding the [trial] participants of the importance of the occasion").

111. See *id.* at 1231 ("That a closure is particularly brief in duration may support the conclusion that it does not implicate the values served by the defendant's right to a public trial."); *Ivester*, 316 F.3d at 960 ("The [closure] was very brief in duration."); *Peterson*, 85 F.3d at 43 (noting the "brevity . . . of the closure").

112. See *Rivera*, 682 F.3d at 1231; *Peterson*, 85 F.3d at 43 (noting the "inadvertence of the closure").

113. *Rivera*, 682 F.3d at 1231-32 (explaining that the closure occurred during a "critical juncture in the proceedings" because "during the hearing, matters of vital importance were discussed and decided: The court computed Rivera's Sentencing Guideline range, heard closing statements from defense counsel and a personal statement from Rivera, weighed the § 3553(a) factors, and imposed its sentence" (quoting *Braun v. Powell*, 227 F.3d 908, 917 (7th Cir. 2000))); *Ivester*, 316 F.3d at 960 (finding closure trivial because "questioning the jurors to determine whether they felt safe is an administrative jury problem" with "no bearing on Ivester's ultimate guilt or innocence").

114. *Ivester*, 316 F.3d at 959-60.

defendant's young son and family members from part of the sentencing phase of a trial constituted a nontrivial closure.¹¹⁵ The Third, Fourth, Sixth, Seventh, Tenth, and D.C. Circuits, as well as several state supreme courts, have implemented a similar multifactor triviality analysis.¹¹⁶

Unsurprisingly, courts employing this subjective, multifactor inquiry have disagreed on the treatment of individual factors and have come to different conclusions on when a closure crosses the line from trivial to constitutionally significant.¹¹⁷ For example, the Tenth Circuit has required that the closure be an "affirmative act" of the court in order to implicate the Sixth Amendment,¹¹⁸ and the Second and Ninth Circuits have similarly used "inadvertence" as a factor pointing towards triviality.¹¹⁹ In contrast, the Seventh Circuit has held the intentionality or inadvertence of the closure "constitutionally

115. *Rivera*, 682 F.3d at 1232.

116. *United States v. Patton*, 502 F. App'x 139, 141-42 (3d Cir. 2012) ("An unjustified courtroom closure only infringes a defendant's Sixth Amendment rights if it undermines the values the Supreme Court identified in *Waller* Although triviality is not determined by a single factor, a closure was trivial and did not implicate the values advanced by the public trial guarantee when the trial judge was unaware of the closure and it was limited in both scope and duration." (citation omitted)); *United States v. Izac*, 239 F. App'x 1, 4 (4th Cir. 2007) ("While a defendant generally has a Sixth Amendment right to a public trial, in certain situations the exclusion of a member of the public can be too trivial to amount to a violation of the Sixth Amendment."); *United States v. Arellano-Garcia*, 503 F. App'x 300, 305 (6th Cir. 2012) ("[C]ourts have consistently refused to find Sixth Amendment violations when a courtroom closure is so limited as to be trivial. . . . This limited exclusion does not implicate the policies underlying the Sixth Amendment, and may not constitute a constitutional closure at all."); *Braun*, 227 F.3d at 919-20 (applying the "values articulated in *Peterson*" to find that exclusion of spectator from trial "did not rise to the level of a Sixth Amendment violation"); *United States v. Al-Smadi*, 15 F.3d 153, 154 (10th Cir. 1994) (finding a closure of an after-hours trial de minimis because "[t]he denial of a defendant's Sixth Amendment right to a public trial requires some affirmative act by the trial court meant to exclude persons from the courtroom"); *United States v. Perry*, 479 F.3d 885, 890 (D.C. Cir. 2007) ("[E]ven a problematic courtroom closing can be 'too trivial to amount to a violation of the [Sixth] Amendment.'" (second alteration in original) (quoting *Peterson*, 85 F.3d at 42)); *People v. Woodward*, 841 P.2d 954, 958-59 (Cal. 1992) (en banc) (finding temporary closure during closing arguments too trivial to constitute Sixth Amendment violation); *People v. Vaughn*, 821 N.W.2d 288, 304-05 (Mich. 2012) (referencing *Gibbons v. Savage*, 555 F.3d 112 (2d Cir. 2009), to conclude that "[b]ecause the closure of the courtroom was limited to a vigorous voir dire process that ultimately yielded a jury that satisfied both parties, we cannot conclude that the closure 'seriously affected the fairness, integrity, or public reputation of judicial proceedings'" (quoting *People v. Carines*, 597 N.W.2d 130, 143 (Mich. 1999))).

117. Compare *Peterson*, 85 F.3d at 43 (applying triviality standard to courtroom closure during witness testimony), with *Tinsley v. United States*, 868 A.2d 867, 871, 875 (D.C. 2005) (applying full *Waller* test to closure of courtroom during witness testimony).

118. *Al-Smadi*, 15 F.3d at 154.

119. *Rivera*, 682 F.3d at 1231; *Peterson*, 85 F.3d at 43.

irrelevant.”¹²⁰ Thus, the Seventh Circuit and the Tenth Circuit have come to opposite conclusions regarding whether a trial that inadvertently continues after a courthouse is closed and locked for the day implicates the Sixth Amendment.¹²¹

Only a small minority of courts has eschewed the triviality doctrine. The Supreme Court of Washington has declared that it has never “indicate[d] a tolerance for so called ‘trivial closures’”: “Although . . . other jurisdictions have determined that improper courtroom closures may not necessarily violate a defendant’s public trial right, a majority of this court has never found a public trial right violation to be *de minimis*.”¹²² In addition to Washington, state courts in Alabama and Texas have rejected a triviality standard,¹²³ and the First Circuit has repeatedly rejected arguments that temporary, inadvertent closures are too trivial to warrant Sixth Amendment treatment (without rejecting the doctrine outright).¹²⁴ The Eighth and Eleventh Circuits have also held that total closures, no matter how temporary, must be subject to the four-prong *Waller* test,¹²⁵ and neither circuit has ever found a total closure too trivial or *de minimis* to implicate the Sixth Amendment.

120. *Walton v. Briley*, 361 F.3d 431, 433 (7th Cir. 2004); *see also State v. Vanness*, 738 N.W.2d 154, 158 (Wis. Ct. App. 2007) (“We . . . conclude the court’s intent is irrelevant to determining whether the accused’s right to a public trial has been violated by an unjustified closure.”).

121. *Compare Walton*, 361 F.3d at 433 (finding a Sixth Amendment violation where after-hours trial was closed to public because it continued after courthouse was locked at the end of the day), *with Al-Smadi*, 15 F.3d at 154-55 (finding no Sixth Amendment violation where after-hours portion of trial was closed to public because courthouse was locked).

122. *State v. Easterling*, 137 P.3d 825, 831 (Wash. 2006) (en banc).

123. *See, e.g., Ex parte Easterwood*, 980 So. 2d 367, 375-76 (Ala. 2007) (distinguishing between partial and total closures but holding that even temporary total closures merit the full *Waller* test); *Harrison v. State*, No. 02-10-00432-CR, 2012 WL 1034918, at *13 (Tex. App. Mar. 29, 2012) (per curiam) (referencing and rejecting triviality doctrine for closure of voir dire to defendant’s family members).

124. *See, e.g., United States v. Agosto-Vega*, 617 F.3d 541, 544-45, 548 (1st Cir. 2010) (declining to address the triviality standard when a courtroom was closed for an entire day); *Owens v. United States*, 483 F.3d 48, 62-63 (1st Cir. 2007) (rejecting the triviality argument because the day-long closure far exceeded “a mere fifteen or twenty-minute closure”).

125. *See, e.g., United States v. Thompson*, 713 F.3d 388, 395 (8th Cir. 2013) (declining to evaluate “how long a trial is closed”); *United States v. Thunder*, 438 F.3d 866, 867-68 (8th Cir. 2006) (“To withstand a defendant’s objection to closing a trial *or any part of one*, an order directing closure must adhere to the principles outlined in *Press-Enterprise* . . .” (emphasis added)); *Judd v. Haley*, 250 F.3d 1308, 1315-16 (11th Cir. 2001) (“Nowhere does our precedent suggest that the total closure of a courtroom for a temporary period can be considered a partial closure, and analyzed as such.”).

C. The “Partial Closure” Split

A third conflict exists concerning whether courts should distinguish between “partial” closures—excluding only certain spectators—and “total” closures—excluding everyone except witnesses, court personnel, the parties, and their counsel. The First, Second, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits,¹²⁶ as well as several state high courts,¹²⁷ view partial closures as triggering a less stringent “substantial reason” standard in lieu of *Waller’s* “overriding interest.”¹²⁸ In contrast, the highest courts of New York, Illinois, and Minnesota,¹²⁹ among other states, have refused to distinguish closures based on who was barred.

Illustrative in its reasoning, the Second Circuit adopted the partial closure doctrine more than two decades ago in *Woods v. Kuhlmann*, wherein individuals who had allegedly threatened a witness were removed from the courtroom during that witness’s testimony.¹³⁰ The court “note[d] a significant difference” between the exclusion of all spectators and the exclusion of some, and accordingly departed from *Waller*, requiring a “substantial reason” instead of an “overriding interest.”¹³¹ The court reasoned that “a less stringent standard was justified because a partial closure does not implicate the same secrecy and fairness concerns that a total closure does.”¹³²

The Fifth Circuit has adopted the same “substantial reason” test, reasoning that “the partial closing of court proceedings does not raise the same constitutional concerns as a total closure, because an audience remains to ensure the fairness of the proceedings.”¹³³ The Eleventh Circuit has come to

126. See, e.g., *United States v. DeLuca*, 137 F.3d 24, 34 (1st Cir. 1998) (distinguishing between partial and total closures); *Woods v. Kuhlmann*, 977 F.2d 74, 76 (2d Cir. 1992); *United States v. Osborne*, 68 F.3d 94, 98-99 (5th Cir. 1995); *United States v. Simmons*, 797 F.3d 409, 413-14 (6th Cir. 2015); *Garcia v. Bertsch*, 470 F.3d 748, 752-53 (8th Cir. 2006); *United States v. Sherlock*, 962 F.2d 1349, 1357 (9th Cir. 1992); *United States v. Addison*, 708 F.3d 1181, 1187 (10th Cir. 2013) (“Where, as here, there is only a partial closure of the trial, the defendant’s right gives way if there is a ‘substantial’ reason for the partial closure.”); *Judd*, 250 F.3d at 1315 (“[W]e have recognized a distinction between total closures of proceedings, as in *Waller*, and situations where the courtroom is only partially closed to spectators.”).

127. See, e.g., *Ex parte Easterwood*, 980 So. 2d at 376 (Ala. 2007) (“[I]n those situations where the trial court has ordered only a partial closure of the courtroom, the party seeking the closure need only advance a ‘substantial reason’ for the closure.”); *State v. Rolfe*, 851 N.W.2d 897, 903 (S.D. 2014), *cert. denied*, 135 S. Ct. 953 (2015).

128. *Judd*, 250 F.3d at 1315, 1317; see also *DeLuca*, 137 F.3d at 34 (requiring the government to establish that a partial closure furthered “simply a ‘substantial’ interest rather than a ‘compelling’ interest”).

129. See *infra* notes 142-45 and accompanying text.

130. 977 F.2d at 74-75.

131. *Id.*

132. *Id.*

133. *United States v. Osborne*, 68 F.3d 94, 98-99 (5th Cir. 1995).

the same conclusion: “[I]n the event of a partial closure, a court need merely find a ‘substantial’ reason for the partial closure, and need not satisfy the elements of the more rigorous *Waller* test.”¹³⁴ Although “[b]oth partial and total closures burden the defendant’s constitutional rights,” if not everyone is excluded from the courtroom, “the impact of the closure is not as great, and not as deserving of such a rigorous level of constitutional scrutiny.”¹³⁵ The Eleventh Circuit has elaborated on this reasoning to a greater extent than its sister courts:

[O]ur prior cases have articulated the values that the Constitution’s public trial guarantee seeks to protect, which include permitting the public to see that a defendant is dealt with fairly, ensuring that trial participants perform their duties conscientiously, and discouraging perjury. These values are only moderately burdened when the courtroom is partially closed to the public, as certain spectators remain and are able to subject the proceedings to some degree of public scrutiny. However, a total closure of the courtroom, even for a temporary period, eliminates for a time the valuable role the presence of spectators can have on the performance of witnesses and court officials, and can create a public perception that the defendant is not being treated justly.¹³⁶

In fact, all but one of the circuit courts to reach the partial closure issue have adopted the “substantial interest” test, expressing some form of the Eleventh Circuit’s reasoning.¹³⁷

On the other side of the split, New York, Illinois, and Minnesota have held that *Waller* applies in its entirety to partial closures, including the “overriding interest” prong. New York’s highest court has recognized the conflict and flatly rejected a different standard for partial closures: “We are aware that some courts have recognized that a less demanding standard can be applied to [partial] closure requests. We disagree.”¹³⁸ In *People v. Jones*, where the trial judge instituted screening procedures requiring identification at the door, the Court of Appeals of New York held that a complete and rigorous application of *Waller* applied,¹³⁹ as a partial closure “raises the same secrecy and fairness concerns that a total closure does.”¹⁴⁰ According to the *Jones* court, modifying

134. *Judd v. Haley*, 250 F.3d 1308, 1315 (11th Cir. 2001).

135. *Id.*

136. *Id.* at 1315-16 (citations omitted).

137. The First, Second, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuit decisions are discussed above. *See supra* note 126. The Third, Fourth, Seventh, and D.C. Circuits have not reached the issue. *See, e.g., United States v. Perry*, 479 F.3d 885, 889 n.4 (D.C. Cir. 2007) (“While we have not addressed the issue . . . several circuits require that the prosecution advance only a ‘substantial’ interest—not an ‘overriding’ interest—to support a ‘partial’ closing”); *Bell v. Jarvis*, 236 F.3d 149, 168 n.11 (4th Cir. 2000) (“[W]e need not consider whether *Waller*’s stringent test for complete closure applies equally in the context of a . . . partial closure”).

138. *People v. Jones*, 750 N.E.2d 524, 529 (N.Y. 2001) (footnote omitted) (citations omitted).

139. *See id.* at 526, 529.

140. *Id.* at 529.

Waller's test for varying degrees or circumstances of closure is utterly unnecessary: the test "already contemplates a balancing of competing interests" by ensuring that the closure is no broader than necessary and the trial court consider alternatives suggested by the parties.¹⁴¹

The Supreme Court of Minnesota has decided the issue along similar lines.¹⁴² In *State v. Mahkuk*, the trial judge allowed alleged members of the defendant's gang to be excluded during trial to prevent witness intimidation, without any of the findings required by *Waller*.¹⁴³ The Supreme Court of Minnesota deemed the trial court's ruling improper, finding that *Waller's* test must be met despite the partial nature of the closure: "Although some federal circuit courts of appeals apply a lesser 'substantial reason' test to review the constitutionality of partial closures, we have not applied different tests to complete versus partial closures."¹⁴⁴ The Supreme Court of New Mexico has agreed,¹⁴⁵ and Illinois intermediate appellate courts have long held the same, holding that the *Waller* "overriding interest" test is applied regardless of whether there is total or partial closure of a trial.¹⁴⁶

III. Reconceptualizing *Waller* for a Unified Approach to Courtroom Closures

A. An Explanation for Lower Courts' Avoidance of *Waller*

As the cases in Part II demonstrate, trial judges generally exclude the public from their courtrooms for a handful of routine, practical reasons—to prevent overcrowding, witness intimidation, and disruptions during trial.¹⁴⁷ In the

141. *Id.*

142. *State v. Mahkuk*, 736 N.W.2d 675, 685 (Minn. 2007); *see also* *State v. Brown*, 815 N.W.2d 609, 624 (Minn. 2012) (Meyer, J., dissenting) ("We have rejected any distinction between partial and total closures, requiring that the *Waller* framework apply to all courtroom closures.").

143. *Mahkuk*, 736 N.W.2d at 684-85 ("[T]he trial court did not make specific findings as to what it was about the testimony that supported the closure decision.").

144. *Id.* at 685 (citation omitted).

145. *State v. Turrietta*, 308 P.3d 964, 970-71 (N.M. 2013).

146. *People v. Webb*, 642 N.E.2d 871, 874 (Ill. App. Ct. 1994); *see also* *People v. Taylor*, 612 N.E.2d 543, 547 (Ill. App. Ct. 1993) ("We find no Illinois cases which adopt, or even mention, the 'substantial reason' test. On the contrary, [the Illinois Supreme Court in] *People v. Holveck* recognizes and adopts the *Press-Enterprise/Waller* 'overriding interest' test. Although not distinguishing between partial and total closures, *Holveck* applied the 'overriding interest' test to a partial closure setting." (citation omitted)).

147. *See, e.g.*, *Cosentino v. Kelly*, 926 F. Supp. 391, 393-94 (S.D.N.Y. 1996) (disruptions during trial); *Mahkuk*, 736 N.W.2d at 684 (witness intimidation); *State v. Salazar*, 414 S.W.3d 606, 613 (Mo. Ct. App. 2013) (overcrowding), *cert. denied*, 134 S. Ct. 2875 (2014); *see also* Levitas, *supra* note 22, at 507-09 (describing trial judges' various justifications for courtroom closures).

cases appealed on these grounds, the trial judges seemingly have simply failed to recognize *Waller's* applicability.¹⁴⁸ In contrast, for the most part, the appellate courts hearing these cases explicitly acknowledge *Waller* and *Presley*, fully aware that public trial right violations require automatic reversal.¹⁴⁹ The novel closure doctrines described above have decidedly *not* been produced by ignorance or misapprehension of relevant precedent on the part of appellate courts. More likely, the opposite is true—courts of appeals are reluctant to find public trial right violations *because* doing so would require automatic reversal and retrial. To avoid windfalls for defendants and burdens on limited court resources, appellate courts have carved out new paths of avoidance.

This phenomenon is not uncommon in judicial treatment of strict procedural rights with robust remedies.¹⁵⁰ In the Fourth Amendment context, scholars have argued that, under the rigid exclusionary rule, courts are more hesitant to find constitutional violations when doing so would require automatic suppression of evidence.¹⁵¹ Once a defendant's case falls into the suppression category, the court must exclude any evidence derived from the unconstitutional search or seizure.¹⁵² To circumvent the suppression category, judges have "warp[ed] Fourth Amendment doctrine," "twist[ing] the facts and

148. See, e.g., *State v. Venable*, 986 A.2d 743, 746 (N.J. App. Div. 2010) (describing how the trial judge excluded the public without mentioning *Waller*); *State v. Barkmeyer*, 949 A.2d 984, 1001 (R.I. 2008) (same).

149. As Justice O'Connor put it, judges "know how to mouth the correct legal rules with ironic solemnity while avoiding those rules' logical consequences." *TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 500 (1993) (O'Connor, J., dissenting) (quoting *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897, 907 (W. Va. 1991)); see also *Salazar*, 414 S.W.3d at 612 (discussing *Waller* and *Presley*); *Venable*, 986 A.2d at 746-47 (citing *Waller* several times before applying triviality test).

150. See Sonja B. Starr, *Using Sentencing to Clean Up Criminal Procedure: Incorporating Remedial Sentence Reduction into Federal Sentencing Law*, 21 FED. SENT. REP. 29, 30 (2008) ("In a variety of contexts, courts tend to circumvent costly automatic remedies by declining to find violations, even if it means defining down the underlying right."); cf. *United States v. Strunk*, 467 F.2d 969, 973 (7th Cir. 1972) ("Perhaps the severity of that remedy [dismissal] has caused courts to be extremely hesitant in finding a failure to afford a speedy trial."), *rev'd on other grounds*, 412 U.S. 434 (1973).

151. See, e.g., John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1036-37 (1974) ("[C]ourts have shown a remarkable ability in the most serious cases to stretch legal doctrine to hold doubtful searches and seizures legal. The courts have often avoided applying the exclusionary rule in situations in which the consequences of so doing would offend their own sense of proportionality or reach beyond their view of what the public would tolerate."); cf. George C. Thomas III & Barry S. Pollack, *Saving Rights from a Remedy: A Societal View of the Fourth Amendment*, 73 B.U. L. REV. 147, 147-49 (1993) ("The possibility of these 'erroneous acquittals' may cause courts to twist the facts and doctrine to avoid finding Fourth Amendment violations." (footnote omitted)).

152. For a thorough discussion of suppression under the Fourth Amendment's exclusionary rule, which generally excludes from trial evidence obtained in violation of the Fourth Amendment, see WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* § 9 (West 2015).

doctrine to avoid finding Fourth Amendment violations.”¹⁵³ Judge-crafted escape routes like the abandonment rule (where a defendant has “abandoned” the property)¹⁵⁴ and the inevitable discovery rule (where the evidence would have been found even without the unconstitutional search)¹⁵⁵ allow courts to avoid suppressing evidence from even blatantly unconstitutional searches.¹⁵⁶

A similar trend has occurred with *Batson v. Kentucky*¹⁵⁷ appeals, wherein prosecutorial discrimination against potential jurors on the basis of race is remedied by automatic reversal.¹⁵⁸ Pamela Karlan describes the common result of *Batson* appeals as follows: “[W]hen [appellate] courts cannot calibrate the remedy [of automatic reversal], they fudge on the right instead.”¹⁵⁹ “In essence,” Karlan writes, appellate courts “have responded to the fact that many *Batson* violations might be found harmless if harmless error analysis were performed by declining to find a violation in the first place.”¹⁶⁰ The Sixth Amendment’s public trial right has been affected by the same “creative”¹⁶¹ judicial innovation—a “surreptitious[] redefin[ition]”¹⁶² of the underlying right and the application of something approaching harmless error analysis.

Admittedly, reasonable concerns underlie judges’ circumspect treatment of potentially harmless violations of the public trial right. The social costs of letting a guilty defendant go free because the government failed to follow a procedural rule are high.¹⁶³ A sense of proportionality between the error committed by the government and the boon to the defendant is “a major

153. Thomas & Pollack, *supra* note 151, at 147-49; see also Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure?: Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2469 (1996) (describing “inclusionary” rules that allow the use of, or uphold convictions based on, unconstitutionally obtained evidence).

154. See, e.g., *Abel v. United States*, 362 U.S. 217, 241 (1960).

155. See, e.g., *Nix v. Williams*, 467 U.S. 431, 444 (1984).

156. Cf. Kaplan, *supra* note 151, at 1036-38 (discussing public pressure on judges to avoid applying the exclusionary rule).

157. 476 U.S. 79 (1986).

158. See Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2005 (1998) (arguing that the reversal remedies for *Batson* claims are “too effective” and thus that “courts have responded to the stringency of the remedial scheme by implicitly restricting the underlying right” and “strain[ing] not to find a violation in the first place”).

159. *Id.* at 2015; see also Steven M. Shepard, Note, *The Case Against Automatic Reversal of Structural Errors*, 117 YALE L.J. 1180, 1188 (2008) (arguing that Karlan’s explanation “describes not only the case law applying *Batson*, but also the case law governing all other errors to which the rule of automatic reversal applies”).

160. Karlan, *supra* note 158, at 2021.

161. Thomas & Pollack, *supra* note 151, at 149.

162. Karlan, *supra* note 158, at 2021.

163. See *id.* at 2019 (arguing that per se reversal is “obviously not socially costless” because some defendants will have their convictions reversed “despite the fact that we can be certain, beyond a reasonable doubt, that they would have been convicted” regardless).

element of our sense of justice.”¹⁶⁴ As John Kaplan has explained, the public’s revulsion at apparent windfalls for guilty defendants represents “a major political force”: “The solid majority of Americans rejects the idea that [t]he criminal is to go free because the constable has blundered.”¹⁶⁵ Although courts, not constables, have blundered in public trial right cases, the sentiment remains the same. Just as the exclusionary rule “flaunts before us the costs we must pay for fourth amendment guarantees,”¹⁶⁶ structural treatment of the most trivial and inadvertent closures may give defendants already found guilty another bite at the apple.¹⁶⁷

Concerns about resource constraints have also likely played into appellate courts’ reluctance to overturn verdicts and order new trials. Automatic reversals require trial courts to expend significant resources and time in retrying defendants, putting further strain on an already overburdened court system,¹⁶⁸ even when the expected outcome will be the same (guilty). As mentioned above, in applying its triviality doctrine, the Second Circuit has found “unimaginable” the contention that “a brief and trivial mistake could require voiding a criminal trial of many months['] duration.”¹⁶⁹ And, practically speaking, since appeals often take years to complete, retrial may not always be a viable option. By the time a defendant’s case has reached the retrial stage, original witnesses may no longer be available, memories may have faded, and evidence may have been lost or destroyed.¹⁷⁰

B. A Proposal for Unifying Sixth Amendment Closure Doctrine

In light of these concerns, what should a unified treatment of court closures—partial, trivial, or otherwise—look like? Harmless error analysis is not the answer, because, as the Supreme Court has noted, showing prejudice from the absence of the intangible benefits of the public trial right would be difficult, if not impossible, in most cases.¹⁷¹ Nor have the three doctrines

164. Kaplan, *supra* note 151, at 1036.

165. *Id.* at 1035 (alteration in original) (quoting *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926) (Cardozo, J.)).

166. *Id.* at 1037.

167. *Cf.* Levitas, *supra* note 22, at 497 (noting the “understandable reluctance of some appellate courts to reverse convictions of appellants who appear obviously guilty”).

168. *See, e.g.*, Astrid Galvan, *Top Judge Says New Mexico Courts Overburdened, Underfunded*, WASH. TIMES (Jan. 22, 2015), <http://www.washingtontimes.com/news/2015/jan/22/nm-courts-overburdened-and-underfunded-top-judge-s>; William Glaberson, *Faltering Courts, Mired in Delays*, N.Y. TIMES (Apr. 13, 2013), <http://nyti.ms/ZmOE6s> (“Concerns about an overburdened, underfinanced court system have nagged with increasing urgency across New York City.”).

169. *Gibbons v. Savage*, 555 F.3d 112, 120 (2d Cir. 2009).

170. *See* Shepard, *supra* note 159, at 1187.

171. *See* *Waller v. Georgia*, 467 U.S. 39, 49 n.9 (1984); *see also* Levitas, *supra* note 22, at 524 (“The assignment of the structural error label also rests ‘upon the difficulty of assessing

footnote continued on next page

described in Part II produced workable solutions that protect both defendants' rights and the integrity of the court system; each presents distinct problems, which are addressed in turn below.

Instead, this Note advocates a different conception of *Waller's* test that takes into account its built-in versatility. Although some lower courts have passed it over, *Waller's* test applies seamlessly to partial and trivial closures, adapting to virtually any circumstance with its balancing of interests and narrow tailoring analysis. The *Waller* test also takes into account the underlying concerns of appellate courts described above—to the extent appropriate in the structural error context. It acknowledges that the public trial right is not absolute and responds to proportionality issues by allowing closures that are “no broader than necessary.”¹⁷² But it also adheres to the Supreme Court's mandate that courts treat structural errors as structural errors, no matter the proportionality or resource concerns. In addition to ensuring use of the analytically superior approach, universal application of *Waller* would provide predictability and consistency to an area currently rife with confusion. Uniformity of outcomes for similarly situated defendants represents a worthy end in and of itself.

1. Problems with lower courts' non-*Waller* doctrines

a. The “excluded individual” doctrine

As the courts on the other side of the conflict have noted, Missouri and like-minded courts employing the “excluded individual” doctrine have missed the point in their public trial right analyses.¹⁷³ The Supreme Court has never required a defendant to provide an excluded spectator to establish a public trial right violation; to the contrary, the *Waller* decision ignored whether anyone was actually excluded.¹⁷⁴ And for good reason. A closed courtroom threatens the same evils whether or not specific people were turned away at its doors. The public trial right serves not only the interests of individuals actually attending trials but also broader interests of the accused and of the public in a justice system more fairly run because of the public's ability to observe it. As the Supreme Court has explained, “The value of openness lies in the fact that people not actually attending trials can have confidence that standards of

the effect of the error,’ which makes a determination of harmlessness nearly impossible, and thus improper.” (footnote omitted) (quoting *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006))).

172. *Waller*, 467 U.S. at 48 (“[T]he closure must be no broader than necessary . . .”).

173. See *State v. Brown*, 815 N.W.2d 609, 627 (Minn. 2012) (Meyer, J., dissenting) (“[A]s the Texas Court of Criminal Appeals recently held in finding a public trial violation, the focus on actual exclusion asks the wrong question . . .” (citing *Lilly v. State*, 365 S.W.3d 321, 331 (Tex. Crim. App. 2012))).

174. See *Waller*, 467 U.S. at 48.

fairness are being observed.”¹⁷⁵ As Eddie Salazar’s lawyers argued, “public trials serve important values regardless of whether anyone shows up to watch,” and thus “[i]t is the *openness* of a trial, not the presence of spectators, that the Sixth Amendment protects.”¹⁷⁶

Moreover, the excluded individual rule presents serious administrability problems, as the defendant and his lawyer (both inside the courtroom) must somehow monitor the other side of the courtroom’s closed doors during trial. As the Third Circuit has noted, “To require proof of this by the defendant would be ironically to enforce against him the necessity to prove what the disregard of his constitutional right has made it impossible for him to learn.”¹⁷⁷

While this requirement is not tantamount to a demonstration of prejudice by the defendant, it is much closer to that than the Supreme Court has ever gone—requiring that a defendant show a specific harm resulting from a courtroom closure. Such a requirement is unacceptable when enforcing a right that the Supreme Court has designated a structural safeguard for ensuring a fair trial.

b. The “triviality” doctrine

The triviality doctrine also approaches harmless error analysis, requiring more of defendants than *Waller* and *Presley* allow. As discussed in Part II, instead of applying *Waller*’s test, courts applying the triviality doctrine require defendants to show that the closure “subvert[ed] the values the drafters of the Sixth Amendment sought to protect,” which they have identified as: i) ensuring a fair trial, ii) reminding court officers and attorneys of the importance of their responsibilities, iii) allowing new witnesses to make themselves known, and iv) discouraging perjury.¹⁷⁸ Although these courts have been careful to distinguish this standard from harmless error analysis, the test still demands much more of defendants than the Supreme Court has deemed reasonable when dealing with the intangible benefits of structural error rights. A defendant in a triviality jurisdiction does not have to show a reasonable possibility that the outcome of the trial would have been different (i.e., prejudice), but he does have to show some kind of specific injury manifested through the undermining of one of four chosen Sixth Amendment values. If he cannot, then the closure was trivial—in other words, harmless.¹⁷⁹ While these

175. *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 508 (1984).

176. Petition for a Writ of Certiorari at 7, 16, *Salazar v. Missouri*, 134 S. Ct. 2875 (2014) (No. 13-1166), 2014 WL 1230974.

177. *United States ex rel. Bennett v. Rundle*, 419 F.2d 599, 608 (3d Cir. 1969).

178. *Gibbons v. Savage*, 555 F.3d 112, 121 (2d Cir. 2009) (quoting *Smith v. Hollins*, 448 F.3d 533, 540 (2d Cir. 2006)).

179. See Cronen, *supra* note 22, at 279 (“By looking for a tangible piece of evidence to weigh for or against a trivial closure, courts are inching closer to a harmless error analysis.”); *Recent Case—Second Circuit Affirms Conviction Despite Closure to the Public of a Voir Dire*, *footnote continued on next page*

courts do not require a showing of prejudice, they do require that defendants show that the closure was *not harmless*.

But, as discussed above, the Supreme Court has expressly rejected the idea that defendants should have to show any kind of actual injury resulting from the closure itself. As the *Waller* Court stated, “prejudice must necessarily be implied” because demonstration of injury “in this kind of case is a practical impossibility.”¹⁸⁰ The Court has acknowledged that many other constitutional rights warrant harmless error review: there are “some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.”¹⁸¹ Indeed, the Court has steadily expanded the group of constitutional rights subject to harmless error analysis over the past five decades, undermining protections as fundamental as the suppression of coerced confessions.¹⁸² As Chief Justice Rehnquist made clear, it is now “the rare case in which a constitutional violation will not be subject to harmless-error analysis.”¹⁸³ But against this backdrop, the Court has repeatedly categorized the public trial right as one of the few remaining structural error rights.¹⁸⁴ It is certainly possible that the Court will, at some future point, move the public trial right into the harmless error category, acknowledging that some brief or inadvertent closures should be treated as harmless—but it has not done so yet, and lower courts cannot do this on their own by manipulating the right’s boundaries.

Lower courts’ replacement of *Waller*’s test with ad hoc determinations regarding a closure’s “triviality” constitutes evasion of controlling Supreme Court precedent. Tellingly, appellate courts’ application of the triviality doctrine to cases presenting *Presley*’s fact scenario contradicts the holding in *Presley* itself. *Presley* involved a trial judge who excluded the public from voir dire, without any reference to *Waller*, because of concerns about overcrowding

125 HARV. L. REV. 1072, 1075 (2012) (“*Gupta* renders the triviality doctrine akin to the harmless error doctrine and thus comes into tension with *Waller*.”).

180. *Waller v. Georgia*, 467 U.S. 39, 49 n.9 (1984) (quoting *State v. Sheppard*, 438 A.2d 125, 128 (Conn. 1980)).

181. *Chapman v. California*, 386 U.S. 18, 22 (1967).

182. See, e.g., *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991); see also Harry T. Edwards, *To Err Is Human, but Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1177 (1995) (“In a statement that accurately describes the thrust of the Supreme Court’s post-*Chapman* jurisprudence, the *Fulminante* Court said flatly that ‘most constitutional errors can be harmless.’” (quoting *Fulminante*, 499 U.S. at 306)).

183. *Sullivan v. Louisiana*, 508 U.S. 275, 282 (1993) (Rehnquist, C.J., concurring).

184. See, e.g., *United States v. Marcus*, 560 U.S. 258, 263 (2010); *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148-49 (2006); *Neder v. United States*, 527 U.S. 1, 7-8 (1999); *Johnson v. United States*, 520 U.S. 461, 468-69 (1997).

in the courtroom.¹⁸⁵ With venire regularly surpassing sixty people, this seems to be a relatively common occurrence that forms the factual basis for many of the Part II decisions that failed to apply *Waller*, both pre- and post-*Presley*.¹⁸⁶ For example, in *Patton*, the trial judge summarily ordered the U.S. Marshals to close the doors and refuse entry to members of the public during voir dire because the room “was too small to fit all the jurors and the public at the same time.”¹⁸⁷ The appellate court dismissed the public trial appeal on triviality grounds, despite the trial judge’s failure to consider reasonable alternatives or any of *Waller*’s other factors.¹⁸⁸ Faced with these same basic facts, the *Presley* Court, in contrast, specified that *Waller* does apply to voir dire and held that the trial court needed to apply the full four-part test.¹⁸⁹ Because the trial court had simply failed to do so, the Supreme Court of Georgia’s affirmance was reversed.¹⁹⁰ Closing voir dire to prevent overcrowding may well pass the *Waller* test, but the Court has made clear that trial courts still need to explicitly engage in the analysis.

c. The “partial closure” doctrine

The “partial closure” doctrine identifies a distinct issue not implicated by the other two conflicts: what happens when *some* of the public is allowed into the courtroom. Courts espousing this doctrine have decided that when only some spectators are excluded, the concerns underlying the public trial right are mitigated such that a “*Waller* lite” analysis is appropriate, requiring only a “substantial interest” in place of an “overriding” one.¹⁹¹ At first glance, this logic makes some sense. The presence of a few spectators could still fulfill the public trial right’s core purposes by reminding court officers of the importance of their duties, discouraging perjury on the part of witnesses, and ensuring that fishy goings-on during trial do not go unnoticed. The Sixth Amendment certainly does not require a full courtroom.

There are, however, two fundamental problems with this argument and with the partial closure doctrine overall. First, the exclusion of certain

185. *Presley v. Georgia*, 558 U.S. 209, 210-11 (2010) (per curiam) (laying out relevant statements of the trial judge, none of which dealt with *Waller*’s factors).

186. See, e.g., *United States v. Patton*, 502 F. App’x 139, 140-41 (3d Cir. 2012); *Gibbons v. Savage*, 555 F.3d 112, 114 (2d Cir. 2009); *State v. Salazar*, 414 S.W.3d 606, 613 (Mo. Ct. App. 2013), cert. denied, 134 S. Ct. 2875 (2014); *State v. Torres*, 844 A.2d 155, 157 (R.I. 2004).

187. 502 F. App’x at 140.

188. *Id.* at 141-42 (laying out relevant statements of the trial judge, none of which dealt with *Waller*’s factors).

189. *Presley*, 558 U.S. at 213-14.

190. *Id.* at 216 (“[I]t was still incumbent upon [the court] to consider all reasonable alternatives to closure. It did not, and that is all this Court needs to decide.”).

191. See, e.g., *Woods v. Kuhlmann*, 977 F.2d 74, 76 (2d Cir. 1992).

individuals *does* have the real potential to negate the function of the remaining public. Second, *Waller's* test already takes into account the reality that sometimes only specific people, and not the entire public, will need to be excluded; its second prong ensures that the closure is "no broader than necessary to protect [the] interest,"¹⁹² making the test adaptable to these closure circumstances.

To the first point, partial closures can be as dangerous as full closures, depending on whom the court excludes. If the court targets for exclusion all defendant-friendly spectators, leaving only those who wish to see the defendant convicted at any cost, or even just disinterested observers, the defendant-protective function of the right could be seriously undermined. While this may seem like an unlikely scenario, courts do often specifically exclude the family and friends of the defendant, whether to protect those spectators or witnesses from trauma or for various other reasons.¹⁹³ The Supreme Court has identified the presence of precisely these parties as most vital for defendants: "[A]n accused is at the very least entitled to have his friends, relatives and counsel present, no matter with what offense he may be charged."¹⁹⁴ As the Ninth Circuit has recognized, friends and family members "are particularly effective" in "remind[ing] the participants, especially the judge, that the consequences of their actions extend to the broader community," because friends and family members "are the individuals most likely to be affected by the defendant's incarceration."¹⁹⁵ Excluding these parties directly threatens the Sixth Amendment's protection of defendants, even if other members of the public are present.

To the second point, *Waller* takes into account any mitigating effects of the presence of some members of the public in a different prong, through its narrow tailoring analysis. New York's high court has recognized this, rejecting the substantial interest test for partial closures "since *Waller* already

192. *Waller v. Georgia*, 467 U.S. 39, 48 (1984).

193. See, e.g., *United States v. Arellano-Garcia*, 503 F. App'x 300, 305 (6th Cir. 2012) (relative of a co-conspirator); *United States v. Patton*, 502 F. App'x 139, 141 (3d Cir. 2012) (same); *United States v. Rivera*, 682 F.3d 1223, 1225-26 (9th Cir. 2012) (defendant's family); *United States v. Izac*, 239 F. App'x 1, 4 (4th Cir. 2007) (defendant's wife); *United States v. Perry*, 479 F.3d 885, 887-88 (D.C. Cir. 2007) (defendant's family despite defendant's plea to allow his wife to remain because she was his "support system"); *State v. Ortiz*, 981 P.2d 1127, 1132 (Haw. 1999) (defendant's family); *Watters v. State*, 612 A.2d 1288, 1290 (Md. 1992) (defendant's mother, aunts, and great aunt); *People v. Nieves*, 683 N.E.2d 764, 765 (N.Y. 1997) (defendant's wife and children); *State v. Torres*, 844 A.2d 155, 158 (R.I. 2004) (defendant's sisters).

194. *In re Oliver*, 333 U.S. 257, 272 (1948).

195. *Rivera*, 682 F.3d at 1230; see also *Tinsley v. United States*, 868 A.2d 867, 873 (D.C. 2005) ("Indeed, as was borne out in this case, if family and friends are excluded from the trial, there may be no other members of the public who are interested or concerned enough to attend at all.").

contemplates a balancing of competing interests in closure decisions.”¹⁹⁶ As the court explained, under *Waller*, “[t]rial courts are called upon to ensure that the closure is no broader than necessary and to consider alternatives to closure suggested by the parties. The breadth of the closure request therefore will always be measured against the risk of prejudice to the asserted overriding interest.”¹⁹⁷ If only some spectators are singled out for exclusion, the prong ensuring that the closure is “no broader than necessary” may salvage the closure. For example, in *Woods v. Kuhlmann*,¹⁹⁸ where the Second Circuit adopted the partial closure doctrine, the closure circumstances would very likely have satisfied *Waller*’s test. During one witness’s testimony, the *Woods* trial judge excluded from the courtroom only a small group containing individuals who had threatened the safety of the witness,¹⁹⁹ likely meeting both the overriding interest and narrow tailoring prongs. In this way, *Waller* might countenance removing friends and family of the defendant in some circumstances, but the trial judge must still fully apply the test.

2. A fuller understanding and application of *Waller*

Given the Supreme Court’s emphasis on an uncompromised public trial right, lower courts’ “fudg[ing]”²⁰⁰ of the right’s structural nature to avoid the remedy of reversal is doctrinally unacceptable. More importantly, however, avoiding *Waller* is functionally unnecessary because *Waller*’s flexible test has the capacity to deal with all types of closures and exclusions of the public—trivial or serious, partial or total. *Waller*’s test would likely allow many of the trivial closures found unproblematic by lower courts, as long as trial and appellate courts go through the process of creating the record the Supreme Court has required. *Waller*’s test is much less rigid than the phrases “structural error” and “automatic reversal” portend, and avoiding the *Waller* test undermines a right at the center of our justice system.

Each *Waller* prong represents an important consideration that, in combination with the others, provides a comprehensive analysis for determining whether closure is warranted. To ensure that a closure-worthy countervailing interest exists, the party seeking the closure must proffer “an

196. *People v. Jones*, 750 N.E.2d 524, 529 (N.Y. 2001).

197. *Id.*; see also *State v. Turrietta*, 308 P.3d 964, 970-71 (N.M. 2013) (“[W]ithin the *Waller* standard, the reviewing court is charged with considering reasonable alternatives to closing the proceeding. Therefore, if a reviewing court is already contemplating a partial closure, something less than a full closure, that analysis seems to already align with the *Waller* standard’s requirement that the closure be no broader than necessary.”).

198. 977 F.2d 74 (2d Cir. 1992).

199. See *id.* at 74-75.

200. Karlan, *supra* note 158, at 2015 (arguing that lower courts “fudge” on the *Batson* inquiry to avoid automatic reversal).

overriding interest that is likely to be prejudiced” without the closure.²⁰¹ With this first prong, the trial court must identify whether witness intimidation, overcrowding, or some other compelling reason is specifically and sufficiently implicated by the instant trial.²⁰² Second, the party must show that the closure is “no broader than necessary to protect the interest”²⁰³—that the closure only occurs for the relevant parts of the trial or only applies to certain members of the public. Next, the court must consider alternatives: even if the first two prongs are satisfied, the Sixth Amendment does not allow a closure if a reasonable alternative exists.²⁰⁴ And finally, all of these findings must be made specifically and clearly on the record to enable appellate review.²⁰⁵ If a court misses any of these steps, it becomes unclear whether the closure was actually necessary and the specter of intrinsic harm is raised, no matter how harmless the closure appears.²⁰⁶ That is the nature of structural errors, and why the Court has repeatedly rejected applying harmless error review to them.²⁰⁷ When courts start picking and choosing which closures are important enough to deserve *Waller’s* analysis, the right is denigrated, and not just at the margins. As Part II above demonstrated, these avoidance doctrines—essentially distinguishing between small structural errors and larger ones—are slippery slopes.²⁰⁸ The triviality doctrine, for example, has already expanded from

201. *Waller v. Georgia*, 467 U.S. 39, 48 (1984); *see also* *Presley v. Georgia*, 558 U.S. 209, 215 (2010) (per curiam) (“The generic risk of jurors overhearing prejudicial remarks, unsubstantiated by any specific threat or incident, is inherent whenever members of the public are present during the selection of jurors. If broad concerns of this sort were sufficient to override a defendant’s constitutional right to a public trial, a court could exclude the public from jury selection almost as a matter of course. . . . [T]he particular interest, and threat to that interest, must ‘be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.’” (quoting *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 510 (1984))).

202. *See, e.g., Waller*, 467 U.S. at 48 (reversing because “the State’s proffer was not specific as to whose privacy interests might be infringed, [or] how they would be infringed”).

203. *Id.*

204. *Presley*, 558 U.S. at 215 (“Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials.”); *see also id.* (“Without knowing the precise circumstances, some possibilities include reserving one or more rows for the public; dividing the jury venire panel to reduce courtroom congestion; or instructing prospective jurors not to engage or interact with audience members.”); *Waller*, 467 U.S. at 48 (“[T]he trial court must consider reasonable alternatives to closing the proceeding . . .”).

205. *See Waller*, 467 U.S. at 48 (“[T]he trial court must . . . make findings adequate to support the closure.”).

206. *See Neder v. United States*, 527 U.S. 1, 7 (1999).

207. *See Rosenberg*, *supra* note 15 (“The Court’s assertion of the automatic reversal rule has been categorical [I]t has never suggested that a smaller structural error should be treated differently from a larger one.”).

208. *Id.* (arguing, regarding the Second Circuit’s triviality doctrine, that “deciding which errors are so small that they do not warrant reversal inevitably invites fears of a

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covering an accidental closure lasting fewer than twenty minutes to a purposeful closure lasting the entirety of voir dire.²⁰⁹

As described above, *Waller's* test is equipped to handle partial and trivial closures. The only minor caveat to *Waller's* general applicability is accidental closures: trial courts, for obvious reasons, will never be able to apply *Waller* to inadvertent closures only discovered after the fact.²¹⁰ Inadvertence, however, should be irrelevant to the analysis of whether a structural procedural right guaranteed by the Constitution has been violated.²¹¹ Regardless of whether an accidental closure lasts five minutes or an entire trial, the defendant has been harmed in the same way that he would have been had the closure been purposeful. While reversing a decision because of an inadvertent five-minute closure might seem like an overreaction, courts should not start drawing lines between small and large structural errors. The Court's designation of certain errors as "structural" reflects the reality that such lines simply cannot be drawn where the potential for harm to the trial's underlying structure is both too difficult to ascertain and too serious to wish away.²¹² Because structural errors

'slippery slope,' and comparison with the 'harmless error analysis' used for trial errors").

209. Compare *Peterson v. Williams*, 85 F.3d 39, 42-43 (2d Cir. 1996) (twenty minutes), with *United States v. Patton*, 502 F. App'x 139, 140-41 (3d Cir. 2012) (entirety of voir dire).

210. For courts struggling over the inadvertence issue, see notes 119-21 and accompanying text above. See also *Kelly v. State*, 6 A.3d 396, 407 n.10 (Md. Ct. Spec. App. 2010) ("Some courts do consider whether the closure was inadvertent. Other courts find this factor irrelevant to the analysis." (citation omitted)); cf. Cronen, *supra* note 22, at 279 (arguing for restriction of Minnesota's triviality doctrine to accidental closures).

211. Although the Court does consider, for some nonstructural constitutional errors, whether the conduct underlying the violation was accidental or a good faith mistake, in those circumstances the Court is expressly worried about deterrence. See *United States v. Leon*, 468 U.S. 897, 906, 918-19, 925 n.26 (1984) (distinguishing between "willful" police conduct and "inadvertent mistake[s]" because the exclusionary rule is "designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than [as] a personal constitutional right of the party aggrieved" (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974))); Robert C. Hauhart & Courtney Carter Choi, *The Good Faith Exception to the Exclusionary Rule*, 48 CRIM. L. BULL. 316, 320 (2012) (arguing that the *Leon* Court sought to "excus[e] . . . single instances of unintentional inadvertence that would not be deterred by evidentiary exclusion in any event"); see also *United States v. Diehl*, 276 F.3d 32, 43 (1st Cir. 2002) (applying *Leon* when officers acted in good faith by making an "inadvertent mistake" as to whether their surveillance point was within the curtilage (quoting *Leon*, 468 U.S. at 925 n.26)). The Court has never identified deterrence as even a peripheral motivation for reversals of structural errors. By their very definition, structural errors are "so intrinsically harmful as to require automatic reversal" without looking to the consequences of the specific error, either inside or outside the courtroom. *Neder*, 527 U.S. at 7.

212. See *Arizona v. Fulminante*, 499 U.S. 279, 309-11 (1991) (describing structural errors as "defy[ing] analysis by 'harmless-error' standards" because they "affect[] the framework within which the trial proceeds," and thus that "no criminal punishment may be regarded as fundamentally fair" if such an error has occurred (quoting *Rose v. Clark*, 478 U.S. 570, 577-78 (1986)); see also Charles J. Ogletree, Jr., *Arizona v. Fulminante: The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152, 162 (1991)

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“affect[] the framework within which the trial proceeds, rather than simply [constituting] an error in the trial process itself,” these defects inherently “defy analysis” that would assign gradations of harm.²¹³

Appellate courts’ rogue doctrinal avoidance of *Waller* also discourages correction of trial courts’ mistakes in this area.²¹⁴ As detailed in Part II, trial judges are accidentally missing or purposefully ignoring *Waller*’s applicability. The current appellate court trend of coddling trial judges by redefining Sixth Amendment closures provides no incentive for trial judges to correctly apply *Waller* in future cases. Instead, it gives them an out from the Supreme Court’s carefully calibrated test. Appellate courts are bending over backwards to avoid reversal, when, in actuality, retrials would encourage more consistent application of *Waller*’s test at the trial level. That, in turn, would reduce the frequency of these appeals and reversals, as trial judges would more often avoid violating the right in the first place.²¹⁵ A fuller conception of *Waller*’s test would thus lead to a more unified doctrine, stronger protection of the right and more up-front consideration of countervailing concerns in particular cases.

Conclusion

The public trial right has always occupied an important space at the heart of the American justice system. Although the intangible benefits flowing from the right are not made plain in every criminal trial, rigorous preservation of the right protects innocent defendants and serves our pursuit of truth.²¹⁶ As a result, the Supreme Court has expressly chosen to keep the public trial right in the “very limited class”²¹⁷ of constitutional rights still subject to structural error treatment. When the Supreme Court established the *Waller* test, it made no exceptions to its application; instead, it crafted a test flexible enough to adapt to any closure circumstances that might arise. Lower courts’ creation of three distinct doctrines that avoid *Waller* is thus both doctrinally improper and pragmatically unnecessary. In addition to creating a mess of jurisdictional variances that treat similarly situated defendants differently, these doctrines directly undermine the public trial right by requiring that defendants show

(“To the *Fulminante* majority, a trial error seems to be one for which we can sometimes know for sure whether it has caused inaccuracy in a trial outcome, and a structural error seems to be one for which we can never know with any certainty.”).

213. See *Fulminante*, 499 U.S. at 309-10.

214. Cf. Steven Hartwell, *Legal Processes and Hierarchical Tangles*, 8 CLINICAL L. REV. 315, 335 (2002) (“The appellate court calibrates the trial court.”).

215. See Karlan, *supra* note 158, at 2020 (“[B]ecause per se reversal lessens the ‘hindsight problem’—by precluding reviewing courts from relying unconsciously on the fact that the defendant was convicted in assessing his claim—it is also more likely to deter . . . violations in the first place.” (footnote omitted)).

216. Amar, *supra* note 1, at 642.

217. *Johnson v. United States*, 520 U.S. 461, 468 (1997).

much more than is practically possible. Application of *Waller* to all closures would instead more fully protect the public trial right and promote consistent outcomes across jurisdictions.