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Abstract

Maintaining social distance in the time of COVID-19 is a public health priority. A crowded courtroom is an environment at odds with public health needs. Accordingly, until science determines otherwise, it will be necessary for judges to manage courtroom attendance and exclude the public from trials, wholly or in part. Courtrooms may be closed to the public, despite the Sixth Amendment's right to a public trial, when the closure is justified by a strong government interest and is narrowly tailored to further that interest. Typically, this heightened scrutiny is applied on a case-by-case basis and turns on a case's specific circumstances. This Article proposes that in this period of pandemic, with indisputably strong government interests in public health and with few means available beyond closure to satisfy those interests, courtroom closures may be ordered by trial courts, and approved by appellate courts, almost categorically. It further suggests that there are alternative protections available that may be employed by courts to further the Sixth Amendment's good government purposes in this time of emergency.

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I. Introduction

In 2020, with the novel coronavirus producing both illness and government responses intended to reduce its spread, courts nationwide have issued orders continuing criminal trials, essentially closing the courts.[1] Even the Supreme Court postponed oral arguments for the current term.[2] These orders largely deferred trials of all kinds. No responsible judge wants to bring people together to empanel a jury when that would risk exposing prospective jurors and court staff to the virus.

Should courts determine, however, with the passage of time, that a jury may be convened to try the backlog of cases before it, the question remains, how populated should the

1. *See, e.g.*, U.S. DIST. COURT FOR THE N. DIST. OF ILL., SECOND AMENDED GENERAL ORDER 20-0012 (Mar. 30, 2020), https://perma.cc/89HN-4SLG (PDF); SUPERIOR COURT OF CAL., CTY. OF S.F., APRIL 13, 2020 GENERAL ORDER RE: IMPLEMENTATION OF EMERGENCY RELIEF (Apr. 13, 2020), https://perma.cc/NK5Q-FBSQ (PDF).

2. *See COVID-19 Announcements*, SUP. CT OF THE U.S., https://perma.cc/X3T2-GZE4 (last visited May 19, 2020) (on file with the Washington and Lee Law Review).

courtroom be? With the need for pandemic-mandated social distancing likely to persist for months, if not years, some sort of accommodations will have to be made. Juries will need to be empaneled, eventually. But will jurors be able to sit a few inches from one another, per previous common practice? Or will they have to be spaced throughout the courtroom, to prevent the transmission of the virus through droplets or aerosolized material?

Beyond the jury itself, what about the courtroom audience? It seems to be a given that they must, at least, be kept apart.[3] But public health needs might recommend excluding them altogether. The fewer attendees at a trial, the fewer opportunities for the virus to spread.

The exclusion of spectators presents a constitutional problem. The Sixth Amendment guarantees to criminal defendants the right to a public trial.[4] "Our country's public trial guarantee reflects the founders' wisdom of the need to cast sunlight—the best of disinfectants—on criminal trials."[5] The right is implicated if spectators are excluded from a criminal trial, absent waiver of the right by the defendant.[6] This Article addresses the Sixth Amendment implications of courtroom management options that require closure. It also proposes that closures ordered in response to the COVID-19 crisis should pass constitutional muster almost categorically, rather than as determined on a case by case basis. Finally, it reviews procedural tools that may help further the values of the right to a public trial, even in a closure situation.

II. A Vision of the COVID-Era Courtroom

A COVID courtroom is likely one without any members of the public, but could also be one with some select members of the public admitted. The essential participants in a criminal

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3. *See Social Distancing: Keep Your Distance to Slow the Spread*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://perma.cc/53HS-9H7Z (last visited May 19, 2020) (on file with the Washington and Lee Law Review).

4. U.S. CONST. amend. VI.

5. State v. Silvernail, 831 N.W.2d 594, 607 (Minn. 2013) (Anderson, J., dissenting).

6. *See* Levine v. United States, 362 U.S. 610, 619–20 (1960) (indicating that a defendant may waive his right to a public trial).

trial include the defendant and counsel, the judge, the prosecutor, and the jury. A court reporter is common, but could conceivably be replaced by a recording device. A bailiff or courtroom clerk is customary. In some courtrooms, these diverse players may be kept apart by the six feet prescribed by the Centers for Disease Control & Prevention (CDC) and other agencies.[7] Many state and federal courtrooms, however, would have difficulty positioning twelve jurors six feet apart, and would not be able to accommodate trial spectators beyond the essential participants while honoring social distancing protocols.

Even greater practical problems may be faced by judges and courtroom staff trying to manage large venire panels from which juries are chosen in individual cases. These can consist of many dozens, even hundreds of potential jurors, who have to be shepherded to courtrooms for voir dire.[8] Indeed, many courtroom closure cases arise in the context of voir dire proceedings and the management of prospective jurors in a courtroom while a jury is being selected.[9] While these complexities may be practically overwhelming, they are not necessarily constitutional in nature.

Accordingly, this Article is addressed to the specific image of the COVID courtroom during trial—one featuring essential participants, and either entirely without spectators or with a limited number of them. Presuming that no spectators may attend trial, trials convened with only essential participants would be considered closed for Sixth Amendment purposes.[10] Trials held with only some spectators, excluding those beyond some permitted number, would be considered partially closed under common Sixth Amendment jurisprudence developed in the lower courts.[11] In case of either a closure or partial closure,

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7. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 3.

8. *See, e.g.*, Berghuis v. Smith, 559 U.S. 314, 319 (2010) (noting a venire panel of 60–100 potential jurors).

9. *See, e.g.*, Presley v. Georgia, 558 U.S. 209, 210 (2010); United States v. Gupta, 699 F.3d 682, 684 (2d Cir. 2012).

10. Waller v. Georgia, 467 U.S. 39, 42 (1984) (treating as closed, for Sixth Amendment purposes, a courtroom "closed to all persons other than witnesses, court personnel, the parties, and the lawyers").

11. *See infra* notes 28–29 and accompanying text.

some form of heightened constitutional scrutiny would be applied to determine the propriety of the closure.[12]

III. Sixth Amendment Scrutiny

The Sixth Amendment to the United States Constitution provides, in part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."[13] The right to a public trial is not absolute, however.[14] Some closures are permissible. In *Waller v. Georgia*,[15] the Supreme Court set forth the test trial courts should apply to determine whether a courtroom closure is appropriate.

The Court prescribed a four-part test to determine whether a closure complies with the Sixth Amendment:

> [1] the party seeking to close the [proceeding] 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.[16]

Waller's test is in the nature of strict scrutiny.[17] While *Waller* requires that the government interest pursued through a courtroom closure be an "overriding" one,[18] rather than employing the commonly used strict scrutiny language of a "compelling" interest,[19] it is indistinguishable. The strict scrutiny of *Waller* is an unusual kind, however—one steeped in

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12. *See infra* note 30 and accompanying text.

13. U.S. CONST. amend. VI.

14. *See Waller*, 467 U.S. at 45.

15. 467 U.S. 39 (1984).

16. *Id.* at 48 (citing Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 511–12 (1984) (establishing a test for a courtroom closure case arising under the First Amendment)).

17. *See* Commonwealth v. Chism, 65 N.E.3d 1171, 1178 (Mass. 2017) (referring to the "strict scrutiny test articulated in *Waller*"). *Cf. In re* Reporters Comm. for Freedom of the Press, 773 F.2d 1325, 1354 (D.C. Cir. 1985) (citing Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 509 (1984) (observing that "[t]he Supreme Court has most recently spoken as if closure orders must meet the test of strict scrutiny")).

18. *Waller*, 467 U.S. at 48.

19. *See, e.g.*, Boos v. Barry, 485 U.S. 312, 321 (1988) (setting forth strict scrutiny test in the First Amendment context).

the practicalities of courtroom management. Strict scrutiny has been famously described as "'strict' in theory and fatal in fact."[20] It is not so when courtroom management is at stake.[21]

A. The Government Interests Satisfied by a COVID Closure

1. Overriding Interests to Support Complete Closures

Interests that courts have found "overriding" for purposes of the *Waller* test are typically responsive to the safety, privacy, and emotional needs of particular courtroom participants. Perhaps unremarkably, "[t]he safety of law enforcement officers 'unquestionably' may constitute an overriding interest."[22] Similarly, those officers' privacy (which may also implicate their safety) qualifies: "[T]he State has an 'overriding interest' in protecting the identity of its undercover officers."[23] Courts have also frequently justified closures to protect the emotional well-being of child witnesses.[24]

Protecting public health is indisputably an "overriding" interest.[25] Protecting the public from unnecessarily spreading a potentially fatal virus is not only a purpose the government *may* pursue; it is one it has an obligation to. The values served by the right to a public trial are important ones, but are, in almost all cases, hypothetical. There is little danger, in the ordinary case,

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20. Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

21. *Cf.* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 819–20 (2006) (noting that judicial actions reviewed under strict scrutiny are upheld at a rate of fifty-eight percent).

22. Moss v. Colvin, 845 F.3d 516, 520 (2d Cir. 2017).

23. Rodriguez v. Miller, 537 F.3d 102, 110 (2d Cir. 2008).

24. *See, e.g.*, Bowers v. Michigan, No. 16-2325, 2017 WL 1531958, at *1 (6th Cir. Apr. 28, 2017) ("[T]he victim was twelve years old when she testified, her testimony was sensitive, and the closure was done to protect the victim from embarrassment and shame.").

25. *See* Mead v. Holder, 766 F. Supp. 2d 16, 43 (D.D.C. 2011) ("[T]he Government clearly has a compelling interest in safeguarding the public health by regulating the health care and insurance markets."); Legatus v. Sebelius, 901 F. Supp. 2d 980, 995 (E.D. Mich. 2012) ("The court has no doubt that every level of Government has an interest in promoting public health as a general matter . . . .").

of wrongdoing by the trial's participants that requires the watchful eye of the public to stamp out. The danger to the health of the trial's essential participants, any would-be spectator, and the people they encounter after leaving the courtroom, on the other hand, is considerably more acute.

There are cases indicating that closures justified by nothing more than tight quarters—a lack of room for both jury candidates and the public—lack an overriding interest.[26] But those are very different circumstances. In the ordinary course—pre-COVID days—accommodations may be made for substantial numbers of people: a shifted table here, an extra seat there. Social distancing requires strict limits on the number of people in the courtroom. If the justification offered is one of convenience and relatively straightforward logistics, it should not be considered "overriding." That is not the case in the COVID courtroom. Its spacing requirements arise from vital public health needs.

2. "Substantial Reasons" to Support Partial Closures.

The *Waller* test has been applied not only to complete closures of trial proceedings, but also to partial closures of court proceedings. As the terms have developed, a complete courtroom closure is one in which all non-participating individuals are excluded from the courtroom, for all of a proceeding. The "proceeding" may be a granular one—a motion hearing, for instance—it need not be an entire trial.[27] A partial closure, on the other hand, is one in which certain individuals are excluded,[28] or people are generally excluded, but only for a very specific portion—the testimony of a particular witness, for instance.[29]

The Supreme Court has never differentiated between, nor used the terms, partial and complete closures. The terminology

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26. *See* Gibbons v. Savage, 555 F.3d 112, 117 (2d Cir. 2009) (holding that, under *Waller*, insufficient space because of the size of the venire and the risk of tainting the jury pool are not "compelling reasons" for closure).

27. *See, e.g.*, Presley v. Georgia, 558 U.S. 209, 210 (2010) (defining the closure of voir dire as a proceeding).

28. *See* United States v. Laureano-Perez, 797 F.3d 45, 77–79 (1st Cir. 2015).

29. *See* State v. Turrietta, 308 P.3d 964, 967 (N.M. 2013).

has taken hold in the lower courts, however, as a way of distinguishing between closures that require close attention, and those that are perhaps subject to more cursory analysis. Most courts have applied a slightly different version of the *Waller* test to partial closures.[30] When "partial" closures are at issue, they have diluted *Waller*'s "overriding" interest to require only a "substantial" interest.[31] This makes clear the lower courts' understanding that *Waller* applies strict scrutiny. These courts have fashioned a form of intermediate scrutiny at the interest phase of the tiered scrutiny approach.[32]

In practice, the "substantial reasons" courts have approved as justifying partial courtroom closures are quite similar to the "overriding interests" that have supported valid complete closures.[33] The same safety and emotional well-being interests that are invoked as "overriding interests" have been recited as "substantial reasons."[34]

Despite this relatively long discursion into the distinction between a complete closure of a COVID courtroom and a partial one that might permit the attendance of some spectators, the result should be the same. The public health reasons that justify a total courtroom closure apply with even more force in a partial closure situation, where Sixth Amendment concerns for fairness and "sunlight" are less acute.[35]

In closure cases of all stripes, the government interest in keeping people apart from one another in pursuit of reducing

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30. *See* United States v. Simmons, 797 F.3d 409, 413–14 (6th Cir. 2015) ("Nearly all federal courts of appeals . . . have distinguished between the total closure of proceedings and situations in which a courtroom is only partially closed to certain spectators.").

31. *See, e.g.*, Woods v. Kuhlmann, 977 F.2d 74, 76 (2d Cir. 1992) (applying the "substantial reason" test). *But see Turrietta*, 308 P.3d at 967 (holding *Waller*'s "overriding interest" factor applies in partial closures excluding only some courtroom spectators).

32. *See* Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2375 (2018) (describing intermediate scrutiny as requiring a substantial interest).

33. *See Woods*, 977 F.2d at 77 (finding both overriding interest and substantial reason in closing for "protection of a witness who claims to be frightened as a result of perceived threats").

34. *See* United States v. Osborne, 68 F.3d 94, 99 (5th Cir. 1995) ("The protection of a minor from emotional harm is a substantial enough reason to defend a limited closing of the proceedings.").

35. *See id.*

infections from the coronavirus is sufficient to justify the order. There should be little more demanded of a judge managing a COVID courtroom—the closure occurred in response to a government interest of the first order.

B. Tailoring and Consideration of Alternatives to Closure

The next two factors of the *Waller* test are interrelated. The second factor calls for the closure to be "no broader than necessary."[36] The third requires that the court "must consider reasonable alternatives" to closing the courtroom.[37] Together, they call upon the judge to craft a narrowly tailored closure, and to consider alternatives to closure. The tailoring aspect of strict scrutiny asks whether the means chosen to protect the government interest at issue was the necessary one, or whether other choices could have been made that would better protect the constitutional right at issue.[38]

The Supreme Court's opinion in *Presley v. Georgia*[39] provides a helpful example of how a judge may tailor courtroom management to protect the interest in a public trial. In *Presley*, the trial judge had closed the courtroom to the public because there just wasn't "space," and because he worried that the defendant's uncle, the lone spectator attending the trial, might make prejudicial remarks that the close-quarters jurors might hear.[40]

The Court indicated that it could easily hypothesize many alternatives to closure: "some possibilities include reserving one or more rows for the public; dividing the jury venire panel to reduce courtroom congestion; or instructing prospective jurors not to engage or interact with audience members."[41]

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

37. *Id.*

38. *See*, *e.g.*, United States v. Playboy Entm't Grp., 529 U.S. 803, 815 (2000) (explaining that a government action is not narrowly tailored if there are less rights-restrictive alternatives available).

39. 558 U.S. 209 (2010).

40. *See id.* at 210–11.

41. *Id.* at 215; *see also* People v. Evans, 69 N.E.3d 322, 326 (Ill. App. Ct. 2016) ("[W]e can conceive reasonable alternatives—many of which are based in common sense.").

If there are alternatives to closure, a trial court is expected to resort to them first, not last. If there are other courtroom management techniques, like those described in *Presley*, they should be used in lieu of closure.

A COVID closure is categorically "no broader than necessary," and is the only "reasonable" response to the government interest in public health. A courtroom is a physical space, with physical limits. It is measurable in square feet. If a group of people wants to honor the social distancing regimen while occupying that space, it can do so only in certain numbers.[42] This requires the exclusion of people beyond those numbers.

Alternatives are imaginable, but they are not reasonable ones. Entrants into the courtroom could conceivably enter in great numbers should they be in "hazmat"-style suits. Few people have those. Courts are not equipped to dispense them. Additionally, a court could administer testing, perhaps for the disease, perhaps for antibodies. Aside from the invasion of privacy this might induce, here, too, courts are not equipped. They are not situated to engage in medical testing. Given the practical restraints on a judge's ability to reduce the possibility of disease being spread in her courtroom, closure, complete or partial, is the only tool at her disposal.

While there are no reasonable alternatives to closure in the COVID courtroom, there is one subsidiary issue that will require trial judge attention. When determining who should be excluded, should there be room for any of the public, priority should be given to people associated with the defendant. While it is dicta, the Supreme Court has indicated that the accused is entitled to have friends and family members present in the courtroom.[43]

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42. Those numbers may change as our understanding changes. Today's six feet may be tomorrow's two, or twenty.

43. *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 . . . ."); *see also* United States v. Rivera, 682 F.3d 1223, 1230 (9th Cir. 2012).

C. Adequate Findings to Support Closure

Waller's final demand is that a trial court "make findings adequate to support the closure."[44] These findings must be "specific enough that a reviewing court can determine whether the closure order was properly entered."[45] These findings do not require a particular form of opinion or order.[46]

In the context of a COVID closure, this factor, too, is easily satisfied. The public health crisis the world is presently enduring may be judicially noticed.[47] Once the court takes notice of the public health crisis, resulting findings flow therefrom, naturally. Acting to reduce the spread of the virus is an indisputable "overriding interest." Maintaining social distance or separation is the necessary means of furthering that interest, and no reasonable alternatives are available.

IV. Alternative Means of Serving the Purposes of the Right to a Public Trial

While the application of the *Waller* test in the COVID era demonstrates that closures to protect public health comply with the requirements of the Sixth Amendment, there are additional ways to assure that the values and purposes of the right to a public trial are honored. A court ordering a *Waller*-compliant closure may nonetheless provide additional procedural protections for defendants subjected to closed proceedings. One of these is already in place—trial transcripts. The other is video recording of trial proceedings.

The Sixth Amendment's right to a public trial exists to (1) "ensur[e] that judge and prosecutor carry out their duties

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44. *Waller*, 467 U.S. at 48.

45. *Presley*, 558 U.S. at 215 (quoting Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510 (1984)).

46. *See* Bell v. Jarvis, 236 F.3d 149, 172 (4th Cir. 2000) ("[T]he *Waller* Court prescribed no particular format to which a trial judge must adhere to satisfy the findings requirement.").

47. *See* FED. R. EVID. 201. The COVID crisis and social distancing protocols are "generally known within [any] trial court's territorial jurisdiction." *See* NLRB v. Ford Motor Co., 114 F.2d 905, 911 (6th Cir. 1940) (taking judicial notice of social conditions and noting that "[t]he court may not close its eyes to what was referred to at the time by the then Governor of Michigan, as 'the greatest industrial conflict of all times'").

responsibly," (2) "encourag[e] witnesses to come forward," and (3) "discourag[e] perjury."[48] "[T]he guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution."[49] But the right was conceived in a different time, one without the ability to memorialize the details of a trial—stenographically, visually, or aurally. Today, verbatim transcripts, audio recordings, and video may provide the needed "sunlight" shed on trial proceedings in a way that did not exist centuries ago. Because of the availability of these many ameliorative processes, the right to a public trial should probably be policed less rigorously as a general matter, but should certainly be in this time of emergency. Alternate means of publicizing a trial's contents may be constitutionally adequate, while benefitting our present-day public health needs.

The first way to accommodate the concerns of the right to a public trial is by ensuring the availability of transcripts (or, perhaps, audiovisual recordings of some sort). To be sure, the court has never said that the Sixth Amendment's protection is adequately safeguarded by transcripts, and transcripts were surely available in *Waller* and *Presley*, cases in which the Court held that the right had been violated. Nonetheless, a transcript or other memorialization of trial proceedings necessarily contributes to the good government goals of the right to a public trial.[50]

Moreover, the Court has indicated that transcripts may be constitutionally satisfactory in the First Amendment context of the right of public access to a trial. The Court's jurisprudence on that right gave birth to the *Waller* test. Indeed, *Waller*'s requirement of an "overriding interest" and narrow tailoring

48. Waller v. Georgia, 467 U.S. 39, 46 (1984); *see also* Jocelyn Simonson, *The Criminal Court Audience in A Post-Trial World*, 127 HARV. L. REV. 2173, 2177 (2014) ("[T]here is power in the act of observation: audiences affect the behavior of government actors inside the courtroom, helping to define the proceedings through their presence.").

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

50. *See* Ayala v. Speckard, 131 F.3d 62, 72 (2d Cir. 1997) (en banc) (noting availability of transcript as a consideration in evaluating the validity of a courtroom closure).

was taken verbatim from a First Amendment press access case: *Press-Enterprise Co. v. Superior Court*.[51]

Besides delivering its test to *Waller*, the Court also indicated that transcripts were a means of providing constitutionally required public access. It explained that "the constitutional values sought to be protected by holding open proceedings may be satisfied later by making a transcript of the closed proceedings available within a reasonable time."[52]

The Court had previously set forth a similar assessment of the power of a transcript, noting that when a hearing transcript was made available after the fact, "[t]he press and the public then had a full opportunity to scrutinize the suppression hearing. Unlike the case of an absolute ban on access, therefore, the press here had the opportunity to inform the public of the details of the pretrial hearing accurately and completely" and the right of trial access under the First Amendment was not violated.[53]

Besides the availability of transcripts to ensure that nothing untoward happens in a closed trial proceeding, courts might also further Sixth Amendment values by using cameras to take recordings, or to simulcast trial proceedings.[54] Again, two purposes of the Sixth Amendment's right to a public trial are to "ensure a fair trial" and "remind the prosecutor and judge of their responsibility to the accused and the importance of their functions."[55] Regarding the Sixth Amendment's goal of keeping trial participants on their best behavior, social behavior

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51. 464 U.S. 501 (1984).

52. *Id.* at 512. *But see* United States v. Simone, 14 F.3d 833, 842 (3d Cir. 1994) (holding transcripts were not a sufficient grant of access).

53. *See* Gannett Co. v. DePasquale, 443 U.S. 368, 393 (1979); *In re* The Spokesman-Review, 569 F. Supp. 2d 1095, 1102 (D. Idaho 2008) ("Her testimony will be forever memorialized in the written transcript, which the Media and public will have access to and which will be more than sufficient to satisfy the right of access.").

54. While the author's research has not revealed any cases concluding that cameras are an adequate substitute for a traditional public trial, at least one court has found that requiring the public to remain in an "overflow room" with a video feed available, rather than the courtroom itself, produced no actionable closure at all. *See* United States v. Gutierrez-Calderon, No. 2016-0009, 2019 WL 3859753, at *11 (D.V.I. Aug. 16, 2019).

55. Peterson v. Williams, 85 F.3d 39, 43 (2d Cir. 1996) (citing *Waller*, 467 U.S. at 46–47).

research indicates that, indeed, having spectators present at trial may serve to improve the behavior of a trial's essential participants:

> [T]he presence of others may affect human experience in various ways: it can inhibit or facilitate public performances; . . . and may trigger self-evaluations and result in behavior adjustments. . . . In other words, the presence of others can be seen as a social force, affecting feelings, cognitions, and, to some degree, behaviors.[56]

The authors of this study proposed that the "implied audience" provided by visible security cameras might have a similar effect on behavior to actual audiences examined in previous studies.[57] And indeed, their results supported the hypotheses "that security cameras can trigger public helping behavior by implying the presence of an audience: participants provided more help."[58]

Although "helping behavior" may be distinguished in some way from the ethical choices we hope that judges and prosecutors will make when they are in front of an audience, "helping," and, say, not asking obviously objectionable questions of a witness, both demonstrate pro-social impulses.[59] It is therefore conceivable—maybe even likely—that the implied audience behind a camera lens will produce the same attention to a trial participant's responsibilities that a live audience might produce.

Another study on security camera use similarly found an increase in pro-social behavior when cameras were installed, but noted that people exposed to cameras "may become desensitized to the cameras over time, thus watering down the

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56. Thomas J. L. van Rompay, Dorette J. Vonk & Marieke L. Fransen, *The Eye of the Camera Effects of Security Cameras on Prosocial Behavior*, 41 ENV'T & BEHAV. 60, 61–62 (2009) (citations omitted) (reviewing previous research).

57. *Id.* at 64.

58. *Id.* at 68.

59. *Id.* at 69 ("Although the motivation to help may be driven by self-concern, that is, to ensure approval of others, cooperative behavior is certainly desirable in many environmental settings.").

potential for long term deterrent gains."[60] One can only hope that the requirement of COVID closures will not persist long enough that trial participants reach a desensitized state.

In the ordinary course, the right to a public trial is not fully realized by the availability of transcripts or the presence of cameras. But in this time of COVID, when courtroom closures are otherwise justifiable when viewed through *Waller*'s lens, these tools provide a "backstop," a check to ensure that the values of the right are honored, in some degree.

V. Conclusion

Although the *Waller* test anticipates a case-by-case review of courtroom closure decisions, COVID closures should lend themselves to almost categorical approval. The strong governmental interest in public health is the same from case to case; there can be no difference in the analysis of that factor. Moreover, in terms of tailoring, there are few tools for a court to deploy in lieu of closure, partial or complete. Add to these easily satisfied (under these circumstances) criteria the protection of alternative means of making proceedings publicly available, and closures should not be considered the obstacle they might be in normal times. A court should not be required to take courtroom measurements—of space, of participants, of furniture—to determine with precision the physical distance between essential participants and would-be spectators. No math should be required of a judge—trying to both hear a trial and maintain safety—to determine if, just maybe, an extra person could have fit inside the room. It is by now a truism that "while the Constitution protects against invasions of individual rights, it is not a suicide pact."[61]

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60. Lorraine Mazerolle, David Hurley & Mitchell Chamlin, *Social Behavior in Public Space: An Analysis of Behavioral Adaptations to CCTV*, 15 SECURITY J. 59, 72 (2002).

61. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963); Terminiello v. City of Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) ("[I]f the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.").