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Scaling Waller: How Courts Have Eroded the Sixth Amendment Public Trial Right

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COMMENTS

SCALING *WALLER*: HOW COURTS HAVE ERODED THE SIXTH AMENDMENT PUBLIC TRIAL RIGHT

ABSTRACT

American courts and legal commentators have long praised the Sixth Amendment public trial right, but courts often lack the willingness to enforce it. Although the Supreme Court has consistently held that violations of the public trial right belong to an exceedingly small class of constitutional errors requiring reversal, appellate courts persist in upholding improper courtroom closures even when the record shows that courts below have violated the applicable constitutional standard. When criminal trials are fatally fouled by structural, constitutional error of this kind, the reluctance of appellate courts to reverse is damaging in two ways—it encourages repetition of the same mistake, and it denigrates core values of individual rights that underlie our system of justice. This Comment argues for corrective action by explaining the rules governing courtroom closure, highlighting the errors often made by trial and appellate courts, and detailing the legal basis for more rigorous enforcement of the public trial right.

Waller v. Georgia, decided in 1984, is perhaps the Supreme Court's most definitive pronouncement on the scope of the Sixth Amendment public trial guarantee. This Comment explains the background and significance of Waller, details the test it requires before a courtroom can be closed, and identifies specific shortcomings in appellate review that undermine the public trial right. In light of this assessment, appellate courts should: (1) refrain from applying harmless error analysis to violations of the public trial right; (2) regularly review alleged violations of Waller for plain error; (3) require application of the Waller test in all cases of courtroom closure—even if pursuant to state law; (4) refrain from using post hoc findings to justify closure; (5) reject the argument that "partial" closure of the courtroom absolves courts of the obligation to fully comply with Waller; and (6) recognize that even when courtrooms are closed to protect child victims of sexual abuse, the procedural rules of Waller still apply. Courts may not look past constitutional errors

simply because state laws authorizing closure were drafted to protect victims, not defendants; such errors still require reversal, even in the absence of a well-preserved objection. Although the Court recently turned its attention to the public trial right in Presley v. Georgia, the above issues remain unaddressed.

INTRODUCTION

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .*
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> —United States Constitution, Sixth Amendment[1]
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> *"The harmless error rule is no way to gauge the great, though intangible, societal loss that flows" from closing courthouse doors.*
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> *—Waller v. Georgia*[2]

American courts and legal commentators have long praised the Sixth Amendment public trial guarantee,[3] but trial judges and appellate courts are often unwilling to enforce this fundamental right. Although the Supreme Court has consistently held that violation of the public trial right belongs to an exceedingly small class of constitutional errors requiring reversal,[4] state and federal appellate courts persist in upholding improper courtroom closures. When a criminal trial is fatally fouled by a courtroom closure that amounts to structural, constitutional error of this kind, an appellate court's refusal to reverse fails to deter trial courts from repeating the same mistake and undermines the core values of individual rights central to our system of justice.[5] This Comment argues for corrective action by explaining the rules governing courtroom closure, highlighting the errors made by trial and appellate courts, and detailing the legal basis for more rigorous enforcement of the public trial right. The following anecdote illustrates the range of issues involved.

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[1] Throughout this Comment the terms "public trial right" and "public trial guarantee" are used interchangeably.

[2] 467 U.S. 39, 49 n.9 (1984) (quoting People v. Jones, 391 N.E.2d 1335, 1340 (N.Y. 1979)).

[3] *See* discussion *infra* Part I.A–B (tracing the historical developments of, and justification for, the public trial guarantee).

[4] *See* discussion *infra* Part II.A (exploring the reasoning of *Waller* and its framework for securing the right to a public trial against court errors).

[5] *See* Harry T. Edwards, *To Err Is Human, but Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1194–99 (1995) (arguing that inadequate judicial regard for individual rights erodes the sphere of personal liberty that distinctly undergirds the American criminal justice system).

After six years of unrelenting sexual abuse by her stepfather, David Wayne Craven's eleven-year-old stepdaughter confided in family members, who contacted the police.[6] Prosecutors charged Craven with aggravated sodomy and child molestation; he pleaded not guilty and insisted on a trial.[7] Immediately before the young victim testified, the trial judge cleared the courtroom of all but the parties, the lawyers, and courtroom personnel.[8] Citing Georgia law, which requires courtroom closure during the testimony of any person under the age of sixteen regarding a criminal sex offense,[9] the judge also removed the defendant's family, even though the statute required that they be allowed to remain.[10] After recognizing his error, the judge offered to have the victim repeat her testimony the next day with Craven's family present.[11] Craven's attorney declined, noting that "having the child testify twice would unduly emphasize [her] testimony."[12] Craven was convicted of aggravated sodomy and aggravated child molestation and sentenced to twenty-five years in prison.[13]

On appeal, Craven claimed that the closure violated both state law and his federal constitutional right to a public trial.[14] Citing *Waller v. Georgia*,[15] perhaps the U.S. Supreme Court's most definitive pronouncement on the scope of the Sixth Amendment public trial guarantee,[16] Craven argued that because violation of the public trial right constitutes "structural error," he was not required to show how the mistake affected the outcome of the trial to overturn the verdict.[17] *Waller* establishes clear guidelines for courtroom closure:

> [(1)] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, [(2)] the closure must be no broader than necessary to protect that interest, [(3)] the trial court must consider reasonable alternatives to closing the

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6 Craven v. State, 664 S.E.2d 921, 924 (Ga. Ct. App. 2008), *cert. denied* (Oct. 27, 2008).

7 *Id.* at 922.

8 *Id.* at 923.

9 GA. CODE ANN. § 17-8-54 (2009).

10 *Id.*; *see also Craven*, 664 S.E.2d at 924 ("As to the claim of a statutory violation, the trial court erred in removing Craven's immediate family from the courtroom while the victim testified.").

11 *Craven*, 664 S.E.2d at 924.

12 *Id.*

13 *Id.* at 922.

14 *Id.* at 923.

15 467 U.S. 39 (1984); *see also* Logan Munroe Chandler, *Sixth Amendment—Public Trial Guarantee Applies to Pretrial Suppression Hearings*, 75 J. CRIM. L. & CRIMINOLOGY 802 (1984) (discussing in detail the four-part procedural and protective framework of *Waller*).

16 Judd v. Haley, 250 F.3d 1308, 1314 (11th Cir. 2001).

17 *Craven*, 664 S.E.2d at 923–24; *see also infra* note 190 and accompanying text.

> hearing, and [(4) the trial court] must make findings adequate to support the closure.[18]

Despite these rules, the trial court in Craven's case held no hearing prior to closing the courtroom, made no findings of fact related to the closure, and did not explore less restrictive alternatives to closing the courtroom.[19] The prosecution also neglected to advance an overriding interest likely to be harmed absent closure. However, none of this troubled the Georgia Court of Appeals, which accepted the trial court's observation that the state mandatory trial closure statute was "based upon a legislative determination that there is a compelling state interest in protecting children when they are testifying concerning a sex offense."[20] For the court of appeals, then, this presumably functioned as a proxy for *Waller*'s requirement that the trial court find an "overriding interest" justifying the closure. Moreover, although appellate courts are forbidden from applying harmless error analysis to violations of the public trial right,[21] the court of appeals maintained that excluding Craven's family members was "harmless error" given all the evidence against him, which was indeed substantial.[22] To bolster its argument, the court of appeals noted that because the purpose of the Georgia trial closure statute was to protect the child witness,[23] any error by the trial court in excluding Craven's family was of no account because the statute did "not necessarily confer[] a right upon the defendant."[24] Of course, the Constitution confers such a right, but the court of appeals concluded that Craven waived any constitutional claim because he failed to raise a constitutional objection until after the victim had testified.[25] Classifying this sequence of events as a waiver was a mistake,

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18 *Waller*, 467 U.S. at 48 (citing Press-Enter. Co. v. Super. Ct., 464 U.S. 501, 511–12 (1984)).

19 *Craven*, 664 S.E.2d at 923–25.

20 *Id.* at 924 (citation omitted).

21 *Waller*, 467 U.S. at 49–50.

22 *Craven*, 664 S.E.2d at 924. The medical evidence showed "repeated sexual assaults," the victim "drew explicit pictures reflecting what had happened," and the victim's mother and grandmother testified. *Id.* at 924–25.

23 *Id.* at 924.

24 *Id.* (quoting the opinion of the trial court). In its failure to find error in the trial court's exclusion of Craven's family members, the Georgia Court of Appeals also overlooked a concern expressed by the Supreme Court regarding exclusion of a defendant's friends and relatives. *See In re* Oliver, 333 U.S. 257, 271–72 (1948) ("[W]ithout exception all courts have held that an accused is at the very least entitled to have his friends, relatives and counsel present, no matter with what offense he may be charged."); *see also* Carson v. Fischer, 421 F.3d 83, 91 (2d Cir. 2005) ("'The exclusion of courtroom observers, especially a defendant's family members and friends, even from part of a criminal trial, is not a step to be taken lightly.'" (quoting Guzman v. Scully, 80 F.3d 772, 776 (2d Cir. 1996))).

25 *Craven*, 664 S.E.2d. at 924.

however, as Craven did not intentionally relinquish his right to object.[26] Even if Craven did in fact fail to make a timely objection, these events still should have been subject to plain error review, under which appellate courts will consider any error that affects "substantial rights," including even those errors not brought to the court's attention.[27] In this case, application of the plain error rule should have triggered an order for a new trial.[28]

The *Craven* decision exemplifies two trends: (1) the tendency of trial courts to look past the straightforward, explicit requirements of *Waller*; and (2) the understandable reluctance of some appellate courts to reverse convictions of appellants who appear obviously guilty, in spite of the U.S. Supreme Court's pronouncement that violation of the public trial right always constitutes structural error.[29] That reluctance is often, though certainly not always,[30] reinforced by the nature of the crime and the substantial evidence of guilt in these cases. Because courtroom closure is frequently employed in child sex abuse cases—where the crimes are exceptionally deplorable, the testimony is disturbing and graphic, and the victims are especially vulnerable—it takes a strong-willed jurist to reverse such a conviction, even when the Constitution clearly requires it. And when a defendant fails to properly object, the temptation to uphold the trial court's closure order may be irresistible, regardless of the fact that the plain error rule should still require reversal.[31]

But does upholding courtroom closure in the face of constitutional error really raise novel issues? After all, the question of when legal error should be tolerated is not new,[32] and while a criminal defendant has a constitutional right

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[26] *See* United States v. Olano, 507 U.S. 725, 733 (1993) ("Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938))).

[27] FED. R. CRIM. P. 52(b) ("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."); *see also* Lynd v. State, 414 S.E.2d 5, 8 n.2 (Ga. 1992) ("'Plain error' is that which is 'so clearly erroneous as to result in a likelihood of a grave miscarriage of justice' or which 'seriously affects the fairness, integrity or public reputation of a judicial proceeding.'" (quoting United States v. Fuentes-Coba, 738 F.2d 1191, 1196 (11th Cir. 1984))).

[28] *See* discussion *infra* Part III (detailing the authority and rationale for sua sponte plain error review).

[29] *See infra* note 189 and accompanying text (explaining the concept of "structural error").

[30] *See infra* Part IV.E (discussing *Presley v. State*, 658 S.E.2d 773 (Ga. Ct. App. 2008), *aff'd*, 674 S.E.2d 909 (Ga. 2009), *rev'd per curiam*, 78 U.S.L.W. 4051 (U.S. Jan. 19, 2010) and criticizing the failure of Georgia Courts to follow *Waller*).

[31] *See* discussion *infra* Part III.

[32] *See, e.g.*, Edwards, *supra* note 5, at 1173–83 (reviewing the twentieth century history of harmless error jurisprudence).

to a fair trial, the proceeding need not be entirely free from error.[33] Because the central purpose of a criminal trial is to decide the defendant's guilt or innocence, and because public respect for the criminal process is enhanced by arriving at a just *result*, it is important that appellate courts tolerate the inevitable presence of immaterial error.[34] However, over the past forty years the tendency of courts to tolerate immaterial error has expanded to include even grave constitutional errors.[35]

In light of this trend, is there anything to be said about the reluctance of courts to uphold the public trial right beyond the predictable observation that courts are often called to balance cardinal principles of individual rights against the need for efficient justice—and that this balancing poses a special challenge when defendants appear obviously guilty? The answer is decidedly yes, and the reason is straightforward: throughout its modern jurisprudence, the Supreme Court has never wavered from its holding that violation of the public trial right is among a small class of constitutional errors that remain automatically reversible and can *never* be subject to harmless error analysis.[36] In the eyes of the Court, such "structural errors" affect the framework of the trial itself and thus impugn the fairness and integrity of the entire proceeding.[37] The fact that the Court has explicitly reaffirmed this position[38] while it has steadily weakened post-trial protection for other serious constitutional errors[39] further strengthens the case for consistent enforcement of the public trial right.

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[33] Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986) ("As we have stressed on more than one occasion, the Constitution entitles a criminal defendant to a fair trial, not a perfect one.").

[34] *Id.*

[35] Chapman v. California, 386 U.S. 18, 22 (1967); *see also* Edwards, *supra* note 5, at 1186 ("*Chapman* heralded a major expansion in both the number of violations subject to harmless-error analysis and the frequency with which that analysis is employed.").

[36] Arizona v. Fulminante, 499 U.S. 279, 310 (1991).

[37] *Id.*

[38] *See id.* at 294 (White, J., dissenting) (disagreeing with the application of the harmless error rule to admission of involuntary confessions while also noting that violation of the public trial right is a constitutional error "that invalidate[s] a conviction even though there may be no reasonable doubt that the defendant is guilty and would be convicted absent the trial error"); *see also* Johnson v. United States, 520 U.S. 461, 468–69 (1997) (discussing, but not deciding, whether the failure to submit the materiality of a false statement to the jury affected the defendant's substantial rights, but noting that violation of the right to a public trial is "structural error," which *does affect* substantial rights).

[39] *Fulminante*, 499 U.S. at 306 ("[M]ost constitutional errors can be harmless."); *see also* Brecht v. Abrahamson, 507 U.S. 619, 652 (1993) (O'Connor, J., dissenting) ("By now it goes without saying that harmless-error review is of almost universal application; there are few errors that may not be forgiven as harmless." (citing *Fulminante*, 499 U.S. at 306–07)).

In addition to mistakenly applying the harmless error rule, trial and appellate courts often make four other mistakes that violate the *Waller* scheme: (1) they ignore the plain error doctrine, which requires reversal in the face of a bona fide violation of a defendant's public trial right, even when the defendant fails to object;[40] (2) they resort to post hoc findings to justify closure when the trial court fails to hold a hearing and make the findings required by *Waller*;[41] (3) they apply a doctrine of "partial closure" to suggest that the four-part *Waller* test need not apply under certain circumstances;[42] and (4) they assert that state trial closure statutes provide a sufficient proxy for the *Waller* test and then hold that any failure to follow the state trial closure statute is irrelevant because the law is for the benefit of the victim.[43] Although the Supreme Court has set clear rules for what constitutes a violation of the public trial right, it has yet to address any of these particular issues since deciding *Waller*.

This Comment draws on the Court's jurisprudence upholding the public trial right, and on related opinions of federal and state courts, to show how each of the rationales used by trial and appellate courts to circumvent the *Waller* rules is flawed, and to argue for more rigorous enforcement of the public trial right. Part I discusses the origins of the public trial right, including its assertion by invoking both the First and Sixth Amendments, and cases leading up to *Waller*. Part II details the significance of *Waller*, the origins of the harmless and structural error doctrines and their application to constitutional error, and the rule that violation of the public trial right is always structural—and never harmless—error. Part III explains why reversal is required under the plain error rule when violations of the public trial right occur, even when the defendant fails to object. Part IV examines in more detail how courts have treated—and often undermined—the public trial right by adopting suspect practices like providing post hoc rationales to justify closure and citing state law doctrines to relieve themselves of the responsibility to follow *Waller*.

In sum, this Comment makes the case for corrective reform and argues that appellate courts must: (1) refrain from applying harmless error analysis to

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[40] *See* discussion *infra* Part III (arguing for the consistent application of plain error review to violations of *Waller*).

[41] *See* discussion *infra* Part IV.A (examining cases in which post hoc justifications are used to affirm erroneous courtroom closure).

[42] *See* discussion *infra* Part IV.B (examining cases in which courts fail to appropriately balance interests as required by *Waller*).

[43] *See* discussion *infra* Part IV.C–D (examining cases in which courts use state closure statutes as a proxy for incomplete and unsatisfactory application of the requirements of *Waller*).

violations of the public trial right; (2) regularly subject violations of *Waller* to plain error review; (3) require application of the four-part *Waller* test in all cases of courtroom closure—even if such closure occurs pursuant to state law; (4) refrain from using post hoc findings to justify closure; (5) reject the argument that closure pursuant to state law absolves trial courts of the obligation to comply with *Waller*; and (6) recognize that the benefit-of-the-victim doctrine cannot excuse a constitutional mistake that is triggered by a statutory error that violates *Waller*. In *Presley v. Georgia*, decided January 19, 2010, the U.S. Supreme Court once again reiterated the importance of the public trial right, but its decision did not address any of the above issues.[44]

I. FUNDAMENTALS OF THE PUBLIC TRIAL GUARANTEE

This Part discusses the origin of the public trial right as well as the countervailing reasons most often invoked to justify courtroom closure. While state and federal courts have historically made firm pronouncements about the sanctity of the public trial right, it was not until the early 1980s that the Supreme Court finally arrived at a coherent set of rules for balancing the competing interests of defendants, victim-witnesses, and the public. This Part discusses the cases that created the legal framework for balancing these and other interests, and explains the rationale behind the rules the Court developed, culminating in *Waller v. Georgia* in 1984. This Part also compares different closure cases and the rationale employed in each to show how courtroom closures were often as arbitrary as the logic employed by the individual trial judges who ordered them—or as valid as any particular appellate court held them to be.

A. The Origins of the Public Trial Guarantee

Although the right to a public trial existed under English common law,[45] its adoption as part of the Bill of Rights[46] stemmed from a greater appreciation for

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[44] 78 U.S.L.W. 4051 (U.S. Jan. 19, 2010) (per curiam).

[45] Max Radin, *The Right to a Public Trial*, 6 TEMP. L.Q. 381, 382 (1932) (quoting Matthew Hale, writing around 1670, that evidence is "given 'in the open court and in the presence of the parties, counsel, and all by-standers . . . .'").

[46] U.S. CONST. amend. VI. Prior to ratification of the Constitution in 1791, the constitutions of six states provided for a speedy trial right. Radin, *supra* note 45, at 383 n.5a. Only Pennsylvania specified that the proceeding be "public," while North Carolina required that criminal convictions by jury verdict be rendered "in open court." *Id.*; *see also In re* Oliver, 333 U.S. 257, 267 n.15 (1948). For a concise overview of the Colonial attitude toward the public trial right and related observations about the adoption of the Sixth Amendment, see *Gannett Co. v. DePasquale*, 443 U.S. 368, 424–27 (1979) (Blackmun, J., concurring and

the rights of the accused in America than could be found in Britain.[47] As Max Radin observed, although a defendant was entitled to a public trial in England, the privilege did not count for much.[48] The authorities held a defendant virtually incommunicado until trial, denied him the right to prepare for his own defense, and gave no notice of the evidence against him until trial.[49] A defendant also had no right to counsel, no right to confront witnesses against him, and no right to call witnesses on his own behalf—and even if he could, a defendant would have had no idea what evidence the witnesses might give because he had no right to examine them beforehand.[50] According to Radin:

> Under these circumstances it is more than doubtful that it was the prisoner's interest which created the [public trial] practice. We may well imagine that the poor wretches who stood in the dock could not have highly valued the fact that, for a brief period, there would be a little audience to see them arraigned, convicted, and sentenced—all three of which events, in those sturdy times, might well take place in a single day.[51]

Taking into account the totality of these proceedings, the public aspect of such trials probably did less to protect the rights of the accused and more to reinforce the legitimacy of the convictions obtained.[52] However, irrespective of what may have been the original *function* of the public trial guarantee under these conditions, its effect has been hailed by many.[53] One supporter was Jeremy Bentham, who famously observed in 1827 that "[w]ithout publicity, all

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dissenting). Following ratification of the Bill of Rights in 1791, a majority of states adopted constitutional requirements for a public trial, borrowing language from the Sixth Amendment. *In re Oliver*, 333 U.S. at 267; *see also Gannett*, 443 U.S. at 414 n.3 (Blackmun, J., concurring and dissenting) ("Forty-eight of the fifty States protect the right to a public trial in one way or another. Forty-five have constitutional provisions specifically guaranteeing the right . . . .").

47 *See, e.g.*, *In re Oliver*, 333 U.S. at 268–69, 269 n.22 (recounting the "excesses of the English Court of Star Chamber" in which the accused "was grilled in secret [and] often tortured, in an effort to obtain a confession").

48 Radin, *supra* note 45, at 384.

49 *Id.* at 383 (citing JAMES FITZJAMES STEPHEN, 1 HISTORY OF THE CRIMINAL LAW OF ENGLAND 350 (1883)).

50 *Id.* at 383–84.

51 *Id.* at 384.

52 United States v. Cianfrani, 573 F.2d 835, 853 n.6 (3d Cir. 1978) ("It is doubtful that at common law the requirement that trials be held in public grew up as a right of the accused at all."); *see also* Douglas Hay, *Property, Authority and the Criminal Law*, *in* ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND 17, 48 (1975) (arguing that the "peculiar genius of the law [was that it] allowed the rulers of England to make the courts a selective instrument of class justice, yet simultaneously to proclaim the law's incorruptible impartiality, and absolute determinacy").

53 *See infra* notes 54, 58–62 and accompanying text.

other checks are insufficient: in comparison of publicity, all other checks are of small account."[54]

When discussing the main impetus for the adoption of the Sixth Amendment public trial guarantee, American courts and commentators have been quick to cite the "historical warnings of the evil practice of the Star Chamber in England,"[55] the infamous practices of the Spanish Inquisition, and the *lettres de cachet* of the French monarchy.[56] As the Supreme Court explained, "[a]ll of these institutions obviously symbolized a menace to liberty. In the hands of despotic groups each of them had become an instrument for the suppression of political and religious heresies in ruthless disregard of the right of an accused to a fair trial."[57]

American courts often cite Thomas Cooley, the renowned nineteenth century constitutional scholar, when articulating the values of a public trial. A public proceeding, he observed, "is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions . . . ."[58] Crediting Hale and Blackstone, courts also have emphasized the importance of a public trial in drawing out persons who may know the facts of a case and thus deliver important testimony.[59] Public trials produce a more reliable result because they presumably discourage perjury[60] and engender basic fairness.[61] As Justice Harlan observed nearly two decades before *Waller*:

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[54] 1 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 524 (1827).

[55] Davis v. United States, 247 F. 394, 395 (8th Cir. 1917). *But see* Radin, *supra* note 45, at 386–87 ("As far as the Star Chamber is concerned, the Parliamentary opponents of that tribunal never seem to have picked out secrecy as characteristic of it or as a reprehensible practice in it. . . . There was apparently nothing secret about the practice of this court, and the grievance the Parliament had against it was rather its power, than the method in which that power was exercised.").

[56] Radin, *supra* note 45, at 388 ("The *lettre de cachet* was a document bearing the king's private seal (*cachet*) . . . [and was] most frequently used as a means of interfering in the ordinary course of justice and of arbitrarily ordering the indefinite imprisonment of any particular person.").

[57] *In re Oliver*, 333 U.S. at 269–70.

[58] *Id.* at 270 n.25 (citing 1 THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 647 (8th ed. 1927)).

[59] Tanksley v. United States, 145 F.2d 58, 59–60 (9th Cir. 1944); *see also* State v. Klem, 438 N.W.2d 798, 803 n.5 (N.D. 1989) (observing that the presence of family members might assure "testimonial trustworthiness").

[60] *See* Waller v. Georgia, 467 U.S. 39, 46 (1984) ("In addition to ensuring that judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages perjury.").

[61] *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569 (1980) (citing Hale and Blackstone for the "importance of openness to the proper functioning of a trial [because] it gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants,

> Essentially, the public-trial guarantee embodies a view of human nature, true as a general rule, that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings. A fair trial is the objective, and "public trial" is an institutional safeguard for attaining it.[62]

Public trials also advance the much broader social purpose that '"[i]n this country it is a first principle that the people have the right to know what is done in their courts.'"[63]

1. In re Oliver

The public trial right has been held in high esteem by courts and commentators alike, but it was not until *In re Oliver*,[64] in 1948, that the Supreme Court held that the Public Trial Clause of the Sixth Amendment applied to state criminal proceedings through the Fourteenth Amendment.[65] In *In re Oliver*, the Court reversed the criminal contempt conviction of a man who had been summoned by a Michigan judge to testify privately as a witness in "a 'one-man grand jury' investigation into alleged gambling and official corruption."[66] Finding the witness not credible, the judge convicted him of contempt and sentenced him to sixty days in jail.[67] The Michigan Supreme Court upheld the conviction, but the U.S. Supreme Court reversed, holding that the "mantle of secrecy" surrounding the proceedings violated the Due Process Clause of the Fourteenth Amendment.[68] *In re Oliver* was a landmark Supreme Court case, but it drew on earlier decisions of the lower federal courts that were no less insistent on enforcing the public trial right.

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and decisions based on secret bias or partiality"). *But see* Radin, *supra* note 45, at 384 ("[I]t is clear that [Hale and Blackstone] are scarcely thinking of the privileges of the accused, but of the effectiveness of the process of trial, which in the minds of most official persons of all times means the expedition and frequency of conviction and not the facilitation of acquittal.").

62 Estes v. Texas, 381 U.S. 532, 588 (1965) (Harlan, J., concurring) (citation omitted).

63 *See* State v. Keeler, 156 P. 1080, 1084 (Mont. 1916) (quoting *In re* Shortridge, 34 P. 227, 228 (Cal. 1893)). "The people are interested in knowing, and have the right to know, how their servants—the judge, county attorney, sheriff, and clerk—conduct the public's business." *Id.* at 1083.

64 333 U.S. 257 (1948).

65 Barbara Hricko Wait, Comment, *Constitutional Law—First Amendment—Access to Government Proceedings*—Voir Dire *of Jurors*—Press-Enterprise Co. v. Superior Court of Cal., 3 N.Y.L. SCH. HUM. RTS. ANN. 199, 202 (1985) (citing *In re Oliver*, 333 U.S. at 273).

66 *In re Oliver*, 333 U.S. at 258. The proceeding was authorized under Michigan law. *Id.* at 261.

67 *Id.* at 259.

68 *Id.* at 273.

2. Davis v. United States

In 1917, the Eighth Circuit Court of Appeals declared in *Davis v. United States*[69] that "[t]he corrective influence of public attendance at trials for crime was considered important to the liberty of the people, and it is only by steadily supporting the safeguard that it is kept from being undermined and finally destroyed."[70] In *Davis*, the defendants were charged in federal court in connection with a train robbery, and by the end of the trial an excitable crowd had gathered.[71] Anticipating a disruption, the trial judge cleared the courtroom of everyone but members of the bar, defendants' relatives, and newspaper reporters.[72] The defendant was convicted and later appealed. Noting that the courtroom was not overcrowded and that no "person was making a disturbance or threatening to do so,"[73] the Court of Appeals ordered a new trial on Sixth Amendment grounds. The *Davis* opinion is also noteworthy on two other counts: (1) it emphatically declared that violations of the public trial right are not harmless error;[74] and (2) it compared eleven leading cases upholding courtroom closures with six others in which the exclusion of spectators was held unconstitutional under state provisions identical to the Sixth Amendment.[75] In doing so, *Davis* characterized the exceptions to the public trial right as "few" and "based upon considerations of public morals and peace and good order in the courtrooms."[76] In contrast, those decisions finding a

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[69] 247 F. 394 (8th Cir. 1917).

[70] *Id.* at 395.

[71] *Id.*

[72] *Id.* at 394.

[73] *Id.* at 395.

[74] *Id.* at 398–99 ("It is urged that no prejudice to defendants was shown. A violation of the constitutional right necessarily implies prejudice and more than that need not appear. Furthermore, it would be difficult, if not impossible, in such cases for a defendant to point to any definite, personal injury. To require him to do so would impair or destroy the safeguard.").

[75] *Id.* at 396–98 ("We turn now to those [cases] in which [the courtroom closures] have been disapproved."). As the discussion of *State v. Osborne*, *Tilton v. State*, and *State v. Hensley* in this subsection reveals, the closures at issue in those cases were held invalid on state constitutional grounds. *See infra* notes 87–97 and accompanying text. In *People v. Hartman*, the court did not explicitly distinguish between the California and federal constitutions, but clearly stated that the closure was "in direct violation of that provision of the constitution which says that a party accused of crime has a right to a public trial." 37 P. 153, 154 (Cal. 1894). Likewise, the closures in *People v. Yeager* and *People v. Murray* were held to violate section 28 of article 6 of the Michigan Constitution. *See People v. Yeager*, 71 N.W. 491, 492 (1897) (relying on *Murray* and stating that "if such a trial as is provided for by the [state trial closure] statute is not a public trial, the act is plainly in conflict with section 28 of article 6 of the constitution . . . ."); *People v. Murray*, 50 N.W. 995, 997 (Mich. 1891) ("We cannot accept the conclusion of the judge, 'that the trial was at all times during the same a public trial, within the meaning of the [state] constitution.'"); *infra* notes 191–94 and accompanying text (discussing *Murray*).

[76] *Davis*, 247 F. at 396.

violation of the public trial right were described as "well founded in principle and reason."[77]

In reality, there was not much of a distinction between those cases where the closures were ruled erroneous and those where the closures were upheld. The following brief comparative analysis reveals that the differences in outcome did not stem from the application of a well-ordered rule to different facts—after all, there was no such rule until the 1980s. Instead, the variation was more likely the product of relatively arbitrary judicial decision making against the backdrop of controversial circumstances. In this context some courts simply appear to have been more willing than others to accept the implicit moralistic reasoning justifying closure. For example, in *Benedict v. People*,[78] the defendant was convicted of "the infamous crime against nature,"[79] the trial involved "the recital of disgusting facts,"[80] and the selective exclusion of spectators was upheld.[81] In *State v. McCool*,[82] the prosecution asked for all women to be excluded, as the county attorney "was about to refer to some of the evidence which was unfit for ladies to hear."[83] And in *People v. Swafford*,[84] everyone but the judge, jurors, witnesses, and persons connected with the case was excluded on the grounds that "the word 'public' in the Constitution was used in opposition to secret, and [thus the] defendant was not denied a public trial."[85] Like *Benedict*, the exclusions in *McCool* and *Swafford* were upheld, though *Swafford* was eventually "held unsound."[86]

In contrast to these ostensibly legitimate closures, the *Davis* court cited *State v. Osborne*,[87] a rape case in which the exclusion of all but the defendant, the attorneys, the jury, officers of the court, and testifying witnesses "was vigorously condemned" by the Oregon Supreme Court on state constitutional grounds.[88] Likewise, in *Tilton v. State*,[89] a case of adultery with a fourteen-

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77 *Id.* at 398.

78 46 P. 637 (Colo. 1896).

79 *Id.* (referring to the offense of sodomy).

80 *Id.* at 638.

81 *Id.*

82 9 P. 745 (Kan. 1886).

83 *Id.* at 747.

84 3 P. 809 (Cal. 1884).

85 Davis v. United States, 247 F. 394, 396–97 (8th Cir. 1917).

86 *See id.* at 397–98 (noting that *Swafford* was "an extreme case" that was later "held unsound" by *People v. Hartman*, 37 P. 153, 154 (Cal. 1894)).

87 103 P. 62 (Or. 1909).

88 *Davis*, 247 F. at 397. *See also Osborne*, 103 P. at 63–64 ("It is argued that the procedure complained of is in violation of the plain provisions of both our national and state Constitutions. . . . [W]hatever the rule

year-old girl, the Georgia Supreme Court held that the trial court could have excluded, with "perfect legality,"[90] all minors and women from the courtroom, but that its order banishing everyone not connected with the case was "too sweeping"[91] under the state constitution.[92] There, the judge had closed the courtroom, citing state law authorizing trial courts to clear the courtroom of "'all or any portion of the audience'" in "'any cause of seduction or divorce, or other case where the evidence is vulgar or obscene, or relates to the improper acts of the sexes, and tends to debauch the morals of the young . . . .'"[93] And in *State v. Hensley*,[94] a case of statutory rape, when the trial was adjourned to a smaller courtroom to hear "immoral or obscene testimony,"[95] the public was excluded, but reporters were allowed to remain.[96] The Ohio Supreme Court held that "the order of exclusion was too general . . . and that the defendant was not accorded . . . a public trial."[97]

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on that subject may be with reference to the national organic law on the subject, the Constitution of our state is to the same effect." (citations omitted)).

[89] 62 S.E. 651 (Ga. Ct. App. 1908).

[90] *Id.* at 654.

[91] *Id.*

[92] *Id.* at 651 (citing GA. CONST. of 1877, art. I, § 1, para. 5, which "provides, among other things, that 'every person charged with an offense against the laws of this state . . . shall have a public trial'"). The Georgia Constitution was revised in 1983, during a special session of the General Assembly at which the public trial provision was moved from article VI, the judicial article, to article I, section 1, paragraph 11(a). *See* MELVIN B. HILL, JR., THE GEORGIA STATE CONSTITUTION: A REFERENCE GUIDE 29, 42–43 (1994); *see also* H.R. 4 136th Gen. Assem., Extraordinary Sess. (Ga. 1981) (proposing a new constitution for the State of Georgia), *available at* http://www.sos.georgia.gov/archives/what_do_we_have/online_records/historic_documents/1983_georgia_constitution/default.htm.

[93] *Tilton*, 62 S.E. at 651 (citing section 5296 of the Georgia Civil Code of 1895). The constitutionality of the statute was not challenged. *Id.*

[94] 79 N.E. 462 (Ohio 1906).

[95] *Id.*

[96] *Id.*

[97] *Id.* at 464. In holding the closure invalid on state constitutional grounds, the court observed that "[p]rovisions respecting a public trial similar to that of our Constitution . . . are found in the federal Constitution, and in most, if not all, of the Constitutions of the states of the Union . . . ." *Id.* at 463. *Hensley* also contains an impassioned justification for the application of the plain error rule to violations of the public trial right:

> [C]ounsel for the state [insists] that, because no specific objection or exception was entered by the defendant at the time the order was made or was being enforced, the error, if any was committed, cannot now be taken advantage of. This objection ignores the force and effect of the constitutional provision. The right to a public trial is guarantied [sic]. It is of the same high order of right as the other guaranties [sic] embodied in the section—that to appear and defend in person and with counsel, that to meet the witnesses face to face and have compulsory process, and that to a trial by jury. The right cannot be waived by silence any more than can the right to be tried by jury where the accusation is a felony and the plea is not guilty.

Id. at 464.

Of course, the right to a public trial is not an unqualified one. The next section more closely examines the reasons cited to justify courtroom closure and shows how core principles and lofty rhetoric favoring the public trial right can give way to other interests—some more credible than others.

B. Countervailing Values and Interests: The Justification for Courtroom Closure

Most discussions of the public trial guarantee take as their premise the age-old fear of despotic regimes,[98] as well as concern over "possible abuse of judicial power,"[99] and the need to "safeguard against any attempt to employ . . . courts as instruments of persecution."[100] Perhaps it is because of these concerns that courtrooms have been closed in the United States relatively rarely by government officials pursuing their own objectives or seeking to quash dissent.[101] Instead, as evidenced by the cases discussed in *Davis*,[102] courtroom closures since the late nineteenth century appear to have been triggered most often by sex crime prosecutions.[103] Historically, these closures have been justified by a desire to preserve "public morals and public

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[98] *See, e.g.*, *In re* Oliver, 333 U.S. 257, 268–70 (1948) (discussing the "traditional Anglo-American distrust for secret trials"); *see also* People v. Murray, 50 N.W. 995, 998 (Mich. 1891) (citing the "great abuses practiced in England . . . in conducting criminal prosecutions" as the impetus for including the public trial right in the 1850 Michigan Constitution and "in all of the constitutions of the American states and of the United States").

[99] *In re Oliver*, 333 U.S. at 270.

[100] *Id.*

[101] As the discussion in *Davis* of the cases reveals, government misconduct is not frequently at issue in cases where judges order courtroom closure. *See* Part I.A.2 (discussing *Davis*); *infra* note 103 (listing sex crime cases precipitating closure). For an example of a courtroom closure which does appear motivated by a desire to shield government misconduct, see *Murray*, 50 N.W. at 996–98 (holding unconstitutional on state constitutional grounds the exclusion of all but "respectable citizens" from the courtroom during the trial of a defendant charged with murdering a police officer, where the only persons allowed entry were "about a dozen policemen, three or four detectives, several police commissioners, and others apparently interested in the conviction of [the] defendant").

[102] *See supra* Part I.A.2.

[103] Of the seventeen cases discussed in *Davis v. United States*, 247 F. 394, 396–98 (8th Cir. 1917), eleven involved offenses of a sexual nature: *Grimmett v. State*, 2 S.W. 631 (Tex. Ct. App. 1886) (assault with intent to rape); *Benedict v. People*, 46 P. 637 (Colo. 1896) (sodomy); *State v. Nyhus*, 124 N.W. 71 (N.D. 1909) (rape of a girl under fourteen); *Reagan v. United States*, 202 F. 488 (9th Cir. 1919) (rape); *State v. Callahan*, 110 N.W. 342 (Minn. 1907) (convicted of assault with intent to rape); *People v. Swafford*, 3 P. 809, 809 (Cal. 1884) (noting that the defendant "was charged with abducting a chaste female under age"); *State v. Osborne*, 103 P. 62 (Or. 1909) (assault with intent to rape); *Tilton v. State*, 62 S.E. 651 (Ga. Ct. App. 1908) (adultery with a fourteen-year-old girl); *State v. Hensley*, 79 N.E. 462 (Ohio 1906) (statutory rape); *People v. Hartman*, 37 P. 153 (Cal. 1894) (assault with intent to commit rape); *People v. Yeager*, 71 N.W. 491 (Mich. 1897) (assault with intent to commit rape).

decency"[104] or to elicit sensitive testimony from victims.[105] Other justifications for courtroom closure include preserving the anonymity of a police officer in an undercover "buy and bust" drug investigation,[106] encouraging testimony by witnesses who fear retaliation,[107] and maintaining public safety and order in the courtroom.[108] Preventing disclosure of sensitive government information is also a compelling interest that sometimes justifies closure.[109]

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[104] THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 441 (Victor H. Lane ed., 7th ed. 1903) (noting the "evidences of human depravity which the trial must necessarily bring to light"); *see also* Harris v. Stephens, 361 F.2d 888, 890–91 (8th Cir. 1966) (calling the practice of closing the courtroom to spectators during testimony of "a twenty-three year old virgin" who was the victim of rape "a frequent and accepted practice when the lurid details of such a crime must be related by a young lady"); Globe Newspaper Co. v. Super. Ct., 423 N.E.2d 773, 778 (Mass. 1981) (observing that while "the constitutional right of access to trials arises in part from an unbroken tradition of openness . . . . [t]here is at least one notable exception to this history. In cases involving sexual assaults, portions of trials have been closed to some segments of the public, even when the victim was an adult." (citations omitted)), *rev'd*, 457 U.S. 596 (1982).

[105] *See Callahan*, 110 N.W. at 345 (upholding the constitutionality of courtroom closure to facilitate testimony by a rape victim who was "seriously embarrassed by . . . a crowd of spectators"); *Grimmett*, 2 S.W. at 633–34 (upholding, under the state constitution, the exclusion of most spectators, in part "to relieve the witness of the embarrassment which . . . the disorderly conduct of [the] crowd[] occasioned"). *But see* Tanksley v. United States, 145 F.2d 58, 59 (9th Cir. 1944) (holding that "[i]t would be denying the defendant his presumption of innocence" to hold that a rape victim "must be relieved of . . . embarrassment" because she is called to testify about the crime "and her shame").

[106] *See* Bowden v. Keane, 237 F.3d 125, 127, 130 (2d Cir. 2001) (upholding "narrow courtroom closure" where an undercover narcotics officer articulated "even a generalized fear that his safety could be endangered by testifying in open court, and explain[ed] in rough terms the basis of his fear"). *But see* Vidal v. Williams, 31 F.3d 67, 69 (2d Cir. 1994) (reversing the district court's denial of habeas corpus where the defendant's parents were excluded from the courtroom "to prevent them from recognizing [the arresting officer] . . . and disclosing his identity" because the parents "lived in a 'high drug area'" and might possibly encounter the officer or "disclos[e] his identity as retribution for their son's conviction.").

[107] *See, e.g.*, United States v. Farmer, 32 F.3d 369, 372 (8th Cir. 1994) (upholding closure where the evidence supported "the victim's well-reasoned fear of [the defendant]").

[108] *See, e.g.*, People v. Kerrigan, 14 P. 849, 850 (Cal. 1887) (upholding courtroom closure where the defendant, convicted of assault with intent to commit murder, had addressed the judge and officers of court with "vulgar and profane language," thereby creating so much commotion that the spectators were ordered to leave the courtroom).

[109] Waller v. Georgia, 467 U.S. 39, 45 (1984). A thorough exploration of this issue is beyond the scope of this Comment. However, for a relevant discussion in the context of a recent national security prosecution, see *United States v. Abu Marzook*, 412 F. Supp. 2d 913 (N.D. Ill. 2006). In *Abu Marzook*, the courtroom was ordered closed during testimony of Israeli intelligence agents, but the court held that a suppression hearing authorized under the Classified Information Procedures Act, 18 U.S.C. app. (2006), also must "square[] with the Constitution" and '"meet the test set out in *Press-Enterprise* and its predecessors.'" *Abu Marzook*, 412 F. Supp. 2d at 924–28 (quoting *Waller*, 467 U.S. at 47).

With the advent of the victims' rights movement[110] and heightened sensitivity toward sex crime victims in particular, prosecutors and courts have often justified courtroom closure as necessary to protect the dignity and psychological integrity of the victim[111] and to encourage victim testimony.[112] Courts have paid particular attention to these issues where children and teenagers are concerned.[113]

Without clear guidelines for courtroom closure it is not surprising that different judges assessing even similar facts and weighing similar interests, such as protecting the psychological integrity of a rape victim, might decide differently about excluding the public.[114] What is important to note is the range of countervailing interests that have been cited to justify courtroom closure. The next section examines the leading U.S. Supreme Court cases on this issue—including two where closure was requested by the *defendant* in the interest of a fair trial[115]—to explain how the Court ultimately settled on clear procedural requirements, culminating in *Waller*. These procedures ensure that

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110 *See* Frank Carrington & George Nicholson, *The Victims' Movement: An Idea Whose Time Has Come*, 11 PEPP. L. REV. 1, 1–2 (1984); *see also* Shirley S. Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 3 UTAH L. REV. 517, 524 (1985) ("The early voices [of the victims' rights movement] were frequently feminine . . . . Their concern was for a particular victim, the victim of rape.").

111 *See* United States *ex rel*. Latimore v. Sielaff, 561 F.2d 691, 694–96 (7th Cir. 1977) (upholding the trial court's dismissal of spectators because testimony by the victim, a "21-year-old unmarried woman," about her rape by four men "posed a substantial threat of indignity to the witness").

112 *See Farmer*, 32 F.3d at 372. *But see* Globe Newspaper Co. v. Super. Ct., 457 U.S. 596, 607–10 (1982) (criticizing as "speculative in empirical terms" the claim that mandatory trial closure during testimony of a minor victim "will lead to an increase in the number of minor sex victims coming forward").

113 *See Globe Newspaper*, 457 U.S. at 607 (noting that the interests cited by the State of Massachusetts justifying mandatory trial closure during the testimony of minor victims "are reducible to two: the protection of minor victims of sex crimes from further trauma and embarrassment; and the encouragement of such victims to come forward and testify in a truthful and credible manner"). For a discussion of child victims of sexual abuse and the legal process, including the issues raised by courtroom closure during child testimony in light of the Sixth Amendment rights of criminal defendants, see Donald C. Bross, *Protecting Child Witnesses*, *in* FOUNDATIONS OF CHILD ADVOCACY: LEGAL REPRESENTATION OF THE MALTREATED CHILD 117, 117–26 (Donald C. Bross & Laura Freeman Michaels eds., 1987) and JAMES SELKIN & PETER G.W. SCHOUTEN, THE CHILD SEXUAL ABUSE CASE IN THE COURTROOM: A SOURCE BOOK 91–102 (1987). *See also* AM. PROSECUTORS RESEARCH INST., NAT'L CTR. FOR PROSECUTION OF CHILD ABUSE, INVESTIGATION AND PROSECUTION OF CHILD ABUSE 441, 441–62 (3d ed. 2004) ("Testifying in court can be a frightening experience for crime victims, but it is especially so for child witnesses. Courtrooms are large and intimidating, and a child witness must make public an intensely private and shameful experience in the presence of the abuser."). *But see* McIntosh v. United States, 933 A.2d 370, 377, 380 (D.C. Cir. 2007) (reversing defendant's conviction of misdemeanor sexual abuse of a twelve-year-old girl on the ground that the partial closure of the courtroom during the child's testimony violated *Waller*, in spite of the fact that the child, who had "limited mental capacity" and other problems, would suffer "trauma and embarrassment" from testifying in public).

114 *See* discussion of cases *supra* notes 105–06.

115 *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980); Gannett Co. v. DePasquale, 443 U.S. 368, 379–84 (1979).

trial courts properly balance the interests involved when deciding to close the courtroom and require that trial courts create a suitable record for appellate review.

C. Asserting the Public Trial Guarantee Through the First Amendment

In re Oliver, decided in 1948, held that the Sixth Amendment applies to state criminal proceedings through the Fourteenth Amendment,[116] but it took another three decades for the Supreme Court to hold that the press and public have the right to attend state criminal trials under the First Amendment.[117] In arriving at this conclusion, the Supreme Court relied heavily on the history of openness in criminal proceedings,[118] which it saw as essential to both the proper functioning of the criminal justice system and America's "republican system of self-government."[119] The interests of the public and the press must be balanced, however, against the defendant's right to a fair trial, as well as other interests previously discussed, such as the anonymity of undercover police officers, or the need to elicit sensitive testimony from sex crime victims.[120] The Court ultimately articulated the same criteria for evaluating the constitutionality of courtroom closures under both the First and Sixth Amendments, but these early First Amendment cases laid the foundation for the four-part test the Court eventually established in *Waller*.[121]

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116 *See supra* Part I.A.1.

117 *Richmond Newspapers*, 448 U.S. at 575–80 (plurality opinion). Although Justice Burger authored the plurality opinion, in which he was joined by Justices White and Stevens, the various concurrences of Justices Marshall, Brennan, Stewart and Blackmun all agreed that the First Amendment ensured a right of public access to criminal trials. Only Justice Rehnquist dissented. *See generally* Lawrence J. Morris, Note, *CONSTITUTIONAL LAW—Closure of Trials—The Press and the Public Have a First Amendment Right of Access to Attend Criminal Trials, Which Cannot Be Closed Absent an Overriding Interest.* Richmond Newspapers, Inc. v. Virginia, *100 S. Ct. 2814 (1980)*, 64 MARQ. L. REV. 717 (1981) (discussing U.S. Supreme Court jurisprudence concerning the public trial right in the context of *Gannett* and *Richmond Newspapers*); George W. Kelly, Richmond Newspapers *and the First Amendment Right of Access*, 18 AKRON L. REV. 33 (1984); William K. Meyer, Note, *Evaluating Court Closures After* Richmond Newspapers*: Using Sixth Amendment Standards to Enforce a First Amendment Right*, 50 GEO. WASH. L. REV. 304, 309 (1982).

118 *Richmond Newspapers*, 448 U.S. at 573 (plurality opinion) ("From this unbroken, uncontradicted history, supported by reasons as valid today as in centuries past, we are bound to conclude that a presumption of openness inheres in the very nature of a criminal trial under our system of justice.").

119 *Id.* at 587 (Brennan, J., concurring).

120 *See supra* Part I.B.

121 *See* articles cited *supra* note 117.

1. Richmond Newspapers, Inc. v. Virginia

Richmond Newspapers, Inc. v. Virginia was the first case to establish the right of the press and public to attend criminal trials, but it had an unusual procedural history.[122] After the defendant was tried three times unsuccessfully for murder (the first conviction was reversed on appeal and two mistrials followed),[123] he asked the trial court in the fourth proceeding to close the courtroom, and the motion was unopposed.[124] In ordering the courtroom cleared "of all parties except the witnesses when they testify,"[125] the trial court cited a state law that permitted the exclusion of "any persons whose presence would impair the conduct of a fair trial, provided that the right of the accused to a public trial shall not be violated."[126]

In the plurality opinion, Chief Justice Burger[127] wrote that, based on an "unbroken, uncontradicted history" of open criminal trials,[128] the "fundamental right" of the public to attend criminal trials is "implicit in the guarantees of the First Amendment"[129] and applies to the states through the Fourteenth Amendment.[130] Because the trial court had: (1) made no findings to support the closure, (2) conducted no inquiry into alternatives, and (3) failed to recognize a constitutional right for either the public or the press to attend the trial, the Supreme Court held the closure improper under the First Amendment.[131] In his concurrence, Justice Stevens hailed *Richmond Newspapers* as a "watershed case" for "unequivocally hold[ing] that an arbitrary interference with access to important information is an abridgment

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122 *Richmond Newspapers*, 448 U.S. at 559–63 (plurality opinion).

123 *Id.* at 559. The defendant had been convicted of second-degree murder, but the Virginia Supreme Court reversed because a blood-stained shirt "had been improperly admitted into evidence." *Id.*; *see also* Morris, *supra* note 117, at 722 n.28.

124 *Richmond Newspapers*, 448 U.S at 559–60 (plurality opinion).

125 *Id.* at 560.

126 *Id.* at 560 n.2 (quoting VA. CODE ANN. § 19.2-266 (Supp. 1980)) (internal quotation marks omitted).

127 Chief Justice Burger was joined by Justices White and Stevens, with four other Justices concurring in the judgment. *Id.* at 558 (syllabus). Justice Powell took no part in the decision. *Id.* However, in Justice Powell's concurring opinion in *Gannett v. DePasquale*, he indicated a belief that the First Amendment gives the press a limited "right of access" to criminal trials. 443 U.S. 368, 397–98 (1979) (Powell, J., concurring).

128 *Richmond Newspapers*, 448 U.S at 556, 573 (plurality opinion).

129 *Id.* at 580.

130 *Id.* Justice Rehnquist disagreed, filing the only dissent and rejecting any application of the First, Sixth, or Fourteenth Amendments. *Id.* at 605–06 (Rehnquist, J., dissenting). Justice Rehnquist also took his fellow Justices to task for "smother[ing] a healthy pluralism which would ordinarily exist in a national government embracing 50 States." *Id.*

131 *Id.* at 580–81 (plurality opinion).

of . . . the First Amendment."[132] In a separate concurrence, Justices Brennan and Marshall went well beyond a discussion of access to information and emphasized the "*structural* role" of the First Amendment "in securing and fostering our republican system of self-government."[133]

2. Gannett Co. v. DePasquale

Although *Richmond Newspapers* was a case of first impression regarding the First Amendment right of the public to attend criminal trials, the Court had struggled with many of the same issues under the framework of the Sixth Amendment a year earlier in *Gannett Co. v. DePasquale*.[134] In *Gannett*, the majority held that because the Sixth Amendment right to a public trial is "personal to the accused,"[135] the public does not have an independent right under either the Sixth or Fourteenth Amendments to attend criminal trials.[136] In that case—a murder trial—the trial court had approved, without objection, a defense motion to close a pre-trial suppression hearing where "the unabated buildup of adverse publicity had jeopardized the ability of the defendants to receive a fair trial."[137] The posture of *Gannett* was thus quite similar to *Richmond Newspapers*, where the request to close the courtroom had also been made by the defendant and was unopposed, and the lower court had also invoked the defendant's right to a fair trial to justify the closure.[138] Faced with an apparent conflict between the interests of the public and the defendant, the majority in *Gannett* concluded that the right to close the courtroom belonged to the defendant.[139] Making an analogy to the defendant's right to waive a jury trial, the majority observed that "if the defendant waives his right to a jury trial, and the prosecutor and the judge consent, it could hardly be seriously argued that a member of the public could demand a jury trial because of the societal interest in that mode of fact-finding."[140]

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132 *Id.* at 582–83 (Stevens, J., concurring).

133 *Id.* at 587 (Brennan, J., concurring); *see also* Kelly, *supra* note 117, at 36 (noting that under this analysis the First Amendment is "linked to the process of communication necessary for the survival of democracy").

134 443 U.S. 368 (1979).

135 *Id.* at 379–80; *see also id.* at 381 n.9 ("Numerous commentators have also recognized that only a defendant has a right to a public trial under the Sixth Amendment."). For a thorough discussion of *Gannett*, see Morris, *supra* note 117, at 717–21.

136 *Gannett*, 443 U.S. at 391.

137 *Id.* at 375.

138 *See* discussion of *Richmond Newspapers supra* Part I.C.1.

139 *Gannett*, 443 U.S. at 379–80.

140 *Id.* at 383–84. *But see* United States v. Cianfrani, 573 F.2d 835, 854 (3d Cir. 1978) (holding that the Sixth Amendment public trial right provides the public a qualified right of access to criminal trials and

Other Justices, however, were not so quick to dispense with this "societal interest" in public trials. In a dissent by Justice Blackmun, and joined by Justices Brennan, White, and Marshall, the minority invoked the history of the public trial right under English and American common law to support their conclusion that the Sixth Amendment, incorporated through the Fourteenth Amendment, prohibits states from closing the courtroom to the public unless "full and fair consideration [is given] to the public's interests in maintaining an open proceeding . . . . [n]otwithstanding the fact it is the accused who seeks to close the trial."[141]

Although the Court in *Gannett* was divided over the extent to which the public trial right is strictly "personal to the accused"[142] or whether the societal value of criminal proceedings could trump the interests of a defendant, all nine Justices were moving toward a consensus position requiring trial courts to more rigorously consider these competing interests before excluding the public from any criminal proceeding. It took the intervening decision in *Richmond Newspapers* in 1980, and the deliberations of the Court in two subsequent cases,[143] to clearly establish the framework under which all Justices would agree that "the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public."[144] The decisions of the Court in *Globe Newspaper Co. v. Superior Court* and *Press-Enterprise Co. v. Superior Court* also set the standards for the determination established in *Waller* regarding how courts should enforce the Sixth Amendment public trial right of criminal defendants.[145]

3. Globe Newspaper Co. v. Superior Court

In *Richmond Newspapers*,[146] the Court held for the very first time that the public and the press have a qualified First Amendment right to attend criminal trials, but the Justices could not agree on a central rationale for their

observing that "'justice cannot survive behind walls of silence,' even when those walls are erected at the behest of the defendant" (quoting Sheppard v. Maxwell, 384 U.S. 333, 349 (1966))).

141 *Gannett*, 443 U.S. at 414, 433 (Blackmun, J., dissenting).

142 *Id.* at 380.

143 Press-Enter. Co. v. Super. Ct., 464 U.S. 501 (1984); Globe Newspaper Co. v. Super. Ct., 457 U.S. 596 (1982).

144 Waller v. Georgia, 467 U.S. 39, 46 (1984).

145 *See* Wait, *supra* note 65, at 223–24, 226–27.

146 *See supra* Part I.C.1.

decision.[147] Two years later, in *Globe Newspaper*,[148] the Court "clarified and strengthened the [First Amendment] right of access [previously] announced in *Richmond*,"[149] and its decision won the support of five Justices and a special concurrence by Justice O'Connor.[150] *Globe Newspaper* arose out of the closure of the trial of a defendant charged with the rape of three teenage girls.[151] During pretrial motion hearings and throughout the trial, until the defendant's acquittal, the courtroom was closed pursuant to a Massachusetts law that required the exclusion of the public and the press while testimony is given by a victim under the age of eighteen in a sex offense trial.[152] The statute stated that in a trial for the rape of a minor, "the presiding justice shall exclude the general public from the court room, admitting only such persons as may have a direct interest in the case."[153]

In finding the statute unconstitutional on First Amendment grounds, the five-Justice majority placed particular emphasis on the "functional" character and societal benefits of open criminal trials.[154] Writing for the majority, Justice Brennan reiterated the same arguments about the openness of criminal trials contained in his *Richmond Newspapers* concurrence.[155] But Justice Brennan took the majority in *Globe Newspaper* further, applying strict scrutiny to hold for the first time in the context of the closure of a criminal trial that where "the State attempts to deny the right of access . . . it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest."[156] Moreover, the "compelling interest" must be established on a case-by-case basis.[157]

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147 Jeanne L. Nowaczewski, Comment, *The First Amendment Right of Access to Civil Trials After* Globe Newspaper Co. v. Superior Court, 51 U. CHI. L. REV. 286, 288–89 (1984) ("The multiplicity of views represented in the seven separate opinions in *Richmond* left the newly established right of access largely undefined.").

148 457 U.S. 596 (1982).

149 Nowaczewski, *supra* note 147, at 289.

150 *Globe Newspaper*, 457 U.S. at 597. Chief Justice Burger was joined only by Justice Rehnquist in his dissent. *Id.* Justice Stevens dissented principally on the ground that he found the Court's decision "advisory, hypothetical, and, at best, premature." *Id.* at 620, 623 (Stevens, J., dissenting).

151 *Id.* at 598 (majority opinion).

152 *Id.* at 598–99.

153 *Id.* at 598 n.1 (citing MASS. GEN. LAWS ANN. ch. 278, § 16A (West 1981), which the Court invalidated in this same opinion).

154 Nowaczewski, *supra* note 147, at 291–92.

155 Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 592 (1980) (Brennan, J., concurring) ("[O]pen trials are bulwarks of our free and democratic government.").

156 *Globe Newspaper*, 457 U.S. at 606–07.

157 *Id.* at 608 n.20.

Unlike *Gannett* and *Richmond Newspapers*, where the defendant's right to a fair trial was invoked to justify closure (successfully under the Sixth Amendment in *Gannett*, and unsuccessfully under the First Amendment in *Richmond Newspapers*), the trial court in *Globe Newspaper* relied on an altogether different rationale for closure: the state's desire to prevent undue psychological harm to child victims of sexual offenses who must testify at trial.[158]

While the majority agreed that these interests could certainly be compelling, it held the Massachusetts mandatory trial closure statute unconstitutional[159] and required a case-by-case balancing of interests.[160] Thus, when making findings to support closure of the courtroom in a sex abuse trial, the court should consider, among other things, "the minor victim's age, psychological maturity and understanding, the nature of the crime, the desires of the victim, and the interests of parents and relatives."[161] The "compelling interest" requirement and the mandate for specific findings announced in *Globe Newspaper*[162] thereby laid the foundation for the four-part test articulated in *Waller*. However, before deciding *Waller*, the Court further refined the standard for courtroom closure under the First Amendment once more and extended the right of public access to criminal trials to voir dire.

4. Press-Enterprise Co. v. Superior Court

Press-Enterprise Co. v. Superior Court[163] involved the closure of the courtroom to the press and public during all but three days of a six-week voir dire proceeding for the trial of a defendant charged with the "interracial sexual attack and murder" of a fifteen year-old girl.[164] Unlike the divided decisions in *Globe Newspaper* and *Richmond Newspapers*, all nine Justices agreed for the first time[165] that the public right of access to criminal trials—in this case, voir

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158 *Id.* at 600 (citing Globe Newspaper Co. v. Super. Ct., 401 N.E.2d 360, 369 (Mass. 1980), *vacated*, Globe Newspaper Co. v. Super. Ct., 449 U.S. 894 (1980)).

159 *Id*. at 602.

160 *Id.* at 608 n.20 ("Indeed, the plurality opinion in *Richmond Newspapers* suggested that individualized determinations are *always* required before the right of access may be denied: 'Absent an overriding interest *articulated in findings*, the trial of a criminal case must be open to the public.'" (quoting *Richmond Newspapers*, 448 U.S. at 581)).

161 *Id.* at 608 (footnote omitted).

162 *Id.* at 607–08.

163 464 U.S. 501 (1984).

164 *Id.* at 521 n.1 (Marshall, J., concurring in judgment).

165 Chief Justice Burger wrote the majority opinion. *Id.* at 502. Justices Blackmun and Stevens wrote separate concurring opinions. *Id.* Justice Marshall wrote a special concurrence, agreeing with the judgment

dire proceedings, which the Court held "presumptively [to have] been a public process"[166]—is found in the First Amendment.[167]

Here, in a highly charged criminal proceeding, the trial court justified the closure during voir dire by citing the defendant's right to a fair trial, as well as the right to privacy of some jurors who had "special experiences in sensitive areas that do not appear to be appropriate for public discussion."[168] In holding the closure unconstitutional on First Amendment grounds, the Court articulated the framework that would become the basis for the four-part *Waller* test:

> The presumption of openness may be overcome only [(1)] by an overriding interest [(2)] based on findings that closure is essential to preserve higher values and is [(3)] 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.[169]

In support of its holding, the Court cited many of the same arguments raised in *Globe Newspaper* and *Richmond Newspapers*: the historical practice of open trials in England and Colonial America,[170] as well as the "community therapeutic value"[171] of public proceedings, which "vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct by jurors fairly and openly selected."[172] Justice Stevens also emphasized the structural benefit of open trials and reiterated the argument from Justice Brennan's majority opinion in *Globe Newspaper* that "the First Amendment serves to ensure that the individual

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but refusing to join the opinion because he felt the majority had made "gratuitous comments concerning the length of *voir dire* proceedings" and failed to appreciate the racially charged nature of the case. *Id.* at 521–22 (Marshall, J., concurring in judgment). Although Justice Rehnquist had filed the lone dissent in *Richmond Newspapers* and joined Chief Justice Burger's dissent in *Globe Newspaper*—and sided with the five-member majority in *Gannett* in holding that the public *does not have* an independent right under either the Sixth or the Fourteenth Amendment to attend criminal trials—Justice Rehnquist voted with the majority in *Press-Enterprise* to uphold the right of public access to criminal trials. *Id.* at 502 (majority opinion); *see also* discussion *supra* Part I.C.1–3.

166 *Press-Enter.*, 464 U.S. at 505 (majority opinion).

167 *See id.* at 509 n.8 ("[T]he question we address—whether the *voir dire* process must be open—focuses on First . . . Amendment values and the historical backdrop against which the First Amendment was enacted."); *id.* at 516 (Stevens, J., concurring).

168 *Id.* at 504 (majority opinion) (quoting the trial court judge) (internal quotation marks omitted).

169 *Id.* at 510.

170 *Id.* at 505 ("[A]t the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open." (quoting Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569 (1980) (plurality opinion))).

171 *Id.* at 508.

172 *Id.* at 509.

citizen can effectively participate in and contribute to our republican form of self-government."[173]

In a special concurrence, Justice Marshall reiterated the requirement that Justice Brennan articulated in *Globe Newspaper*, stating that any closure must be narrowly tailored: "[P]rior to issuing a closure order, a trial court should be obliged to show that the order in question constitutes *the least restrictive means available* for protecting compelling state interests."[174] Marshall's language in *Press-Enterprise* thus reinforced the importance of strict scrutiny, which would be incorporated as the second element of the four-part *Waller* test: Any closure must be "no broader than necessary to protect" the state's overriding interest justifying the closure.[175]

II. THE SIXTH AMENDMENT PUBLIC TRIAL GUARANTEE: *WALLER V. GEORGIA* AND THE RULES OF STRUCTURAL AND HARMLESS ERROR

> *[T]he settled rule of the federal courts [is] that a showing of prejudice is not necessary for reversal of a conviction not had in public proceedings.*
>
> —Levine v. United States[176]

Part I of this Comment discussed the origin of the public trial right, the competing interests that courts must balance when deciding to close the courtroom, and the Supreme Court's rationale in establishing guidelines to protect First Amendment interests in the event of courtroom closure. Part II discusses how these guidelines were adopted in the context of the Sixth Amendment public trial right in *Waller v. Georgia*. This Comment argues that trial and appellate courts too often err by approving wrongful courtroom closures, and that corrective action is needed to properly enforce the public trial right and protect the important underlying values at stake. This Part advances that argument by explaining why violation of the public trial right is considered "structural error" requiring reversal, and how the doctrine of harmless error applies to violations of some constitutional rights, especially violations of the Public Trial Clause of the Sixth Amendment.

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173 *Id.* at 517–18 (Stevens, J., concurring) (quoting Globe Newspaper Co. v. Super. Ct., 457 U.S. 596, 604 (1982)) (internal quotation marks omitted).

174 *Id.* at 520 (Marshall, J., concurring in judgment).

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

176 362 U.S. 610, 627 n.* (1960) (Brennan, J., dissenting).

A. Waller v. Georgia *and the Sixth Amendment: Violation of the Public Trial Guarantee Is Never Harmless*

In holding that "the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public,"[177] *Waller* succinctly synthesized the Court's prior jurisprudence to arrive at a coherent set of rules for uniformly enforcing the public trial right under both the First and Sixth Amendments.[178] Decided by a unanimous Court in May 1984, *Waller v. Georgia* ruled unconstitutional the closure of a seven-day suppression hearing as part of the criminal trial of thirty-seven defendants charged with illegal gambling.[179] In so doing, *Waller* established the process that trial courts must follow before closing a courtroom in light of a defendant's right to a public trial under the Sixth and Fourteenth Amendments[180]:

> [(1)] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, [(2)] the closure must be no broader than necessary to protect that interest, [(3)] the trial court must consider reasonable alternatives to closing the proceeding, and [(4)] it must make findings adequate to support the closure.[181]

Writing for the majority, Justice Powell[182] reiterated the observation made by constitutional scholar Thomas Cooley that "[t]he requirement of a public trial is for the benefit of the accused."[183] Justice Powell was careful to note, however, that the right to an open trial must be balanced against other interests, such as the defendant's right to a fair trial or the government's interest in preventing disclosure of sensitive information.[184] While Justice Powell

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177 *Waller*, 467 U.S. at 46.

178 As the U.S. Supreme Court explained in *Presley v. Georgia*, a case involving the constitutionality of courtroom closure during voir dire under the Sixth Amendment, "[t]he extent to which the First and Sixth Amendment public trial rights are coextensive is an open question . . . . [but] there is no legitimate reason . . . to give one who asserts a First Amendment privilege greater rights to insist on public proceedings than the accused has." 78 U.S.L.W. 4051, 4052 (U.S. Jan. 19, 2010) (per curiam).

179 Chandler, *supra* note 15, at 802–04.

180 *Waller*, 467 U.S. at 47 ("[U]nder the Sixth Amendment any closure of a suppression hearing over the objections of the accused must meet the tests set out in *Press-Enterprise* and its predecessors.").

181 *Id.* at 48 (citing Press-Enter. v. Super. Ct., 464 U.S. 501, 511–12 (1984)).

182 Justice Powell did not participate in the *Richmond Newspapers* decision, but he voted with the majority in support of a qualified First Amendment right of access to criminal trials in both *Globe Newspaper* and *Press-Enterprise*. *See* discussion *supra* Part I.C.3–4.

183 *Waller*, 467 U.S. at 46 (quoting Gannett Co. v. DePasquale, 443 U.S. 368, 380 (1979)) (internal quotation marks omitted).

184 *Id.* at 45.

anticipated that courtroom closures would be rare, he cautioned that "the balance of interests must be struck with special care."[185] Thus, under *Waller*, the party seeking the closure has the burden of demonstrating the overriding interest at stake and proving the closure is no broader than necessary.[186] The trial court must also explore reasonable alternatives and, if ordering closure, make adequate findings in support of its decision.[187] As the North Dakota Supreme Court explained, the findings requirement is not imposed "merely to give the reviewing court something to review," but to demonstrate that the trial court carefully weighed the competing interests before ordering closure.[188]

Waller not only gave new guidance to trial judges considering courtroom closure, it unequivocally instructed appellate courts that they could not review any failure to follow the four-part test using harmless error analysis.[189] The Court's holding that "[t]he defendant should not be required to prove specific prejudice in order to obtain relief for a violation of the public-trial guarantee" was not particularly new, however.[190] The logic for holding that a defendant need not prove he was actually harmed by excluding the public was articulated more than a century ago by the Michigan Supreme Court in *People v. Murray*.[191] In that case, the defendant was charged with murdering a police officer, and the trial judge stationed a police officer at the courtroom door with orders to exclude all but "respectable citizens."[192] The defendant's attorney protested to no avail that "the talk around town is that this trial is a sort of star-chamber proceeding."[193] In ordering a new trial and holding that the trial

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185 *Id.*

186 Judd v. Haley, 250 F.3d 1308, 1317 (11th Cir. 2001) (citing *Waller*, 467 U.S. at 48).

187 *Id.*; *see also Press-Enter.*, 464 U.S. at 511 ("Even with findings adequate to support closure, the trial court's orders denying access to *voir dire* testimony failed to consider whether alternatives were available to protect the interests of the prospective jurors that the trial court's orders sought to guard."); Presley v. Georgia, 78 U.S.L.W. 4051, 4052 (U.S. Jan. 19, 2010) (per curiam) ("The conclusion that trial courts are required to consider alternatives to closure . . . is clear . . . from this Court's precedents . . . .").

188 State v. Klem, 438 N.W.2d 798, 801 (N.D. 1989).

189 *Waller*, 467 U.S. at 49; *see also* Johnson v. United States, 520 U.S. 461, 468–69 (1997) (observing that, according to *Waller*, violation of the public trial right is one of a "very limited class of cases" that constitutes structural error); Arizona v. Fulminante, 499 U.S. 279, 310 (1991) (explaining that a structural error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself"); *Judd*, 250 F.3d at 1314–15 ("[A] violation of one's right to a public trial is structural error. . . . [and] structural errors are not subject to harmless error analysis." (citations omitted)).

190 *Waller*, 467 U.S. at 49 n.9 ("'[T]he settled rule of the federal courts [is] that a showing of prejudice is not necessary for reversal of a conviction not had in public proceedings.'" (quoting Levine v. United States, 362 U.S. 610, 627 n.* (1960) (Brennan, J., dissenting))).

191 50 N.W. 995 (Mich. 1891).

192 *Id.* at 996, 997.

193 *Id.*

court's mistake was not subject to harmless error analysis, the court announced that it disagreed with the proposition that the defendant bears the burden of showing actual injury when he is deprived of a public trial, stating:

> [W]hen [the defendant] shows that his constitutional right has been violated, the law conclusively presumes that he has suffered an actual injury. I go further, and say that the whole body politic suffers an actual injury when a constitutional safeguard erected to protect the rights of citizens has been violated in the person of the humblest or meanest citizen of the state. The [C]onstitution does not stop to inquire of what the person has been accused or what crime he has perpetrated; but it accords to all, without question, a fair, impartial, and public trial.[194]

Murray is a nineteenth century state court opinion, but the Supreme Court, which has since developed a more detailed rationale for sorting out which constitutional violations are subject to harmless error analysis and which are not, has consistently treated the public trial right as non-harmless, structural error.[195] To better understand the doctrines of harmless and structural error, and where violations of the public trial right sit within each—and to lay the groundwork for the discussion that follows about the application of the plain error rule to violations of *Waller*—it is helpful to review the modern history of the harmless error doctrine.

B. "Impregnable Citadels of Technicality": The Evolution of the Harmless Error Doctrine and Its Application to Constitutional Error

The harmless error rule, codified at Rule 52(a) of the Federal Rules of Criminal Procedure, provides that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."[196] Judicial reformers advocated the adoption of earlier versions of the rule in state and federal courts in the early twentieth century in response to appellate courts invoking seemingly minor technicalities to overturn lower court decisions.[197]

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194 *Id.* at 999.

195 *See* discussion *infra* Part II.B.

196 FED. R. CRIM. P. 52(a).

197 In 1919, Congress amended section 269 of the Judiciary Code, declaring that:

> On the hearing of any appeal, certiorari, writ of error, or motion for a new trial in any case, civil or criminal, the court shall give judgment, after an examination of the entire record before the court, without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties.

As noted by Justice Harlan in *Chapman v. California*,[198] prior to the adoption of the harmless error rule, "most American appellate courts, concerned about the harshness of criminal penalties, followed the rule imposed on English courts . . . and held that any error of substance required a reversal of conviction."[199]

Led by authorities such as Roscoe Pound[200] and Judge Learned Hand, the reform movement prompted courts to "discontinue using reversal as a 'necessary' remedy for particular errors and 'to substitute judgment for the automatic application of rules . . . .'"[201] In *Kotteakos v. United States*,[202] the Supreme Court observed that the driving force behind the introduction of the federal harmless error rule was the

> widespread and deep conviction . . . . that courts of review "tower above the trials of criminal cases as impregnable citadels of technicality." So great was the threat of reversal, in many jurisdictions, that criminal trial became a game for sowing reversible error in the record, only to have repeated the same matching of wits when a new trial had been thus obtained.[203]

Reformers agreed that a harmless error rule would restore public confidence in the criminal trial process by focusing appellate courts "on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error."[204] However, disregarding harmless error without

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Edson R. Sunderland, *The Problem of Appellate Review*, 5 TEX. L. REV. 126, 147 (1927) (quoting the amended section 269 of the Judicial Code); *see also* An Act to Codify, Revise, and Amend the Laws Relating to the Judiciary, Pub. L. No. 281, ch. 48, 40 Stat. 1181 (1919). Sunderland also observed, "About eighteen states have adopted similar legislation. About nine or ten states have reached the same result by judicial action. Almost a dozen states adhere more or less closely to the technical rule of presumed prejudice." Sunderland, *supra*.

198 386 U.S. 18 (1967).

199 *Id.* at 48 (Harlan, J., dissenting); *see also* LESTER BERNHARDT ORFIELD, CRIMINAL APPEALS IN AMERICA 190 (1939).

200 Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 14 AM. LAW. 445, 450 (1906) (asserting that "the worst feature of American procedure is the lavish granting of new trials," and contrasting the granting of new trials in American courts with the English Court of Appeal, which grants new trials in only "about three percent of the cases reviewed").

201 *Chapman*, 386 U.S. at 48–49 (Harlan, J., dissenting) (citing and quoting 4 BARRON, FEDERAL PRACTICE AND PROCEDURE § 2571 (1965)).

202 328 U.S. 750 (1946).

203 *Id.* at 759 (footnote omitted) (quoting Marcus A. Kavanagh, *Improvement of Administration of Criminal Justice by Exercise of Judicial Power*, 11 A.B.A. J. 217, 222 (1925)); *see also* Johnson v. United States, 318 U.S. 189, 202 (1943) (Frankfurter, J., concurring) ("To turn a criminal appeal into a quest for error no more promotes the ends of justice than to acquiesce in low standards of criminal prosecution.").

204 Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986).

undermining important principles of justice is no simple task. As the distinguished California jurist Roger J. Traynor colorfully observed:

> Errors are the insects in the world of law, traveling through it in swarms, often unnoticed in their endless procession. Many are plainly harmless; some appear ominously harmful. Some, for all the benign appearance of their spindly traces, mark the way for a plague of followers that deplete trials of fairness.[205]

Despite the adoption of the federal harmless error rule in 1919, most constitutional errors in the first half of the twentieth century were still seen as affecting "the substantial rights of the parties,"[206] and thus continued to be regarded as so grave that they required automatic reversal.[207] This framework changed dramatically in 1967, however, with the landmark case of *Chapman v. California*, in which the Supreme Court fashioned what it termed the "harmless-constitutional-error rule."[208]

In *Chapman*, the appellants had been charged with robbery, kidnapping, and murder, but chose not to testify at trial.[209] The prosecutor commented extensively on their silence and won a conviction.[210] Although implying a defendant's guilt from his refusal to testify was permitted under the California constitution at the time,[211] the California Supreme Court found that the prosecutor violated Chapman's Fifth and Fourteenth Amendment rights.[212] The court upheld the convictions, however, on the ground that the prosecutor's comments were merely harmless error.[213]

In their appeal to the U.S. Supreme Court, the *Chapman* appellants urged the Court to adopt a rule that "all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful" and thus require

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205 ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR, at ix (1970).

206 *Supra* note 197.

207 Edwards, *supra* note 5, at 1175–76; *see also* Chapman v. California, 386 U.S. 18, 42 (1967) (Stewart, J., concurring in result) ("[I]n a long line of cases, involving a variety of constitutional claims in both state and federal prosecutions, this Court has steadfastly rejected any notion that constitutional violations might be disregarded on the ground that they were 'harmless.' Illustrations of the principle are legion.").

208 *Chapman*, 386 U.S. at 22; *see also* Gary C. Horner, Recent Cases, *Constitutional Law—Harmless Constitutional Error*—Chapman v. California, *87 Sup. Ct. 824 (1967)*, 71 DICK. L. REV. 686 (1967).

209 *Chapman*, 386 U.S. at 18–19.

210 *Id.* at 26–42.

211 The U.S. Supreme Court later ruled this practice unconstitutional. Griffin v. California, 380 U.S. 609, 615 (1965).

212 *Chapman*, 328 U.S. at 20.

213 People v. Teal, 404 P.2d 209, 220–21 (Cal. 1965), *rev'd sub nom.* Chapman v. California, 386 U.S. 18 (1967).

automatic reversal.[214] The Court rejected this proposal, holding instead that "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may . . . be deemed harmless, [and] not requiring the automatic reversal of the conviction."[215] Writing for the eight-Justice majority, Justice Black observed that review of federal constitutional errors is a federal question[216] and declared:

> Whether a conviction for crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied. With faithfulness to the constitutional union of the States, we cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights.[217]

Even as the Court in *Chapman* significantly broadened application of the harmless error rule to federal constitutional errors, it nevertheless recognized that some constitutional rights are so basic to a fair trial that their violation can never be treated as harmless error.[218] Such errors invalidate the conviction of even an obviously guilty defendant because "[w]ithout these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair."[219]

Arizona v. Fulminante, decided in 1991, further formalized this dichotomy, dividing constitutional errors into two categories: trial errors and structural errors.[220] The former are subject to harmless error analysis because they "'occur[] during presentation of the case to the jury' and their effect may 'be quantitatively assessed in the context of other evidence presented in order to

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214 *Chapman*, 328 U.S. at 21–22.

215 *Id.* at 22.

216 *Id.* at 18, 21 (noting, also, that "[t]he application of a state harmless-error rule is . . . a state question where it involves only errors of state procedure or state law").

217 *Id.* at 21. *But see id.* at 46–47 (Harlan, J., dissenting) (arguing that the Supreme Court has no "general supervisory power over the trial of federal constitutional issues in state courts" under the Fourteenth Amendment).

218 *Id.* at 23 (majority opinion).

219 Rose v. Clark, 478 U.S. 570, 577–78 (1986) (citation omitted).

220 Arizona v. Fulminante, 499 U.S. 279, 309–11 (1991).

determine whether they were harmless beyond a reasonable doubt.'"[221] The latter are deemed "structural defects"[222] because they "affect[] the framework within which the trial proceeds . . . [and are not] simply . . . error[s] in the trial process itself."[223] Errors of this type are regarded as "so intrinsically harmful as to require automatic reversal . . . without regard to their effect on the outcome."[224] The assignment of the structural error label also rests "upon the difficulty of assessing the effect of the error,"[225] which makes a determination of harmlessness nearly impossible, and thus improper.[226] Structural errors include: a judge entering judgment of conviction in a jury-based criminal trial or directing "the jury to come forward with such a verdict;"[227] denial of the right to counsel;[228] the unlawful exclusion of members of the defendant's race from the grand jury that indicted him (regardless of "overwhelming evidence of his guilt");[229] denial of the right to trial by an impartial judge;[230] and denial of the right to a public trial.[231]

Under the rubric of structural error, a courtroom closure that violates *Waller* is not subject to harmless error analysis because it would be extremely difficult for a defendant to come up with evidence of specific injury resulting from an improper closure.[232] After all, if the public is excluded from the

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221 United States v. Gonzalez-Lopez, 548 U.S. 140, 148, 149 n.4 (2006) (quoting *Fulminante*, 499 U.S. at 307–08) (dividing constitutional error into two comprehensive categories, "trial error" and "structural defects" and specifically citing *Waller v. Georgia*, 467 U.S. 39, 49 n.9 (1984), to illustrate the latter).

222 *Gonzalez-Lopez*, 548 U.S. at 148.

223 *Fulminante*, 499 U.S. at 310.

224 Neder v. United States, 527 U.S. 1, 7 (1999).

225 *Gonzalez-Lopez*, 548 U.S. at 149 n.4.

226 *Waller*, 467 U.S. at 49 n.9 ("'[Where] demonstration of prejudice . . . is a practical impossibility, prejudice must necessarily be implied.'" (quoting State v. Sheppard, 438 A.2d 125, 128 (Conn. 1980))). The difficulty of assessing harm is not, however, the only test. The irrelevance of harmlessness also can lead to designation of structural error. *See, e.g.*, McKaskle v. Wiggins, 465 U.S. 168, 177 n.8 (1984) ("Since the right to self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to 'harmless error' analysis.").

227 *Fulminante*, 499 U.S. at 294 (White, J., dissenting) (noting that such convictions would be invalidated "'regardless of how overwhelmingly the evidence may point in that direction'" (quoting United States v. Martin Linen Supply Co., 430 U.S. 564, 572–73 (1977))).

228 Gideon v. Wainright, 372 U.S. 335 (1963); *see also* Strickland v. Washington, 466 U.S. 668, 692 (1984) ("Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. . . . Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost.").

229 *Fulminante*, 499 U.S. at 294 (White, J., dissenting) (citing Vasquez v. Hillery, 474 U.S. 254 (1986)).

230 Tumey v. Ohio, 273 U.S. 510 (1927) (requiring automatic reversal when a judge with a financial interest in the outcome of the case presides over the defendant's criminal trial).

231 *Fulminante*, 499 U.S. at 310.

232 Waller v. Georgia, 467 U.S. 39, 49 n.9 (1984) ("[A] requirement that prejudice be shown 'would in most cases deprive [the defendant] of the [public-trial] guarantee, for it would be difficult to envisage a case in

courtroom it is difficult, if not impossible, to demonstrate how the presence of spectators would have deterred perjury, curbed judicial abuse, or advanced the cause of republican self-government. As the Court explained in *Waller*, "[w]hile the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance, the Framers plainly thought them nonetheless real."[233]

The strength of the rule that violation of the public trial right is always structural error is reinforced by the fact that over the past forty years the Court has steadily eroded the rule of reversal as applied to other constitutional errors,[234] but has not done so where violations of *Waller* are concerned. For example, the Court has expanded harmless error analysis to apply to violations of the Confrontation Clause,[235] admission of coerced confessions,[236] and a host of other constitutional violations.[237] Notably, the Court has done so while repeatedly reaffirming that any violation of the public trial right still remains structural error.[238] And recently, in *United States v. Gonzalez-Lopez*,[239] where the Court declared that violation of the Sixth Amendment right to counsel of choice is structural error, the Court cited *Waller* to illustrate that its "conclusion of structural error [still rests] upon the difficulty of assessing the effect of the error."[240]

The law is clear that a violation of the public trial right can never be assessed under the rubric of harmless error. However, as demonstrated by

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which he would have evidence available of specific injury.'" (alteration in original) (quoting United States *ex rel*. Bennett v. Rundle, 419 F.2d 599, 608 (1969))).

233 *Id.*

234 Chapman v. California, 386 U.S. 18, 22 (1967); *see also* Brecht v. Abrahamson, 507 U.S. 619, 652 (1993) (O'Connor, J., dissenting) ("By now it goes without saying that harmless-error review is of almost universal application; there are few errors that may not be forgiven as harmless."); *Fulminante*, 499 U.S. at 306 ("[M]ost constitutional errors can be harmless."); Edwards, *supra* note 5, at 1186 ("[T]he Court's decision in *Chapman* heralded a major expansion in both the number of violations subject to harmless-error analysis and the frequency with which that analysis is employed.").

235 Harrington v. California, 395 U.S. 250, 250 (1969) (finding harmless error because of the "overwhelming" evidence against the defendant when a trial judge admitted the confessions of three co-defendants but two of the defendants never took the witness stand).

236 *Fulminante*, 499 U.S. at 308; *see also* United States v. Daniel, 932 F.2d 517, 518, 521–22 (6th Cir. 1991) (holding harmless the coerced statement of a defendant after he and others were forced to lie down on the floor, handcuffed, with their heads covered by a sheet while police executed a search without an arrest warrant or probable cause for the seizure because a later voluntary confession provided the same information); Edwards, *supra* note 5, at 1196–97.

237 For a comprehensive list, see Edwards, *supra* note 5, at 1177 n.33.

238 *See infra* note 257 and accompanying text.

239 548 U.S. 140 (2006).

240 *Id.* at 149 n.4.

Craven v. State, some appellate courts will still resort to harmless error analysis to uphold convictions in the interest of justice for the victim, even when it is obvious that the trial court failed to conduct a *Waller* inquiry.[241] The rule that improper closure mandates reversal is less obvious, however, in a case of plain error—when a trial court violates *Waller*, but the defendant fails to object.

III. APPLYING THE RULE OF PLAIN ERROR TO THE PUBLIC TRIAL GUARANTEE

To invoke the protection of structural error, a defendant should properly object to the courtroom closure. But what rights may a defendant assert if no objection is made? This Part explains the rule of plain error and why it should apply to violations of *Waller*—an issue the Supreme Court has not yet addressed.

It is essential to the goal of judicial economy that a party be required to make a timely objection to the actions of the court and explain the reasons for the objection to preserve a claim of error.[242] "Failure to do so will ordinarily bar review of [a] defendant's claim either on a subsequent motion or on appeal, *except for plain error*."[243] The plain error rule[244] is a companion to the rule of harmless error and is summarily defined as error that "affects substantial rights [and so] may be considered [on appeal] even though it was not brought to the trial court's attention."[245] Given the sparse text of the rule, it is worth examining how it has been interpreted to determine whether it applies to violations of the public trial right when no objection is made. After all, just as the Court has steadily expanded application of the harmless error rule to constitutional violations, it has also announced that not all constitutional errors are subject to plain error review.[246] Furthermore, it is not enough for the error to affect a defendant's "substantial rights." As the language of the rule

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241 Craven v. State, 664 S.E.2d 921, 924 (Ga. Ct. App. 2008) ("In this case, while the trial court erred in removing Craven's family from the courtroom, the error is harmless."), *cert. denied* (Oct. 27, 2008). For a review of *Craven*, see *supra* Introduction.

242 FED. R. CRIM. P. 51; *see also* 3B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §§ 841–43 (3d ed. 2004) (discussing Rule 51 and related cases).

243 WRIGHT, *supra* note 242, at 443 (emphasis added) (footnote omitted).

244 FED. R. CRIM. P. 52(b).

245 *Id.*

246 United States v. Olano, 507 U.S. 725, 731 (1993) ("'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" (quoting Yakus v. United States, 321 U.S. 414, 444 (1944))).

suggests, the defendant must also show that the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."[247] As this Part will show, the Court's adoption of the "fairness, integrity or public reputation" element of the plain error test lends further weight to the argument that violations of the public trial right must be subject to plain error review.

Decided in 1993, *United States v. Olano* established a four-part test for federal appellate courts to determine whether an error without objection is worthy of plain error review[248]: First, there must be *error*—the violation of a legal rule that was not waived, despite the defendant's failure to object.[249] Second, the error must be "plain."[250] Third, it must have affected substantial rights.[251] And fourth, despite the discretionary character of the plain error rule,[252] appellate courts "*should correct* a plain, forfeited error affecting substantial rights if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'"[253]

What is the relationship between harmless error and plain error? If the Court has held that an error violates a defendant's "substantial rights" and therefore is not harmless under Rule 52(a), does the error satisfy the "substantial rights" component of the plain error test of 52(b)? The answer is yes,[254] although under the plain error rule "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to [proving] prejudice."[255]

The plain error rule demands a remedy for an improper courtroom closure, even when no objection was made. As previously discussed, the Court has

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247 *Olano*, 507 U.S at 736 (alteration in original) (quoting United States v. Atkinson, 297 U.S. 157, 160 (1936)).

248 *Id.* at 732–37; *see also* Johnson v. United States, 520 U.S. 461, 466–67 (1997).

249 *Olano*, 507 U.S. at 733–34 ("Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938))).

250 *Id.* at 734 (defining "plain" to mean "'clear' or, equivalently, 'obvious'").

251 *Id.* at 734–35.

252 *Id.* at 735.

253 *Id.* at 736 (alteration in original) (emphasis added) (quoting United States v. Atkinson, 297 U.S. 157, 160 (1936)).

254 *Id.* at 744 (Stevens, J., dissenting) ("The phrase 'substantial rights' appears twice in Rule 52: once in Rule 52(a), which describes the harmless-error rule, and again in Rule 52(b), in connection with the plain-error rule. Presumably, the words have the same meaning each time they are used." (citation omitted)); *see also* WRIGHT, *supra* note 242, at 498 ("This is the same language that is used in defining 'harmless error' in Rule 52(a), and the same kind of inquiry is called for under each branch of Rule 52 . . . .").

255 *Olano*, 507 U.S. at 734.

adopted a per se rule of structural error for violations of the public trial right.[256] If a courtroom is closed in violation of the requirements of *Waller*, prejudice is automatically presumed—the error is deemed structural, not harmless—and a violation of substantial rights has occurred. Under this logic, the defendant has no "burden" to shoulder, and the burden-shifting element of the plain error rule is irrelevant. The Supreme Court has not decided whether the plain error rule applies to a violation of *Waller* when the defendant fails to object, but in *Johnson v. United States*, a leading case discussing the plain error rule, the Court explicitly cites *Waller* to illustrate that the rule applies to the "very limited class of cases" where there is structural error, thus implicating substantial rights.[257] Dicta aside, a bona fide structural error harms substantial rights, and thus will automatically pass the third element of the four-part test of Rule 52(b), enumerated above.

If an improper courtroom closure meets the first three parts of the plain error test—it is (1) *error* that has not been waived, (2) which is "plain," and (3) has affected substantial rights—the next question is whether the error affects the fairness, integrity, or public reputation of the proceeding.[258] If it does, is reversal then required under the plain error rule?[259] Here, the answer must also be yes, because a violation of the public trial right directly impacts the fairness, integrity, and public reputation of a criminal trial. The Court has yet to decide this question, but according to prior opinions of the Court, an inseparable relationship exists between violations of the public trial right and these concerns. After all, if the "searchlight" of a public trial "serves as a restraint against the abuse of judicial power,"[260] then extinguishing it through an improper closure surely threatens to erode the integrity and public reputation of the trial.

In overturning the secret conviction of the defendant in *In re Oliver*, the Court observed that public trials are important because "[t]he spectators learn

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256 *See* discussion *supra* Part II.A.

257 Johnson v. United States, 520 U.S. 461, 468–69 (1997) (noting the existence of a limited class of cases, such as *Waller*, where the errors involved *do affect* substantial rights); *see also* United States v. Dominguez Benitez, 542 U.S. 74, 74 (2004) ("Except for certain structural errors undermining the criminal proceeding's fairness as a whole, relief for [plain] error is tied to prejudicial effect . . . ."); Deborah S. Nall, Comment, United States v. Booker*: The Presumption of Prejudice in Plain Error Review*, 81 CHI.-KENT L. REV. 621, 632 n.86 (2006) (identifying violations of *Waller* as structural error that therefore meet the third prong of the four-part test of the plain error rule).

258 *Olano*, 507 U.S. at 736.

259 *Id.*

260 United States *ex rel*. Bennett v. Rundle, 419 F.2d 599, 606 (3d Cir. 1969).

about their government and acquire confidence in their judicial remedies."[261] It would follow, then, that confidence—and with it, the public reputation of the courts—would suffer absent that opportunity. Discouraging perjury by enabling persons with knowledge of the facts to attend a trial and possibly deliver relevant testimony is essential to the fairness of any criminal proceeding.[262] Likewise, in both *In re Oliver* and *Waller*, the Court incorporated the public trial right under the Fourteenth Amendment, using a test based on fairness principles.[263] Thus, the fourth prong of the plain error test is satisfied because an improper closure clearly affects "the fairness, integrity or public reputation of judicial proceedings."[264]

Additionally, it should be noted that some commentators have observed that the four-part framework for assessing plain error adopted in *Olano* de-emphasized the "miscarriage of justice standard"[265]—which stressed reversals only to avoid the conviction of an innocent defendant—in favor of a standard where "courts rather than counsel are entrusted with insuring the fairness, integrity, and public reputation of the judicial process."[266] As Justice O'Connor's majority opinion explained, a plain error may warrant reversal regardless of the guilt or innocence of the defendant because of the error's effect on the fairness of the trial.[267] Additionally, as argued above, violations of the public trial right especially implicate the fairness, integrity, and public reputation of criminal proceedings. Any further emphasis on these factors created by the holding in *Olano* thus lends even greater weight to finding plain error when courtroom exclusions are improper and the defendant fails to object without conscious waiver.

In many cases, improper courtroom closures can be easily distinguished from those constitutional violations that are harmless error and not covered by the plain error rule. The determination of plain error in most cases depends on a showing of prejudice,[268] and if the constitutional error is one that the

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[261] *In re* Oliver, 333 U.S. 257, 270 n.24 (1948) (citing 6 JOHN HENRY WIGMORE, EVIDENCE § 1834 (3d ed. 1940)).

[262] *See* discussion *supra* note 60.

[263] *See* discussion *supra* Parts I.A.1, II.A.

[264] United States v. Olano, 507 U.S. 725, 736 (1993).

[265] Jeffrey L. Lowry, *Plain Error Rule—Clarifying Plain Error Analysis Under Rule 52(b) of the Federal Rules of Criminal Procedure*, 84 J. CRIM. L. & CRIMINOLOGY 1065, 1084 (1994); *see also* Edwards, *supra* note 5, at 1185, 1203–04.

[266] Lowry, *supra* note 265, at 1081.

[267] *Olano*, 507 U.S. at 736; *see also* Lowry, *supra* note 265, at 1073.

[268] *See* WRIGHT, *supra* note 242, at 501 ("In most claims of plain error, the outcome turns on whether or not prejudice can be demonstrated.").

Supreme Court considers harmless,[269] then the plain error rule *will not* apply. However, because violations of *Waller* are per se structural errors, it is easy to see how they fall within the ambit of plain error. This is only true provided that the *Waller* violation is deemed to meet the fourth element of the plain error test, as this Comment argues. As for other structural constitutional errors, whether the plain error rule applies will also rest on an assessment under the fourth prong of the plain error test.

Thus, a courtroom closure that violates *Waller*, and that is neither objected nor consented to, is almost sure to meet the plain error test and require reversal because (1) a legal rule has been violated without waiver; (2) such errors are certainly obvious; (3) violations of *Waller* are structural errors and clearly implicate substantial rights; and (4) such violations "necessarily render a trial fundamentally unfair."[270] Furthermore, the error at issue represents just the kind of defect that seriously impacts the "integrity or public reputation of judicial proceedings," thus meeting the requirements of *Olano*.[271]

However, as demonstrated by *Craven v. State*, discussed in the Introduction, it is difficult to persuade appellate courts to invoke the rule of plain error in child sex abuse cases where evidence of guilt is substantial.[272] In *Craven*, the Georgia Court of Appeals not only applied harmless error to uphold the closure at issue, but it also announced that Craven had waived any constitutional claim he might have had because he did not object to the exclusion of his relatives from the courtroom until after his stepdaughter had testified.[273]

Georgia courts are not alone in failing to apply plain error review to violations of *Waller*. In *People v. Priola*, the defendant was convicted in Illinois state court of aggravated criminal sexual abuse of an eight-year-old girl.[274] The courtroom was closed during the victim's testimony, but the defendant failed to object. The closure violated *Waller* and also was later deemed illegal under Illinois law.[275] Although the Illinois Court of Appeals

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269 For discussions of *Chapman* and *Fulminante*, see *supra* Part II.B.

270 Rose v. Clark, 478 U.S. 570, 577 (1986).

271 *Olano*, 507 U.S. at 736 (quoting United States v. Atkinson, 297 U.S. 157, 160 (1936)) (internal quotation marks omitted).

272 For a summary of the evidence of the defendant's guilt, see *supra* note 22.

273 Craven v. State, 664 S.E.2d 921, 924 (Ga. Ct. App. 2008); *see also supra* notes 25–27 and accompanying text.

274 561 N.E.2d 82, 87 (Ill. App. Ct. 1990).

275 *Id.* at 96.

found that the trial court failed to make findings of fact or consider alternatives before closing the courtroom, it declined to apply plain error,[276] saying that the evidence against the defendant was not "closely balanced," and the error was not serious enough to deprive him of a fair trial.[277]

This decision may have achieved justice for the victim, but it ignored the constitutional requirements of *Waller* and did not properly apply the plain error rule. The *Waller* violation was structural error, so any inquiry into the "balance" of the evidence was inappropriately akin to harmless error analysis[278] and should not have been part of the court's plain error inquiry. Addressing the issue of fairness under its plain error inquiry, the court simply announced that because "most of the trial was open to the public and the media was not excluded from any portion of the trial," the plain error rule did not apply.[279] However, if one of the goals of a public trial is to encourage witnesses to come forward and to discourage perjury (as even the Illinois Court of Appeals acknowledged),[280] any improper closure has the potential to undermine these goals because it is impossible to know how the exclusion of unknown persons may have impacted the proceeding. It is exactly this uncertainty that led the Supreme Court to declare that violations of *Waller* always constitute structural error. The same logic also suggests that such errors sufficiently implicate the fairness and integrity of the trial to justify applying plain error, even if it is impossible to know exactly how the improper closure may have affected any particular case.[281]

Another example of a state court's failure to apply the plain error rule can be found in *State v. Smith*, where the defendant was accused of multiple sexual offenses involving his daughter, a minor.[282] The trial judge closed the courtroom in response to the prosecutor's request under North Carolina law, and the defendant contended that the trial court failed to make findings of fact prior to the closure.[283] However, because the judge "spent ample time

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276 *Id.*

277 *Id.* at 96–98.

278 *Id.*

279 *Id.* at 97.

280 *Id.*

281 *See* Watters v. State, 612 A.2d 1288, 1292–93 (Md. 1992) ('"Indeed, the barring of spectators would make it impossible for the unknown individual to stray into the courtroom and reveal his information bearing on the case. 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."' (quoting United States *ex rel*. Bennett v. Rundle, 419 F.2d 599, 608 (3d Cir. 1969))).

282 636 S.E.2d 267, 269 (N.C. Ct. App. 2006).

283 *Id.* at 275.

questioning people who were in the courtroom [about] specifically why they were there" before ordering the closure, and because the defendant's lawyer "had an opportunity to object to or comment on the clearing of the courtroom" but failed to do so, the appellate court deemed the defendant had consented to clearing the courtroom.[284] Thus, according to the North Carolina Court of Appeals, no findings were required and no constitutional error occurred.[285]

As in *Priola*, the court here seemed reluctant to order a new trial because doing so would be unfair to the victim in light of the significant evidence of the defendant's guilt.[286] But guilty defendants are still entitled to a full application of the plain error rule, and manufacturing "consent" to extinguish a constitutional claim hardly contributes to the fairness, integrity, and public reputation of a criminal trial, even if the goal is to achieve the "right result" in any particular case. As Justice Felix Frankfurter once observed, "it is an abuse to deal too casually and too lightly with rights guaranteed by the Federal Constitution, even though they . . . may be invoked by those morally unworthy."[287]

IV. A PARADE OF ERRORS: THE FAILURE TO ENFORCE THE PUBLIC TRIAL RIGHT

The previous Part argued for application of the plain error rule to violations of *Waller* and described how some courts resist reversing convictions in spite of improper courtroom closures and how they sometimes manufacture "consent" by the defendant to avoid invoking plain error. This Part examines other key errors committed by trial and appellate courts when they fail to follow or enforce *Waller*, among them: (1) employing post hoc rationales to justify closure when trial courts neglect to make the requisite findings; (2) either failing to properly balance the interests at stake or applying a doctrine of "partial closure" to suggest that a lesser "substantial interest" is required to justify closure instead of the "overriding interest" mandated by *Waller*; (3) asserting that state trial closure statutes provide a sufficient proxy for the *Waller* test; (4) holding that failure to follow the state trial closure statute is

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284 *Id.*

285 *Id.*

286 *See id.* at 270 (detailing testimony by the victim about multiple incidents of abuse and attempted abuse by the defendant, as well as corroborating statements made by the victim to her former minister and to a child protective service worker).

287 Brown v. Allen, 344 U.S. 443, 498 (1953).

irrelevant because the law is "for the benefit of the victim;" and (5) simply disregarding the requirements of *Waller* altogether.

A. Employing Post Hoc Rationales to Justify Closure

Courts often employ post hoc rationales justifying closure despite the plain language of *Waller* that forbids it.[288] In *State v. Anderson*, a criminal sexual misconduct case involving a five-year-old victim, a Minnesota trial court ordered the courtroom closed during a hearing in chambers with counsel present, but the exchange "was not recorded, and the court ha[d] no clear memory of the discussion."[289] Despite the state court of appeals's acknowledgement that a trial court must "articulate its findings with specificity and detail supporting the need for closure," it found no error because the prosecuting attorney's post hoc recollections included "many but possibly not all of [the] reasons" that had originally been articulated in favor of closure, even though the defendant's lawyer disagreed.[290]

In *United States v. Farmer*, the Eighth Circuit held that "specific findings by the district court are not necessary if we can glean sufficient support for a partial temporary closure from the record."[291] And in *Bowden v. Keane*, the Second Circuit echoed this sentiment when it announced that "*Waller*'s fourth prong is satisfied when 'information' that supports the closure can be 'gleaned' . . . from the record developed by the trial court."[292] It is difficult to see how these holdings square with the strong language of *Waller*, which explicitly rejects post hoc findings,[293] and the mandate of *Globe Newspaper* and *Richmond Newspapers* for individualized determinations articulated in findings *prior* to closure.[294] However, in the absence of corrective guidance by the Supreme Court, post hoc findings are likely to remain attractive to appellate courts in some cases, especially those involving child victims where evidence of the defendant's guilt seems overwhelming.

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288 Waller v. Georgia, 467 U.S. 39, 49 n.8 (1984) ("The *post hoc* assertion by the Georgia Supreme Court that the trial court balanced petitioners' right to a public hearing against the privacy rights of others cannot satisfy the deficiencies in the trial court's record. . . . and is itself too broad to meet the *Press-Enterprise* standard."); *see also* State v. Klem, 438 N.W.2d 798, 802 (N.D. 1989).

289 State v. Anderson, No. C9-96-1016, 1996 WL 665902, at *1–2 (Minn. Ct. App. Nov. 19, 1996).

290 *Id.* at *2.

291 32 F.3d 369, 371 (8th Cir. 1994).

292 237 F.3d 125, 132 (2d Cir. 2001).

293 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 and made findings.").

294 *See supra* note 160 and accompanying text.

B. Balancing of Interests and the Partial Closure Doctrine

Although *Waller* clearly mandates a balancing of interests, trial courts often do a poor job of following the rule. In *People v. Holveck*, for example, the defendant was convicted of sexually assaulting three five-year-old girls, and the victims testified in a closed courtroom.[295] Citing *Waller*, the Illinois Court of Appeals held that the trial court had failed to engage "in the careful balancing of interests and the individualized evaluation of factors required" because the "sole reason cited by the court for the closure was the 'unnerving effect' on the children if the courtroom were crowded and wanting to make the unpleasant experience of testifying as pleasant as possible" for the child witnesses.[296] It is not that courts should be unsympathetic to these concerns. After all, *Globe Newspaper* explicitly acknowledged that "safeguarding the physical and psychological well-being of a minor was a compelling interest which could support closure . . . ."[297] However, such a determination must be made by trial courts on a case-by-case basis, and individualized determinations articulated in the findings are always required.[298] It follows that if such findings are not made *before* excluding the public from the courtroom, the trial court may not rationalize its decision after the fact.

In *Woods v. Kuhlmann*, the Second Circuit joined the Ninth, Tenth, and Eleventh Circuits in distinguishing between "partial" and "total" closure of the courtroom to justify a less demanding application of *Waller*.[299] In a partial

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[295] 524 N.E.2d 1073, 1075–76, 1083 (Ill. App. Ct. 1988).

[296] *Id.* at 1083. *But see* LaPlante v. Crosby, 133 F. App'x 723, 725–26 (11th Cir. 2005) (holding that the prosecutor's stated concern that "the child [could] testify in relative calm" satisfied the first prong of the *Waller* test because "the physical and psychological well-being of a minor" is a compelling interest justifying closure during a rape trial of a minor (alteration in original) (quoting Globe Newspaper Co. v. Super. Ct., 457 U.S. 596, 607 (1982))).

[297] *Holveck*, 524 N.E.2d at 1082 (citing *Globe Newspaper*, 457 U.S. at 607–08).

[298] Waller v. Georgia, 467 U.S. 39, 48 (1984); *see also* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581 (1980) (plurality opinion) ("Absent an overriding interest *articulated in findings*, the trial of a criminal case must be open to the public." (emphasis added)).

[299] Woods v. Kuhlmann, 977 F.2d 74, 76 (2d Cir. 1992); *see, e.g.*, Nieto v. Sullivan, 879 F.2d 743, 753–54 (10th Cir. 1989) (holding there was no violation of defendant's public trial right because the trial judge "had a substantial reason for the closure," which the court deemed "partial"), *cert. denied*, 493 U.S. 957 (1989); United States v. Sherlock, 962 F.2d 1349, 1356–57 (9th Cir. 1989) (holding only a substantial—not compelling—reason was required in the context of "partial closure" when only defendants' families were excluded during testimony of the rape victim, a minor, who "was frightened and apprehensive of speaking before defendants' family members"); Douglas v. Wainwright, 739 F.2d 531, 532–33 (11th Cir. 1984) (per curiam) (finding that the impact of partial closure was not the same as total closure, and therefore "only a 'substantial' rather than 'compelling' reason for the closure was necessary"), *cert. denied*, 469 U.S. 1208 (1985).

closure, for example, only members of the defendant's family might be excluded from the courtroom during the testimony of a single witness.[300] In a total closure, supposedly exemplified by *Waller*, "*all* persons other than witnesses, court personnel, the parties and their lawyers [are] excluded for the duration of the hearing."[301] In the former instance, these circuits hold that only a less stringent "substantial reason" is needed to justify partial closure, not the overriding interest required by *Waller*.[302] Yet, "the Supreme Court has never set forth a less rigorous standard for partial closures"[303] and this approach also has been criticized by other courts. In *People v. Jones*, the Court of Appeals of New York flatly noted: "We are aware that some courts have recognized that a less demanding standard can be applied to limited closure requests . . . . We disagree."[304]

There is also a problem with semantics because different courts define "partial closure" differently. As the Eleventh Circuit observed in *Judd v. Haley*, "partial closures" are defined as those "in which the public retains some (though not complete) access to a particular proceeding."[305] However, the court also observed that "[n]owhere 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."[306] Despite this admonition, state courts in the Eleventh Circuit have insisted on doing just that.[307]

Labeling a closure "partial" instead of "total" makes it easier to close the courtroom according to some courts because only a "substantial"—and not an "overriding"—interest is then required to justify the exclusion of the public.[308] However, a different issue arises altogether when courts hold that partial closure does not require compliance with *Waller* at all. It is one thing to bend

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300 *Woods*, 977 F.2d at 74–76 (members of the defendant's family were excluded from the courtroom after the victim-witness expressed concern for her safety, although members of the general public were allowed to remain, hence the court deemed the closure only "partial").

301 *Id.* at 76.

302 *Id.*

303 Bell v. Jarvis, 236 F.3d 149, 168 n.11 (4th Cir. 2000).

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

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

306 *Id.*

307 *See* discussion of Goldstein v. State, 640 S.E.2d 599 (Ga. Ct. App. 2006), *infra* notes 319–20 and accompanying text.

308 *See, e.g.*, Hunt v. State, 602 S.E.2d 312, 315 (Ga. Ct. App. 2004) ("[W]hen access to the courtroom is retained by some spectators (such as representatives of the press or the defendant's family members), we have found that the impact of the closure is not as great, and not as deserving of such a rigorous level of constitutional scrutiny." (citing *Judd*, 250 F.3d at 1315)).

the rules by lowering the threshold of interest required to meet the first part of the *Waller* test, but it is quite another to distinguish between partial and total closure in order to justify holding no hearing, making no findings of fact, and exploring no alternatives. Yet this is what some courts have done. This dynamic is usually seen in the context of courtroom closure pursuant to state mandatory trial closure statutes, as explained below.

C. State Trial Closure Statutes as a Proxy for the Waller *Test*

Although the Supreme Court declared Massachusetts's mandatory trial closure statute unconstitutional in *Globe Newspaper* in 1992,[309] it listed other state statutes, such as Florida's trial closure law,[310] which required exclusion of the general public but not the press during testimony of minor victims in sex abuse cases,[311] but declined to address their constitutionality. Today, Georgia is the only state with a mandatory closure statute nearly identical to Florida's.[312] As of March 2002, fourteen other states and the U.S. Code[313] permitted or required such exclusions to varying degrees.[314] Although the Supreme Court has not considered the constitutionality of a state trial closure law since *Globe Newspaper*, state courts have invalidated them on Sixth Amendment grounds;[315] upheld but construed them as requiring the application

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309 Globe Newspaper Co. v. Super. Ct., 457 U.S. 596 (1982).

310 FLA. STAT. § 918.16 (1979) ("In the trial of any case, civil or criminal, when any person under the age of 16 is testifying concerning any sex offense, the court shall clear the courtroom of all persons except parties to the cause and their immediate families or guardians, attorneys and their secretaries, officers of the court, jurors, newspaper reporters or broadcasters, and court reporters.").

311 *Globe Newspaper*, 457 U.S at 608 n.22.

312 *Compare* GA. CODE ANN. § 17-8-54 (2009) ("In the trial of any criminal case, when any person under the age of 16 is testifying concerning any sex offense, the court shall clear the courtroom of all persons except parties to the cause and their immediate families or guardians, attorneys and their secretaries, officers of the court, jurors, newspaper reporters or broadcasters, and court reporters."), *with* FLA. STAT. § 918.16(2) (2009) ("[I]n the trial of any case, civil or criminal, when any person under the age of 16 . . . is testifying concerning any sex offense, the court shall clear the courtroom of all persons except parties to the cause and their immediate families or guardians, attorneys and their secretaries, officers of the court, jurors, newspaper reporters or broadcasters, court reporters, and, at the request of the victim, victim or witness advocates designated by the state attorney's office."). Other state statutes with mandatory closure language, such as Massachusetts's trial closure law, have been construed to require a case-by-case determination whether "'closure is necessary to protect the welfare of a minor victim.'" Commonwealth v. Martin, 629 N.E.2d 297, 302 (Mass. 1994) (quoting *Globe Newspaper*, 457 U.S at 608); *see also* MASS. GEN. LAWS ch. 278, § 16A.

313 18 U.S.C. § 3509(e) (2006).

314 AM. PROSECUTOR RESEARCH INST., *supra* note 113, at 459–62.

315 *See* Renkel v. State, 807 P.2d 1087, 1088, 1092–93 (Alaska Ct. App. 1991) (declaring unconstitutional a state mandatory trial closure law "indistinguishable from the Massachusetts mandatory closure statute" that the Court found unconstitutional in *Globe Newspaper*).

of *Waller*;[316] reversed convictions where trial courts have failed to apply the *Waller* test;[317] or held them to be proxies for the inquiry mandated by *Waller*, thereby relieving trial courts of the obligation to make case-by-case findings.[318] This latter class of cases is the approach that most erodes *Waller*.

In *Goldstein v. State*, the Georgia Court of Appeals found no error in what it termed a "temporary partial closure" during the testimony of a child molestation victim when the courtroom was cleared of all members of the public while experts for the State and the defense were allowed to remain.[319] No hearing was held and no findings were made, yet the court of appeals affirmed the closure as proper because Georgia's trial closure statute was "based upon a legislative determination that there is a compelling state interest in protecting children while they are testifying concerning a sex offense," and, therefore, partial closure under Georgia law does not violate a defendant's public trial right.[320]

Georgia is not alone. Some Florida appellate courts have also held that the entire four-part test of *Waller* is not required when "partial closure" is ordered pursuant to that state's mandatory trial closure statute.[321] In *Clements v. State*,

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[316] *See* State v. Guajardo, 605 A.2d 217, 219 (N.H. 1992) (holding that section 632-A:8 of the New Hampshire Revised Statutes, which mandates in camera testimony of a sex abuse victim under sixteen unless good cause is shown by the defendant, must be construed in light of the Sixth Amendment and *Waller*'s four-part test); State v. Robinson, No. COA07-1274, 2008 WL 2967706, at *1, *3 (N.C. Ct. App. Aug. 5, 2008) ("In reaching a determination to close the courtroom under N.C. Gen. Stat. § 15-166, the court may not rely solely on the statute but must consider the [four] *Waller* factors."); State *ex rel.* Stevens v. Cir. Ct., 414 N.W.2d 832, 838–39 (Wis. 1987) (holding mandatory trial closure provision unconstitutional, but adopting the "requirements established in *Waller*" to sustain the remaining discretionary closure provision of the Wisconsin law).

[317] *See* People v. Holveck, 524 N.E.2d 1073, 1082–83 (Ill. App. Ct. 1988) (finding state statutory scheme unconstitutional as applied because the trial court failed to "engage[] in the careful balancing of interests and the individualized evaluation of factors required to override the defendant's qualified Sixth Amendment right to a public trial").

[318] *See, e.g.*, Clements v. State, 742 So. 2d 338, 341 (Fla. Dist. Ct. App.-5th 1999), *dismissed per curiam, jurisdiction improvidently granted*, 782 So. 2d 868 (2001) (holding that partial closure during child victim testimony in a sex offense prosecution did not require the four-factor *Waller* inquiry because the state legislature, in enacting the trial closure statute, found there is a compelling interest in protecting minor victims).

[319] Goldstein v. State, 640 S.E.2d 599, 601–02 (Ga. Ct. App. 2006). Goldstein's conviction was reversed on other grounds. *Id.* at 604–06.

[320] *Id.* at 602 (citation omitted); *see also supra* Part IV.D.

[321] *Clements*, 742 So. 2d at 341. *Contra* Thornton v. State, 585 So. 2d 1189 (Fla. Dist. Ct. App.-2d 1991) (per curiam) (holding as improper the failure to apply *Waller* prerequisites before closing the courtroom to even those persons authorized under state law to be present during testimony of a minor victim in a sex offense prosecution); Pritchett v. State, 566 So. 2d 6, 7 (Fla. Dist. Ct. App.-2d 1990) (holding state trial closure statute

one Florida district court of appeal invoked the distinction between partial and total closure and then explained that the state legislature, by enacting the statute, had already made the necessary finding of compelling interest and drafted the statute narrowly to protect defendants' rights.[322] In addition, the court found that "the press, as the eyes and ears of the public, is allowed to remain [and thus] . . . preserves a defendant's constitutional right to a public trial."[323] Therefore, no *Waller* inquiry was required.[324]

This reasoning fails on several fronts. First, even those federal circuits that have announced a lower threshold of interest in cases of partial closure still require compliance with all the other procedural requirements of *Waller*.[325] Second, the argument that a state statute can be a substitute for the kind of particularized findings required by *Waller* is plainly wrong. Nearly thirty years ago in *Richmond Newspapers*, the Court announced that no closure was proper without the articulation of an overriding interest in "evidentiary findings."[326] In *Press-Enterprise*, the Court said these findings must be "specific enough that a reviewing court can determine whether the closure order was properly entered."[327] If a post hoc inquiry is too broad to provide the record needed to "balance[] petitioners' right to a public hearing against the privacy rights of others,"[328] then it can hardly be said that a preemptive legislative determination devoid of specifics and divorced from the facts of any particular case can satisfy the demands of *Waller*. Indeed, it is hard to imagine how the holding in *Clements* can be sustained in light of *Globe Newspaper*, which invalidated the Massachusetts mandatory trial closure law exactly because the statute trumped a case-by-case inquiry.[329] Finally, where it has

unconstitutional as applied when the trial court cleared the courtroom pursuant to state law in a sex offense case without making findings to justify closure).

322 *Clements*, 742 So. 2d at 341. *Clements* was yet another sex-crime case. The defendant was convicted of seven counts of sexual battery on a child under twelve and three counts of lewd acts upon a child. *Id.* at 339.

323 *Id.* at 341–42.

324 *Id.* at 341.

325 *See, e.g.*, United States v. Sherlock, 962 F.2d 1349, 1358–59 (9th Cir. 1989) (holding that the three procedural requirements of *Waller* still must be met in the context of partial closure: the court must hold a hearing, make factual findings to support it, and consider reasonable alternatives); *see also* Douglas v. Wainwright, 739 F.2d 531, 532, 533 n.2 (11th Cir. 1984) (holding that courtroom closures, whether "total" or "partial," still burden a defendant's constitutional rights and require that the trial court hold a hearing and articulate specific findings before undertaking either).

326 Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 560, 581 (1980).

327 Press-Enter. Co. v. Super. Ct., 464 U.S. 501, 510 (1984).

328 Waller v. Georgia, 467 U.S. 39, 49 n.8 (1984).

329 Globe Newspaper Co. v. Super. Ct., 457 U.S. 596, 608 n.20 (1982).

often been said that the purpose of a public trial is to discourage perjury and to encourage witnesses to come forward,[330] the press is poorly suited to act as a proxy for an interested person who may have specific knowledge of the case or whose presence in the courtroom might enhance testimonial trustworthiness.

D. The Benefit-of-the-Victim Doctrine

Closing the courtroom pursuant to state law to protect the psychological integrity of a child who is a victim-witness in a sex crime prosecution is certainly permitted.[331] However, courts must not exclude the public without first conducting a *Waller* inquiry. The tendency to sidestep *Waller* can also surface when the courtroom closure that is ordered goes beyond the parameters of the statute and wrongly excludes the press or family members of the defendant. Although the statutory error may be obvious, some appellate courts have still upheld the closures, reasoning that because the state statute was enacted for the benefit of the victim, the statutory error was "harmless," or simply did not impact the defendant's rights.[332]

In *Turner v. State*, the defendant was convicted of molesting his granddaughter, a child, and appealed.[333] Turner cited numerous errors, including ineffectiveness of counsel, for failure to object to the trial court's clearing of the courtroom of his immediate family during the victim's testimony.[334] Turner alleged a violation of the state statute, not the U.S. Constitution, but the response of the Georgia Court of Appeals illustrates the flawed rationale that is sometimes employed when courtrooms are closed pursuant to victim-witness protection statutes. Here the courtroom was closed under section 17-8-54 of the Georgia Code, which mandates exclusion of a range of persons but not the "immediate families" of the parties.[335]

As the Supreme Court announced in *In re Oliver*, the public trial right is especially impacted when family members of the accused are excluded from a criminal proceeding.[336] According to Turner, the trial court committed statutory error when it excluded his family members.[337] The court of appeals

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330 *Waller*, 467 U.S. at 46.
331 *Globe Newspaper*, 57 U.S. at 608.
332 *See supra* note 20 and accompanying text.
333 536 S.E.2d 814, 816 (Ga. Ct. App. 2000).
334 *Id.* at 816, 818.
335 *See* GA. CODE ANN. §17-8-54 (2009).
336 *In re* Oliver, 333 U.S. 257, 271–72 (1948); *see also supra* note 24.
337 *Turner*, 536 S.E.2d at 818.

countered by announcing that because the purpose of the trial closure statute "is to protect the interest of the child witness, not the defendant," any failure to follow the law did not violate Turner's rights.[338] However, as held by *Globe Newspaper*, *Press-Enterprise*, and *Waller*, protecting the interest of the victim-witness must be balanced against other interests, including the First Amendment interests of the press and the public and the Sixth Amendment interests of the defendant.[339] Georgia's trial closure statute is partially insulated from constitutional infirmity because, while it mandates closure in a criminal sex offense case involving testimony of a minor victim, it does not require exclusion of "parties to the cause and their immediate families or . . . newspaper reporters or broadcasters, and court reporters."[340] However, as construed by the Georgia Court of Appeals in cases such as *Turner* and *Craven* (where family members of the defendant *were excluded* from the courtroom in violation of section 17-8-54 and without a *Waller* inquiry to weigh the defendant's interest), the trial closure statute is susceptible to constitutional challenge. This is not only because the statute *mandates* closure and thereby prevents a balancing of interests, but especially because Georgia courts, unlike those in other states with similar laws, have failed to interpret the measure to require a *Waller* inquiry.[341] Thus, by invoking the benefit-of-the-victim doctrine in the face of statutory errors like those committed in *Turner* and *Craven*, the Georgia Court of Appeals has made section 17-8-54 of the Georgia Code even more vulnerable to constitutional attack.

This vulnerability is heightened by the court of appeals's holding that the Georgia law can act as a proxy for the individualized findings and case-by-case inquiry required by *Waller*.[342] Therefore, as currently construed under Georgia law, no *Waller* inquiry is required when a courtroom is closed pursuant to section 17-8-54. Yet, even if the statute is violated and a *total exclusion* is ordered, the error would ostensibly be excused under the benefit-of-the-victim doctrine, regardless of the obvious requirement under *Waller* to weigh the interests of the public and the defendant. Whether this legal reasoning is as untenable as it is incorrect will be for a higher court to decide.

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338 *Id.*

339 *See supra* Part I.C.3–4; notes 184–85 and accompanying text.

340 *See* GA. CODE ANN. § 17-8-54 (2009).

341 *See supra* notes 315–17 and accompanying text.

342 Craven v. State, 664 S.E.2d 921, 924 (Ga. Ct. App. 2008), *cert. denied* (Oct. 27, 2008).

E. Presley v. State*: An Overarching Failure to Follow* Waller

While many of the cases discussed in this Comment illustrate more than one aspect of the failure by courts to properly follow *Waller*, *Presley v. State*, which was decided by the Georgia Supreme Court in March 2009 but overturned 7–2 in a per curiam opinion by the U.S. Supreme Court in January 2010, perhaps best demonstrates the tendency of some courts to abrogate the procedural requirements of *Waller* altogether.[343] In *Presley*, a routine drug trafficking case, the Georgia Supreme Court upheld a total courtroom closure during voir dire, including the exclusion of a relative of the defendant.[344] In that case, the trial judge closed the courtroom on her own initiative and over the objection of the defendant, ordering the defendant's uncle to wait outside during jury selection, explaining that he could not "sit and intermingle with members of the jury panel."[345] Thus, in addition to implicating the public's First Amendment interest in attending voir dire proceedings, the closure also disregarded the concern that has been expressed by courts regarding the exclusion of family members of a defendant.[346]

When Presley's lawyer objected, the judge announced that the courtroom was too small to accommodate both the prospective jurors and the public.[347] This reason is unconvincing, though, as the record included photographs showing that space considerations did not justify the closure.[348] Beyond

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[343] Presley v. State, 674 S.E.2d 909 (Ga. 2009), *rev'd per curiam*, 78 U.S.L.W. 4051 (U.S. Jan. 19, 2010); *see also* Alyson M. Palmer, *Justices Make Fast Work of Ga. Cases*, DAILY REP. (Fulton County, Ga.), Jan. 20, 2010, at 1.

[344] *Presley*, 674 S.E.2d 909. Presiding Justice Carol W. Hunstein joined Chief Justice Leah Ward Sears in dissent. *Id.* at 912; *see also* Alyson M. Palmer, *High Court OKs Closed Courtroom: DeKalb Judge Said There Wasn't Enough Space in Courtroom for Both Spectators and Potential Jurors*, DAILY REP. (Fulton County, Ga.), Mar. 24, 2009, at 1; Daniel Levitas, Op-Ed., *Been There, Done That: Georgia Supreme Court Errs in Upholding Courtroom Closure that Violates the Right to Public Trial*, DAILY REP. (Fulton County, Ga.), Apr. 8, 2009, at 4.

[345] *Presley*, 674 S.E.2d at 910. When the trial judge initially singled out the defendant's uncle for exclusion, she did not recognize that he was a relative. However, after she identified him as a family member of the defendant, the judge still ordered his exclusion. Defense counsel responded by objecting and asking whether "some accommodation could not be made for both, some of those members of the family and the jurors." The judge denied the request. *Id.*; *see also* Palmer, *supra* note 344.

[346] *See* discussion *supra* note 24 (noting the particular interest of defendants in having their friends and family members present in the courtroom).

[347] *Presley*, 674 S.E.2d at 910; Palmer, *supra* note 344.

[348] *Presley*, 674 S.E.2d at 912 (Sears, J., dissenting) ("[I]t is clear from the pictures in the record that complete closure . . . was not required by space considerations, nor was the closure prompted by specific conduct by any of the spectators in the courtroom."); *see also* Presley v. Georgia, 78 U.S.L.W. 4051, 4051 (U.S. Jan. 19, 2010) ("At a hearing on the motion [for a new trial], Presley presented evidence showing that 14

simply closing the courtroom she also ordered family members of defendants to leave the sixth floor of the courthouse entirely. "That applies to everybody who's got a case," the judge declared, announcing her presumption that anyone affiliated with a defendant might taint the jury pool by interacting with prospective jurors in the hallway as well as inside the courtroom.[349] Subsequent proceedings revealed that this may have been standard operating procedure for the trial judge who, during the motion for a new trial, declared that "other judges 'may have different policies, but I don't permit family members or witnesses for the State or either side to intermingle or sit on the rows with the jurors.'"[350]

Although the trial judge held no hearing and made no findings of fact necessary to establish the overriding interest she supposedly sought to protect by closing the courtroom, the Georgia Court of Appeals upheld the closure under an abuse of discretion standard.[351] This illustrates the tendency of appellate courts to ignore the cardinal rule laid down by the Supreme Court—that harmless error analysis should never be applied to violations of *Waller*. Nevertheless, the Georgia Supreme Court erroneously affirmed, 5–2, holding that "the trial court certainly had an overriding interest in ensuring that potential jurors heard no inherently prejudicial remarks from observers during voir dire."[352] The U.S. Supreme Court forcefully disagreed, finding that the affirmance by the Georgia justices "contravened . . . clear precedents."[353]

Applying the trial judge's logic—and the rationale of the Georgia Supreme Court—a trial judge could order that voir dire always be conducted privately with jurors isolated in a closed courtroom in order to guard against the remote possibility that a stray remark might taint the panel.[354] The U.S. Supreme Court found this logic wholly unsupportable:

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prospective jurors could have fit in the jury box and the remaining 28 could have fit entirely on one side of the courtroom, leaving adequate room for the public.").

349 *Id.*

350 Brief of Petitioner-Appellant at 5, Presley v. State, 674 S.E.2d 909 (Ga. 2009) (No. S08G1152) (quoting Transcript of Motion for New Trial at 60, State v. Presley, No. 04-CR-2574-8 (Ga. Super. Ct. May 4, 2007)).

351 *Presley*, 78 U.S.L.W. at 4051 (citing Presley v. State, 658 S.E.2d 773, 775 (Ga. Ct. App. 2008)).

352 *Presley*, 674 S.E.2d at 911.

353 *Presley*, 78 U.S.L.W. at 4051.

354 Judges may have legitimate reason to question a juror in private when, for example, the nature of the case or comments by the juror indicate a highly sensitive personal matter, or the judge fears the bias of a particular panel member might taint the rest of the jury pool if questioning of that juror continues in open court. *See, e.g.*, Press-Enter. Co. v. Super. Ct., 464 U.S. 501, 511–12 (1984) (observing that the jury selection process may "give rise to a compelling interest of a prospective juror when interrogation touches on deeply

> 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.[355]

Furthermore, ordering a preemptive courtroom closure is hardly the least restrictive means for dealing with the speculative risk of a tainted jury pool—even if the goal is to protect a defendant's right to a fair trial. If a trial court is concerned that comments in the gallery will contaminate the jury panel, the least restrictive response is to issue a clear admonition about proper conduct during voir dire and to arrange the seating to minimize communicative conduct.[356] If those measures are not sufficient, a judge can always declare a mistrial in the unlikely event that contaminating comments are made. However, closing the courtroom preemptively, as occurred in *Presley*, represents just the kind of generalized and unsupportable judicial conduct that the Supreme Court has consistently forbidden, beginning with *Richmond Newspapers* and extending through *Waller*.[357]

Justices Thomas and Scalia dissented on the ground that *Presley* should not have been disposed of summarily because the leading case addressing the public trial right in the context of jury selection, *Press-Enterprise Co. v. Superior Court of California*, dealt with the public's First Amendment right to attend jury selection, and so it remains an open question whether a defendant's

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personal matters" and that jurors may request an opportunity to present the problem to the judge in private, but with counsel present and on the record). However, conducting private, personalized voir dire as a routine matter would almost certainly run afoul of the principles condemned by the Supreme Court in *Waller*. Routine private questioning of jurors without good cause appears similar to Michigan's "one-man grand jury" system struck down by the Supreme Court in *In re Oliver*. *See* discussion *supra* Part I.A.1 and accompanying notes.

355 *Presley*, 78 U.S.L.W. at 4053. To support their analysis, the majority cited dissenting Georgia Supreme Court Justices Carol W. Hunstein and Leah Ward Sears, who explained: "[T]he majority's reasoning permits the closure of voir dire in *every criminal case* . . . whenever the trial judge decides, for whatever reason, that he or she would prefer to fill the courtroom with potential jurors rather than spectators." *Id.* (quoting *Presley*, 674 S.E.2d at 913 (Sears, C.J., dissenting)).

356 *Id.* ("Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials. . . . [S]ome 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.").

357 *See supra* note 160 and accompanying text. Justices Sears and Hunstein expressed this same view in their *Presley* dissent: "The majority today gives the trial courts in these cases the green light to exclude the public entirely from voir dire in all of them, contrary to the express commands of the Sixth Amendment, the Georgia Constitution, *Waller*, and *Lumpkin*." *Presley*, 674 S.E.2d at 913–14 (Sears, C.J., dissenting) (referencing R.W. Page Corp. v. Lumpkin, 292 S.E.2d 815 (Ga. 1982)).

Sixth Amendment right to a public trial extends to voir dire. In short, Justices Scalia and Thomas disagreed with the majority's conclusion "by implication . . . that jury *voir dire* is part of the 'public trial' that the Sixth Amendment guarantees."[358] However, in light of the extensive Supreme Court jurisprudence articulating the sanctity of the public trial guarantee under *both* the First and Sixth Amendments, this is not an issue that seemed to trouble the seven-member majority. As stated in the per curiam opinion, while "[t]he extent to which the First and Sixth Amendment public trial rights are coextensive is an open question," whether the Sixth Amendment right extends to jury voir dire is "so well settled . . . that this Court may proceed by summary disposition."[359] As the majority explained, "The public has a right to be present [during voir dire] whether or not any party has asserted the right."[360]

The Georgia Supreme Court's decision in *Presley* was deeply flawed, but perhaps nowhere more so than its holding that the burden to propose alternatives to closure rests on the party opposing closure, not on the trial court.[361] A majority of Georgia justices claimed that *Waller* did not "provide clear guidance" on this question,[362] but seven U.S. Supreme Court Justices sharply disagreed:

> [T]he Supreme Court of Georgia concluded, despite our explicit statements to the contrary, that trial courts need not consider alternatives to closure absent an opposing party's proffer of some alternatives. While the Supreme Court of Georgia concluded this was an open question under this Court's precedents, the statement in *Waller* that "the trial court must consider reasonable alternatives to closing the proceeding," settles the point.[363]

The *Presley* dissenters disagreed, citing *Ayala v. Speckard*, a Second Circuit case holding that the burden of proposing alternatives falls on the party opposing closure.[364] But even in announcing their dissent, Justice Scalia and

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358 *Presley*, 78 U.S.L.W. at 4053 (Thomas, J., dissenting).

359 *Id.* at 4052 (per curiam).

360 *Id.*

361 *Presley*, 674 S.E.2d at 911–12. In *Presley*, the trial judge acted abruptly, sua sponte, when she banished the public from the courtroom. *Id.* at 912 (Sears, C.J., dissenting).

362 *Id.* at 911 (majority opinion).

363 *Presley*, 78 U.S.L.W. at 4052 (citing Waller v. Georgia, 467 U.S. 39, 48 (1984)).

364 *Presley*, 78 U.S.L.W. at 4054 (Thomas, J., dissenting) (citing Ayala v. Speckard, 131 F.3d 62, 70–72 (2d Cir. 1997) (en banc)). In *Ayala*, the court concluded:

> Whether or not a *sua sponte* obligation exists to consider alternatives to complete closure, we see nothing in the First Amendment cases or in *Waller* to indicate that once a trial judge has determined that limited closure is warranted as an alternative to complete closure, the judge must

Justice Thomas conceded that "the language [of both *Waller* and *Press-Enterprise*] can easily be read to imply" that "the trial court must suggest such alternatives in the absence of a proffer."[365]

Presley was a routine drug trafficking case, unlike *Craven*, *Anderson*, *Priola*, and *Clements*, which each involved child victims of criminal sexual misconduct. If these latter cases illustrate how appellate courts are willing to employ harmless error analysis, use post hoc findings, ignore the rule of plain error, or invoke the statutory cover of the benefit-of-the-victim doctrine to justify upholding the conviction of an "obviously guilty" defendant accused of perpetrating a heinous crime upon a child, then *Presley* stands for the inclination of some jurists—hopefully rare—to summarily disregard the blackletter law of *Waller* altogether. After all, the trial judge freely admitted her penchant for excluding family members of defendants and others during voir dire.[366] Although the evidentiary obstacles may be too difficult to surmount, it remains to be seen whether the convictions of other defendants who have stood trial in this judge's courtroom are likely to be reversed in light of *Presley*.

CONCLUSION

In the twenty-five years since *Waller v. Georgia* was decided, the Supreme Court has never cast doubt on the four-part test it set forth to ensure the constitutionality of courtroom closures. Nor has the Court questioned its longstanding rule that harmless error never applies to violations of the public trial right. In fact, even as the list of constitutional errors subject to harmless

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> *sua sponte* consider further alternatives to the alternative deemed appropriate. At that point, it becomes the obligation of the party objecting to the trial court's proposal to urge consideration of any further alternatives that might avoid the need for even a limited closure.

Ayala, 131 F.3d at 71. The New York Court of Appeals announced an identical holding in *People v. Ramos*, 685 N.E.2d 492 (N.Y. 1997), a companion case to *Ayala* in which the propriety of courtroom closure during undercover police officer testimony was challenged unsuccessfully by the defendants. In *Ramos*, the court held:

> [T]he question as to who is responsible for enumerating desirable alternatives to closure was not before the *Waller* Court. Squarely faced with that question now, we conclude that, where the factual record permits closure and the closure is not facially overbroad, the party opposed to closing the proceeding must alert the court to any alternative procedures that allegedly would equally preserve the interest.

Ramos, 685 N.E.2d at 500 (citation omitted).

365 *Presley*, 78 U.S.L.W. at 4054 (Thomas, J., dissenting).

366 *See supra* note 350 and accompanying text.

error analysis grew, the Court reiterated that violations of the public trial right could never be classified as harmless. A similar pattern is evident in the application of plain error review. Even as the Court moved certain violations of fundamental rights out from under the umbrella of protection afforded by plain error review, the test the Court established for applying plain error became considerably more sympathetic to the public trial right because it emphasized the fairness and integrity of a criminal proceeding.

In light of the clarity of the four-part test laid down in *Waller*, the consistency with which the Supreme Court has referred to violations of *Waller* as structural error, and the straightforward applicability of the plain error rule, violations of the public trial right should be exceedingly difficult to defend. Curiously, this does not appear to be the case in the lower courts. Appellate courts persist in sterilizing violations of the public trial right by holding such errors "harmless;" manufacturing consent to avoid application of the plain error rule; permitting post hoc findings to rationalize improper closures; claiming that a state statutory scheme is a valid substitute for a careful, case-by-case inquiry; and asserting that only a substantial—not an overriding—interest is needed to justify a "partial closure," or that partial closure negates the need to comply with *Waller* altogether. While these shortcomings are the exception, not the rule, violations of the public trial right, like those described in this Comment, still occur far too often. These decisions thus "erode[] the individual rights and liberties that are presumed to elevate our system of justice[,] . . . . dilute[] the force of our laws and shrink[] the boundaries of the sphere of individual autonomy."[367] They also send powerful signals that trial courts below can continue to engage in improper courtroom closures. However, as the Supreme Court has recently announced in *Presley*,

[367] Edwards, *supra* note 5, at 1194–95 (punctuation omitted). *See also Ayala*, 131 F.3d at 82 (Parker, J., dissenting) ("It is galling to my sense of fairness that courtroom closure is such a routine practice in New York buy-and-bust cases."); John M. Leventhal, *Public Trial: Keeping the Undercover "Undercover"*, N.Y. L.J., Nov. 3, 1992, at col. 1 ("Although the courts [of New York] formally reject a *per se* exception for an undercover witness, a showing of almost any factor will justify closure.").

there is no question that trial courts must rigorously follow the requirements laid down in *Waller*, and when they fail to do so, appellate courts must have the courage to reverse.

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