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## The Online Criminal Trial as a Public Trial

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# THE ONLINE CRIMINAL TRIAL AS A PUBLIC TRIAL

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Stephen E. Smith\*

## I. INTRODUCTION

Technical barriers to conducting criminal trials online may have been largely overcome, but legal barriers still exist.<sup>1</sup> This Essay addresses one of those legal barriers: whether the public's ability to attend a criminal trial online—via Zoom or some other service—is sufficient to satisfy the Sixth Amendment's right to a public trial.<sup>2</sup> This Essay concludes that the Constitution should treat online attendance as sufficient to satisfy the requirement of a public trial. This may be an ambitious claim, however; there are certainly arguments to the contrary.

What does it mean to attend an event in 2021 and beyond? In our recent past, millions of students have attended school on Zoom. Movie fans attended *Wonder Woman 1984* on HBO Max. Businesspeople worldwide have attended meetings on various videoconferencing platforms. No one would argue that what these people did was something other than attendance. The word might be qualified with “remote” or “virtual,” but to the extent there was a there to be, there they were.

The Sixth Amendment's right to a public trial anticipates that members of the public will be able to attend criminal trials.<sup>3</sup> This was an obvious-

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1. First among these barriers is probably the Sixth Amendment's Confrontation Clause. Exceptions to in-person confrontation are only rarely permitted. *See Maryland v. Craig*, 497 U.S. 836, 836-37 (1990); *see discussion infra* pp. 8-10. Another is Federal Rule of Criminal Procedure 53, which prohibits the broadcast of criminal proceedings. FED. R. CRIM. P. 53 (“[T]he court must not permit . . . the broadcasting of judicial proceedings from the courtroom.”).

2. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .”). Slightly different issues may be presented by the closely related First Amendment right of the public to attend trials. *See, e.g., Press-Enterprise Co. v. Superior Ct.*, 464 U.S. 501, 508 (1984).

3. *See Press-Enterprise*, 464 U.S. at 508.

enough command at the time of the Founders. Community members had to be provided the opportunity to cross the threshold of the courtroom and observe what occurred within. But does that basic, even primitive, understanding govern later generations that possess technology inconceivable in the 18th Century?<sup>4</sup> Is a trial not public unless you breathe the air of its participants? Must you smell them, see the stains on their pantlegs, and feel the vibration of their footsteps as they approach the bench? Or is the species of attendance we have all grown familiar with in the past year—audio-visual attendance—enough? Ultimately, the question is whether a trial can be public in different ways or in only one way. I conclude that a “public trial” was understood to be one where the audience could see and hear the trial, as is possible online. Moreover, the purposes of the right to a public trial are easily satisfied by conducting a trial online, with audio and video of the proceedings available to interested members of the public. If those purposes are satisfied, there should be no insistence on the presence of bodies in a room.

There are two ways of favorably conceiving online trials in Sixth Amendment terms. One is that an online trial is a public trial, by its terms. The other is that an online trial may not be public, for Sixth Amendment purposes, but may nonetheless satisfy applicable constitutional demands for trials considered “closed.” This Essay proposes both: that an online trial is fundamentally “public” for Sixth Amendment purposes and, if it is not, it may still be a constitutional accommodation of the Sixth Amendment’s public trial guarantee, in appropriate circumstances.

The constitutionality of an online trial may be largely an idle inquiry. There will rarely be an instance where instituting an online trial is worth the trouble. It is easier to simply open the doors of the courtroom. But the COVID-19 pandemic has taught us that there may be times when opening those doors is anything but simple.

## II. WHAT IS AN ONLINE TRIAL?

This Essay is based on a hypothetical situation. One in which a trial is conducted in a way that does not include spectators in a courtroom but allows them audio and video access to the proceedings. Other aspects of the proceedings may be conducted online, in a courtroom, or in some hybrid

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4. “[T]he requirement of a public trial was created at a time when there were no stenographers and few newspapers.” Max Radin, *The Right to a Public Trial*, 6 TEMP. L.Q. 381, 394 (1932) (citing Justice Sanner’s dissenting opinion in *State v. Keeler*, 156 P. 1080, 1084 (Mont. 1916)).

form: the positioning of judge, jury, counsel, and witnesses is not my focus.<sup>5</sup> I am interested, specifically, in the absence of spectators in a physical space with the other trial participants. There may be many technical avenues to conducting a trial online, but this Essay is not a technical one. Instead, it presupposes some mechanism by which spectators may view the participants in the trial, in some degree of detail, and may hear them, with some degree of clarity. I do not believe there should be any guaranteed number of pixels on a screen, or a necessary ability to see the faintest drop of sweat on a witness's brow. This is not required for the trial attendee sitting in the back row of a courtroom and should not be for online viewers. This, of course, leaves room for dispute. Criminal defendants may challenge the degree to which a trial has been made "public" based on the technology employed and the material viewable and hearable. But the possibility of a dispute over degree does not detract from the basic public nature of an online trial.

An argument may be made that an online trial, so described, cannot provide a complete view of the proceedings. For instance, on Zoom, you may see only a witness's head, obscuring any body language through which they may communicate. But that is also true of a witness on the stand when viewed in person. Much of the witness's body—perhaps her tapping toe or drumming finger—is blocked by the stand itself. There are limits to any avenue of perception.

In an article last year, I wrote that video transmission of criminal proceedings could serve as a backstop to satisfy public trial purposes when a trial was properly closed under the applicable constitutional standard.<sup>6</sup> Further consideration leads me to the conclusion that the trial *is* public when available through audio-visual technologies.

### III. WHAT DOES IT MEAN TO BE PUBLIC?

The historical record of what the Founders expected of the right to a public trial is very thin. Indeed, the right "was not a subject of debate or discussion" as the Bill of Rights was considered.<sup>7</sup> Accordingly,

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5. Again, Confrontation Clause concerns will loom large in any decision to conduct a criminal trial online.

6. Stephen E. Smith, *The Right to a Public Trial in the Time of COVID-19*, 77 WASH. & LEE L. REV. ONLINE 1, 15 (2020).

7. SUSAN N. HERMAN, *THE RIGHT TO A SPEEDY AND PUBLIC TRIAL: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* 18 (2006); see Radin, *supra* note 4, at 388 ("It is likely that the word 'public' was introduced into the list of the rights of free men . . . without very much concrete example in mind of what publicity implied and without a clear idea of what it was meant to secure.").

interpretations of the scope and meaning of the Sixth Amendment right typically refer to earlier historical sources, in England and elsewhere.<sup>8</sup>

There can be no question but that all historical sources conceived the public trial in terms of physical presence.<sup>9</sup> Describing English trials in the Sixteenth Century, Sir Thomas Smith explained that they were “doone openlie in the presence of the Iudges, the Iustices, the enquest, the prisoner, and so manie as will or can come.”<sup>10</sup>

The trial of Lieutenant-Colonel John Lilburne in 1649 has been cited as evidence that English common law included a right to a public trial. Howell’s State Trials reports that Lilburne (the defendant, not a judge) stated:

“[T]here I stood upon my right by the laws of England, and refused to proceed with the said committee, till by special order they caused their doors to be wide thrown open, that the people might have free and uninterrupted access.”<sup>11</sup>

In the Colonial period, the government of West New Jersey is often credited with an early American description of the right. In its “Concessions and Agreements,” it provided that “in all publick courts of justice for trial of causes, civil or criminal, any person or persons, inhabitants of the said province, may freely come into and attend the said courts . . . .”<sup>12</sup>

In every instance, physical presence defines the public availability of the courtroom. There was no kind of presence conceivable, other than physical. But with equal uniformity, the historical sources describe in a very specific way the activities enabled by that physical presence. By being present, the public was able to *see* and *hear* the proceedings.

Sir Thomas Smith placed value in the ability to hear testimony. A public trial provided “that all men may heare from the mouth of the depositors and witnesses what is saide.”<sup>13</sup> The West New Jersey Concessions and

8. See, e.g., HERMAN, *supra* note 7, at 3-30; Radin, *supra* note 4, at 381-84; Rory B. O’Sullivan & Catherine Connell, *Reconsidering the History of Open Courts in the Digital Age*, 39 SEATTLE U. L. REV. 1281, 1283-90 (2016).

9. See Radin, *supra* note 4, at 391 (“What is a public trial? It is frequently stated that such a trial is one in which any member of the public may be present if he wishes.”).

10. 2 THOMAS SMITH, DE REPUBLICA ANGLORUM 81 (1583).

11. O’Sullivan & Connell, *supra* note 8, at 1287 (quoting The Trial of Lieutenant-Colonel John Lilburne, at the Guildhall of London for High Treason [1649], reprinted in A COMPLETE COLLECTION OF STATE-TRYALS AND PROCEEDINGS UPON IMPEACHMENTS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE REIGN OF KING HENRY THE FOURTH TO THE END OF THE REIGN OF QUEEN ANNE 582).

12. The West Jersey Concessions: A Model for the Bill of Rights, Chap. XXIII, reprinted in IT HAPPENED HERE: NEW JERSEY, <https://nj.gov/state/historical/assets/pdf/it-happened-here/ihhnj-er-west-jersey.pdf> [hereinafter The West Jersey Concessions].

13. SMITH, *supra* note 10, at 81-82.

Agreements similarly emphasized the ability to hear the proceedings.<sup>14</sup> Lilburne's trial speech referred not only to the ability to hear, but also to see the proceedings (in combination, enabling the public to evaluate the proceedings). To him, the public trial provided "that the people might have free and uninterrupted access to hear, see and consider of what they said to me."<sup>15</sup>

Unsurprisingly, this continues to be the primary description of a public trial. It is one in which members of the public may observe proceedings, using their senses of sight and hearing. A public trial enables "[a]ctual observation of the demeanor, voice, [and] gestures of the participants in a hearing."<sup>16</sup>

To the extent that a public trial is one at which people may see and hear the proceedings, the present-day ability to satisfy both of those senses through technological means should make an online trial a public one.<sup>17</sup> "Public" may simply be shorthand for a proceeding that may be heard and seen. Cameras and microphones may, in fact, be a superior means of making a trial public, by making a proceeding *more* audible and *more* visible.<sup>18</sup>

But the physical presence envisioned by historical commentators may enable more than just the audience's ability to hear and see. One contemporary commentator, in particular, describes an ability to "participate" in general terms.<sup>19</sup> Professor Jocelyn Simonson recognizes the basic function of the public trial to permit the audience to hear and see the proceedings, noting that "there is power in the act of observation."<sup>20</sup> But beyond that observation, she posits a courtroom inhabited by "the audience as participants" rather than as "mere spectators."<sup>21</sup> To the extent that something participatory, *beyond* hearing and seeing, is anticipated by the

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14. The West Jersey Concessions, *supra* note 12.

15. O'Sullivan & Connell, *supra* note 8, at 1287.

16. State *ex rel.* Dayton Newspapers, Inc. v. Phillips, 351 N.E.2d 127, 136 (Ohio 1976) (Stern, J., concurring); see also Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2183 (2014) (referring to the "act of observing"); Smith v. Titus, 141 S. Ct. 982, 986 (2021) (Sotomayor, J., dissenting from denial of certiorari) (repeatedly referring to the public trial right as providing for public "view").

17. I am sympathetic to the view that "questions should be considered in the light of present-day conditions as they actually exist, not in the near darkness of the world as it surrounded the framers." Jacobus tenBroek, *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction*, 27 CAL. L. REV. 399, 411 (1939).

18. Hannah Zeavin explains that media can improve interactions rather than dilute them, noting that, during the recent pandemic, therapy practitioners and their patients "communicated a shock at the intimacy that teletherapy can convene over and despite distance." HANNAH ZEAVIN, *THE DISTANCE CURE: A HISTORY OF TELETHERAPY* 222 (2021).

19. Simonson, *supra* note 16, at 2176.

20. *Id.* at 2177.

21. *Id.* at 2228.

Sixth Amendment and the “presence” of a trial audience, then an online trial may be unable to satisfy the Constitution’s requirements.

Professor Simonson describes an audience that may provide real-time “expressive signals”<sup>22</sup> that may be perceived by other trial participants. She writes that “[a]udience members watch the players in the courtroom; they react to what they see and hear through facial expressions, laughs, and grumbles.”<sup>23</sup> This ability to provide real-time signaling to the other players in the court provides “[t]he audience’s power, born from its physical presence in the courtroom.”<sup>24</sup>

This description of the value of a public trial is a challenge to the constitutionality of an online criminal trial. If the gestures and sounds of a physical audience are constitutive parts of a trial’s public nature, an online trial may be constitutionally inadequate.

Yet the audience at a criminal trial is not supposed to *do* anything. If spectators rise up in disapproval against testimony, a ruling, or a verdict, the trial may be temporarily interrupted, but no substantive change should be worked by the spectators’ energies, other than, perhaps, a mistrial.<sup>25</sup>

If an audience member jumps up and yells, “she’s lying,” the rules of evidence maintain that nothing has happened at all,<sup>26</sup> except, again, perhaps a mistrial.<sup>27</sup> Audience exclamation is not admissible.<sup>28</sup> To the extent such an exclamation might lead the prosecution or defense to call the exclaiming audience member to further explain, the same is true of someone in the video audience. That person, while not situated to shout in the room, might send an email or a text, or type into a chat box. The same act, through different means.

22. *Id.* at 2226.

23. *Id.* at 2182 (Though, “[m]ost of all, they sit, look, and listen.”).

24. *Id.*

25. *See State v. Stewart*, 295 S.E.2d 627, 630-31 (S.C. 1982) (showing that mistrial is appropriate when outbursts of laughter and one spectator’s glare of “obvious disgust” toward jury interfered with trial).

26. *Brown v. Ornoski*, 503 F.3d 1006, 1018 (9th Cir. 2007) (“The trial court properly instructed the jury to disregard any extraneous comments and to decide the case based only on the evidence at trial.”); *Turner v. Johnson*, No. CV 14-00579-AG (GJS), 2017 WL 2819039, at \*10 (C.D. Cal. Mar. 29, 2017) (“The trial court directed the jury to disregard the spectator’s statements from the audience section of the courtroom, as his emotional outburst was ‘not evidence in the case.’”). The report and the recommendations were subsequently adopted in *Turner v. Johnson*, No. CV 14-00579-AG (GJS), 2017 WL 2818978 (C.D. Cal. June 26, 2017).

27. *See White v. State*, 146 So. 85 (Ala. Ct. App. 1933) (Mistrial was appropriate when widow dressed in mourning who rose and “cried out in a passionate voice: ‘That’s not so! That didn’t happen!’” so prejudiced the trial that “nothing [the] learned court could have done would have remedied the harm that had been worked to appellant.”).

28. FED. R. EVID. 603 (requiring oath before testifying).

The accessibility of trial proceedings online greatly *increases* the likelihood that the trial will be accessed by someone with an interest in, or knowledge of, the trial. While it is true that not everyone has easy access to the internet, neither do they have easy access to the courtroom. There are barriers to entry no matter the medium: the physical courtroom or the virtual one. But an online trial necessarily makes itself available to a greater number of spectators.

Physical presence enables some sort of participation by the audience—through coughs, murmurs, or shouts—but it is not clear that a more effective kind of participation could not be enabled by online attendance. As the trial goes on, an online audience member may tweet about the trial, send an email to the prosecutor’s office, or post to a Congressperson’s Facebook page. These forms of participation may not immediately catch the ear of the trial’s key actors but may catch those ears, and others, in a more meaningful way.

#### IV. THE PURPOSES OF THE PUBLIC TRIAL

The ultimate purpose of the public trial is to prevent anything from occurring during the proceedings that would be subject to public condemnation.<sup>29</sup> It lets us see what is happening during the trial so that we know no wrongdoing has occurred. “Our country’s public trial guarantee reflects the founders’ wisdom of the need to cast sunlight—the best of disinfectants—on criminal trials.”<sup>30</sup> Both historical and contemporary commentators have emphasized the abuse-deterrence function of the public trial, agreeing that “if trials are speedy and public, powerful officials will be far less likely to use their power against innocent men than if trials are protracted and secret.”<sup>31</sup>

Beyond abuse deterrence, a truth-seeking function is also purportedly served by the public availability of proceedings. Jeremy Bentham contended

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29. See *In re Oliver*, 333 U.S. 257, 270 (1948) (“[T]he guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution.”).

30. *State v. Silvernail*, 831 N.W.2d 594, 607 (Minn. 2013) (citing *LOUIS D. BRANDEIS, OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT* 92 (1914)).

31. Radin, *supra* note 4, at 381; see, e.g., *State ex rel. Dayton Newspapers, Inc. v. Phillips*, 351 N.E.2d 127, 136 (Ohio 1976) (Stern, J., concurring) (“The correction of judicial abuses and the approval of judicial wisdom and integrity depend alike upon the accessibility of the courts to public scrutiny.”). “All trials should be public, that opinion, which is the best, or, perhaps, the only cement of society, may curb the authority of the powerful, and the passions of the judge.” CESARE BONESANA BECCARIA, *AN ESSAY ON CRIMES AND PUNISHMENTS* 55 (Edward D. Ingraham trans., 2d ed. 1819) (1764).



that publicity is a “safeguard of testimony”: “[f]alsehood may be bold in a secret examination; it is difficult for it to be so in public.”<sup>32</sup>

There is, as well, a purpose perhaps served more by the First Amendment’s closely related right of public access to trials: enabling an informed and interested citizenry.<sup>33</sup> The late Justice Brennan described “broader external or communal benefits of criminal trials—the symbol that the rule of law is operating, the parable about the bad man’s lot, the deterrence of criminal activity, and so on.”<sup>34</sup>

The Supreme Court has set forth a specific set of purposes it believes are served by the right to a public trial. According to the Court, the Sixth Amendment’s right to a public trial exists to (1) ensure that judge and prosecutor carry out their duties responsibly, (2) encourage witnesses to come forward, and (3) discourage perjury.<sup>35</sup> Each of these purposes, leading to trial fairness and to truth, seems easily furthered by an online trial.

The most important is the first—providing a check on the possibility of abuse by the government, embodied in the judge and prosecutor. This check is effected entirely by observation. If a judge (and yes, this is preposterous) tries to require a defendant to testify against her wishes, or a prosecutor proffers rank hearsay (with the judge’s acquiescence over an objection), those acts will be immediately captured by microphone and camera. It is impossible to conceive a wrongful act by either judge or prosecutor that would not be captured on audio and video in the same way it would be perceived by a spectator in the courtroom. It is hard to imagine a government actor behaving differently based on whether she is being viewed in person or via media. Indeed, social science research suggests that the “implied audience” provided by cameras may encourage pro-social behavior in the same way a physical audience would.<sup>36</sup>

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32. JEREMY BENTHAM, A TREATISE ON JUDICIAL EVIDENCE 68 (Etienne Dumont ed., 1825); see also 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 373 (1768) (“The open examination of witnesses viva voce, in the presence of all mankind, is much more conducive to the clearing up of truth than the private and secret examination before an officer or his clerk.”).

33. E.g., JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS 15 (2011) (“Edification of viewers (courts as theaters or schools) remains an objective of open courts . . .”).

34. William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?* A Progress Report, 68 WASH. U.L.Q. 1, 18 (1990); see Simonson, *supra* note 16, at 2200 (“[T]he audience’s presence enhances self-government and democracy among local citizenry.”).

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

36. Thomas J. L. van Rompay et al., *The Eye of the Camera: Effects of Security Cameras on Prosocial Behavior*, ENV’T & BEHAV., Jan. 2009, at 68 (“Security cameras can trigger public helping behavior by implying the presence of an audience.”).

Of course, the necessity of policing the judge and prosecutor may have been obviated long ago, by the development of transcripts and the availability of a robust, regular appeals process. In 1951, a commentator wrote that:

Today's judicial administration has two features which, to some degree, alleviate the necessity for trial publicity—an adequate record of trial court proceedings and appellate facilities for correcting errors below. Any abuses clear enough to be obvious to the court room audience are not likely to escape the reviewing court.<sup>37</sup>

Whether or not there is an ongoing need for an interested citizenry to police official behavior, the Sixth Amendment nonetheless provides the accused that protection. But that purpose is satisfied by audio-visual means at least as well as it is by in-person observation. Indeed, in-person observation has its own significant deficits, including less-audible speech in a cavernous courtroom and less-visible action, when any particular observer potentially obscures the view of the observer behind her.

The purpose of encouraging witnesses to come forward appears to stem from a simple proposition—if the trial is known to the public, those members of the public with knowledge of the case will be able to approach the parties to offer their testimony.<sup>38</sup> Even if “the possibility of pertinent testimony . . . coming from the courtroom audience is a meager one,”<sup>39</sup> this oft-repeated function of the public trial is also well-served by an online trial. A member of the public in possession of important information about a case is at least as likely to be able to access the case online as she is in person.<sup>40</sup>

Finally, the same is true of discouraging perjury. This purpose is achieved in a straightforward way, with the sunlight of publicity.<sup>41</sup> If a witness is lying, and someone in the audience perceives it, the observer with knowledge of the lie can approach the parties to let them know. This, too, is easily accomplished via modern communications tools. It need not be conveyed in person. To the extent it is conveyed in real-time, by a shout in the course of trial proceedings, it is more likely to be the source of a mistrial, as described earlier, than it is to serve the right's truth-seeking function.

Given the ease with which the purposes of the public trial right may be satisfied, Professor Max Radin's words, written 90 years ago, still resonate:

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37. Harold Shapiro, *Right to a Public Trial*, 41 J. CRIM. L. & CRIMINOLOGY 782, 787 (1951).

38. See *State v. Schmit*, 139 N.W.2d 800, 807 (Minn. 1966) (“[T]he possibility that some spectator drawn to the trial may prove to be an undiscovered witness in possession of critical evidence cannot be ignored.”).

39. Shapiro, *supra* note 37, at 786.

40. See generally Jenia I. Turner, *Remote Criminal Justice*, 53 TEX. TECH. L. REV. 197, 223-62 (2021).

41. See *Schmit*, 139 N.W.2d at 806-07 (“The presence of an audience does have a wholesome effect on trustworthiness since witnesses are less likely to testify falsely before a public gathering.”).

[There is no] good reason why the modern methods of communication should be rejected. Photographing the scenes in the court room, broadcasting the proceedings, may affront the dignity of the court, but if a constitutional right is involved, the dignity of the court can hardly weigh much in the balance.<sup>42</sup>

#### V. MARYLAND V. CRAIG AND THE IMPORTANCE OF IN-PERSON PRESENCE

The possibility of an online trial qualifying, on its face, as a public one is made less likely by the Supreme Court's decision in *Maryland v. Craig*.<sup>43</sup> *Craig* is a Confrontation Clause case, but it provides pertinent analysis of the relative constitutional merits of audio-visual and in-person trial proceedings.

In *Craig*, the Supreme Court determined that a child witness in a child abuse case could testify, over closed-circuit television, in a room separate from a criminal defendant, without violating the Sixth Amendment's Confrontation Clause.<sup>44</sup> Despite an earlier determination that the Confrontation Clause entitled a defendant to a "face-to-face meeting,"<sup>45</sup> the Court held this modified approach, under the circumstances, satisfied the constitutional command.

In *Craig*, per Maryland law, the child witness, the prosecutor, and the defense attorney adjourned to a room outside the courtroom, where they conducted direct and cross-examination.<sup>46</sup> The judge, jury, and defendant observed the questioning of the child witness over one-way closed-circuit television.<sup>47</sup> While the procedure removed the "face-to-face" nature of witness confrontation, it preserved the requirement of an oath and cross-examination.<sup>48</sup> It also preserved the ability of "the judge, jury, and defendant . . . to view (albeit by video monitor) the demeanor (and body) of the witness."<sup>49</sup> The Court concluded that the existing safeguards "adequately ensure[d] that the testimony is both reliable and subject to rigorous

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42. Radin, *supra* note 4, at 392. Professor Radin's sentence would also condemn the prohibition against the "broadcast" of criminal trials under Federal Rule of Criminal Procedure 53. By prohibiting the broadcast of criminal trial proceedings, the rule seeks to keep trials from being public spectacles. See *Estes v. Texas*, 381 U.S. 532 (1965) (holding defendant was denied due process by the televising of his trial). While the Constitution's right to a public trial is motivated by a desire to make information available, Rule 53 seeks to keep it from being *too* available. Query whether, in some circumstances, the rule should give way before the constitutional mandate of publicity.

43. 497 U.S. at 836-39.

44. *Id.* at 860.

45. *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988).

46. *Craig*, 497 U.S. at 841.

47. *Id.* at 840-41.

48. *Id.* at 851.

49. *Id.*

adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony.”<sup>50</sup>

So far, this reads as though it provides support for the possibility of concluding that an online trial can satisfy the requirement that it be public. After all, it approves remote confrontation. But the Court did not find that face-to-face confrontation could be forgone as a matter of course. The approved audio-video procedure was held to be permissible only “where denial of such confrontation is necessary to further an important public policy.”<sup>51</sup> Rather than blanket approval of the approach, it was approved only under certain circumstances justified by a strong government interest.

Four Justices, led by Justice Scalia, dissented.<sup>52</sup> He wrote that no circumstances were sufficient to overcome the right to in-person confrontation: “[w]hatever else it may mean in addition, the defendant’s constitutional right ‘to be confronted with the witnesses against him’ means, always and everywhere, at least what it explicitly says: the ‘right to meet face to face all those who appear and give evidence at trial.’”<sup>53</sup>

There can really be no question that the Confrontation Clause, at the time of framing, posited “face-to-face” confrontation. That was the only testimonial possibility, besides hearsay. But simply because physical human presence was the only non-hearsay technology available in the 18th Century does not mean that confrontation “plainly” requires the presence of defendant and witness in the same room.

The fundamental purpose of the Confrontation Clause is to prevent “trial by affidavit,”<sup>54</sup> conviction by documentary hearsay. The distance between face-to-face confrontation and audio-video confrontation is much smaller than the distance between face-to-face confrontation and the presentation of a written document.

Justice Scalia has previously posited how modern processes would have been received at the time of the adoption of the Bill of Rights. In *United States v. Jones*,<sup>55</sup> he was faced with the question of whether law enforcement use of a GPS tracking device was subject to constitutional limits on searches. He concluded there was “no doubt that such a physical intrusion would have been considered a ‘search’ within the meaning of the Fourth Amendment

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50. *Id.*

51. *Id.* at 850.

52. *Id.* at 860-70 (Scalia, J., dissenting).

53. *Id.* at 862 (Scalia, J., dissenting) (quoting *Coy v. Iowa*, 487 U. S. 1012, 1016 (1988)) (alteration in original).

54. *E.g.*, *Mattox v. United States*, 156 U.S. 237, 242-43 (1895).

55. 565 U.S. 400 (2012).

when it was adopted.”<sup>56</sup> It is not obvious that, at the time of the adoption of the Sixth Amendment, the ability to see, hear, and cross-examine would not similarly have been considered confrontation. There is no evidence that the Founders were themselves rigorous purists.

And, indeed, Scalia has acknowledged that technological developments may work changes to historical understandings. Regarding the propriety of another search, he wrote that:

[E]ven if a “frisk” prior to arrest would have been considered impermissible in 1791 . . . perhaps it is only since that time that concealed weapons capable of harming the interrogator quickly and from beyond arm’s reach have become common—which might alter the judgment of what is “reasonable” under the original standard.<sup>57</sup>

So, an interpretation of the Constitution’s words may need to interrogate what the original public meaning of the words *could* have withstood, had the citizens of the time known the technological capacities of today. In that circumstance, confrontation might occur effectively using *Craig* procedures, and the word “public” might well embrace the online trial.

Nonetheless, none of the nine Justices who heard *Craig* opined that the process used in that case would *generally* satisfy the Confrontation Clause. For the dissenters, it never could. For the majority, it could do so only in service of a strong governmental interest, not as a matter of course.<sup>58</sup> This means that the entire Court believed that “face-to-face” confrontation was preferred and generally expected.

*Craig* has obvious implications for the argument that an online criminal trial is a public trial for Sixth Amendment purposes. An 18th Century citizen would expect that a public trial was one he could observe after walking through the courtroom doors. That was what “public” meant at the time. If that understanding controls, then an online trial is not public. The *Craig* dissent might so believe. Moreover, the majority might conclude that the expectations of an 18th Century citizen create the default constitutional mandate and that a public trial, in the sense of one that someone may physically walk into, is preferred, to be deviated from only on a showing of a strong government interest.

There may be a substantial difference, however, between the gravity of in-person confrontation and in-person audience observation. The Court has

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56. *Id.* at 404-05.

57. *Minnesota v. Dickerson*, 508 U.S. 366, 382 (1993) (Scalia, J., concurring).

58. *Craig*, 497 U.S. at 850 (“[A] defendant’s right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured.”).

written that “there is something deep in human nature that regards face-to-face confrontation between accused and accuser as ‘essential to a fair trial in a criminal prosecution.’”<sup>59</sup> The manner in which a spectator conducts her inspection of trial proceedings—in person or over video—seems less deeply rooted in human nature.

The reasoning of both the *Craig* majority and dissent might well lead the Court to consider a trial publicly accessible by only audio-visual means to be totally or partially “closed” for purposes of the right to a public trial. Accordingly, the online trial must also be analyzed as a courtroom closure under the Court’s *Waller* framework.

#### VI. WHAT IF THE ONLINE TRIAL IS NOT A PUBLIC TRIAL?

In light of *Maryland v. Craig* and the relatively easy originalist retort of “public means people present in the flesh,” the claim that an online trial is a public trial is an ambitious one.

But if actual physical presence is the *sine qua non* of the public trial right, there is still a place for the online trial in criminal law. The right to a public trial is not absolute.<sup>60</sup> Conditions arise that give judges good reason to close proceedings. I have written recently that the Covid-19 pandemic provided a strong governmental interest justifying the closure of courtrooms to the public.<sup>61</sup> It is quite possible that the pandemic we have endured (and still are enduring, as of this writing) is not the last one the nation will see.<sup>62</sup> In this distinct situation, online trials will be the best solution to keep trials as open as possible while honoring public health needs.

The Court created its test for whether a courtroom closure conforms to the right to a public trial in 1984 when it decided *Waller v. Georgia*.<sup>63</sup> The court held that the right to a public trial could be overcome, and a courtroom closed, on the satisfaction of a four-part test: “(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

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59. *Coy v. Iowa*, 487 U.S. 1012, 1017 (1988) (quoting *Pointer v. Texas*, 380 U.S. 400, 404 (1965)).

60. *Waller v. Georgia*, 467 U.S. 39, 45 (1984).

61. Smith, *supra* note 6, at 6-7.

62. Victoria Gill, *Coronavirus: This is Not the Last Pandemic*, BBC NEWS (June 6, 2020), <https://www.bbc.com/news/science-environment-52775386>.

63. 467 U.S. at 48.

the proceeding, and (4) the trial court must make findings adequate to support the closure.”<sup>64</sup>

Like some of the tests applied to government actions under the Equal Protection Clause and First Amendment,<sup>65</sup> *Waller’s* test requires a strong government interest in the closure and a narrowly tailored means of effecting it. It also places procedural demands on a court considering closure—a court must consider alternatives to closure and make findings justifying the court’s actions.

It is rare that an entire trial must be closed. Closures are commonly instituted for a particular witness who must be protected from the public eye.<sup>66</sup> For these sorts of spot closures, an online portion of a trial is probably unrealistic—the logistical burden is too great. But for other types of closures, an online trial seems like a commonsense accommodation of public trial values.

Foremost among these would be, again, closure to protect public health in a pandemic. In this unusual and dramatic circumstance, complete closure is likely justified, period. But the availability of an online trial would nonetheless provide public trial protections. Phrased in terms of the *Waller* test, the public health interests at stake would provide the necessary “overriding interest,” and making the trial available online would be the tailored means of publicity and the “reasonable alternative” to having members of the public in the courtroom. It might be considered permissibly “closed” by *Waller’s* standard, requiring no public access at all, but the availability of technological means to make the trial public should be considered and implemented where possible.

The second instance of closure that could be ameliorated by the use of an online format is in the case of particular spectators who have been excluded from the trial. In this circumstance, courts have developed a doctrine of “partial” closure.<sup>67</sup> When “partial” closures are at issue, courts have diluted *Waller’s* “overriding” interest to require only a lesser “substantial” interest.<sup>68</sup> The test remains otherwise the same.<sup>69</sup> A partially closed trial is typically one in which particular people are excluded, though

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64. *Id.* (adopting test from a courtroom closure case arising under the First Amendment, *Press-Enterprise*, 464 U.S. at 511-12).

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

66. *E.g.*, *Rodriguez v. Miller*, 537 F.3d 102, 110 (2d Cir. 2008) (explaining that the closure was to protect the identity of the undercover officer). This is, of course, not the only reason closures are ordered.

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

68. *Woods v. Kuhlmann*, 977 F.2d 74, 76 (2d Cir. 1992).

69. *Id.*

not the public, generally.<sup>70</sup> For instance, a group of disruptive spectators may be excluded when the court concludes that they will not stop their disruptive ways.<sup>71</sup> In these circumstances, excluding these spectators—closing the courtroom to them—is usually justified. But *Waller*'s command to consider “reasonable alternatives” could require, or at least recommend, providing some ability for these interested spectators to attend the trial. An online trial would do just that, without requiring the proceedings to suffer ongoing interruption.

Online trials seem well-suited to satisfy public trial values during a partially closed trial. The availability of audio-visual representation of the trial may not be a substitute for the public availability of the entire proceeding but maybe for the select would-be audience members who must be excluded.

During the recent pandemic, some courts have found partial closure to be a necessary safety procedure and have relied on audio-visual means to provide additional access to proceedings.<sup>72</sup> In *Fortson*, for instance, the Court instituted a “plan to close trial proceedings to spectators, except for Defendant’s family members, while making the trial available for viewing through a live video stream in another courtroom and on the court’s website.”<sup>73</sup>

Another recent decision concluded that providing audio-visual access to proceedings, even though no spectators were allowed in the courtroom, rendered the closure only a partial one.<sup>74</sup> The court’s technological solution to the public trial issue was two-fold. First, it provided a “separate viewing room [in the courthouse] to allow members of the public and the press to observe the proceeding via live video and audio feed.”<sup>75</sup> Second, it provided an online option, indicating that “[f]or those unable or uncomfortable with traveling to the courthouse to access the viewing room, and upon a showing of a particularized need, the Court will also grant authorization to a limited number of people to access the trial.”<sup>76</sup> This “as-needed” limitation on online

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70. *Id.*

71. See Stephen E. Smith, *The Right to a Public Trial and Closing the Courtroom to Disruptive Spectators*, 93 WASH. U. L. REV. 235 (2015).

72. See, e.g., *United States v. Fortson*, No. 2:18-CR-416-WKW, 2020 WL 4589710, at \*3 (M.D. Ala. Aug. 10, 2020).

73. *Id.*; see *United States v. Richards*, No. 2:19-CR-353-RAH, 2020 WL 5219537, at \*3 (M.D. Ala. Sept. 1, 2020) (stating the same).

74. *United States v. Babichenko*, 508 F. Supp. 3d 774, 778 (D. Idaho 2020); see also *United States v. Huling*, C.A. No. 1:19-CR-00037-MSM-PAS, 2021 WL 2291836, at \*2 (D. R.I. June 4, 2021).

75. *Babichenko*, 508 F. Supp. 3d at 778.

76. *Id.*



access was an effort to avoid running afoul of the ban on “broadcasting” of criminal proceedings imposed by Federal Rule of Criminal Procedure 53.<sup>77</sup>

As these cases reveal, courts are already experimenting with the use of audio-visual means to honor the right to a public trial. Whether online access is simply an “extra” provided to gild an already permissibly closed trial, or a part of the determination of the acceptable scope of a courtroom closure, technology provides trial courts a helpful tool to protect Sixth Amendment values.

## VII. CONCLUSION

It is difficult to make an argument based on what the Founders, or legal history preceding them, might have expected from a public trial because they did not have alternatives to embrace or reject. For them, a “public trial” was a public trial—one which let citizens, in some number, be present in the room in which the trial occurred. There were few fine points to argue. There is no historical discussion of what the character of that public attendance had to be. How close the audience had to be, how audible the voices, or how many people should or could attend are all questions that did not appear to arise. The language surrounding the right is largely general: public was public. Today, we must ask whether the physical presence of an audience defines the scope of the right or simply represents the limits of the imaginations of those who instituted it.

All the benefits purporting to spring from the right to a public trial are obtained through the ear and the eye. The ear and the eye are only the more perceptive in the 21st Century. A camera and a microphone give us front row seats, no matter where we are, to courtroom proceedings. It is true that remote spectators do not possess the same ability to interrupt those proceedings should they see fit, but courtroom rules disfavor interruptions. Moreover, the ability to contact trial participants is made easy by electronic communication tools. It is not apparent that the defendant’s right to a public trial is a right to have that trial disrupted by the bodies of the audience.

I have explained that there are arguments against this interpretation of a “public trial.” There is no question but that the “original public meaning” of the phrase anticipated physical presence. Moreover, to the extent there exists some right to have the audience do more than observe, to physically intercede in the proceedings (however minimally), the camera and microphone will be insufficient. Should these arguments win the day, however, there is still a place for the online trial, from a public trial perspective. In cases where a strong enough government interest exists to justify removing spectators from

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77. *Id.* at 780.

the courtroom, the online trial is a meaningful alternative to provide access to members of the public, in order to provide defendants with the “responsible ‘auditors’”<sup>78</sup> needed to ensure that their trials are conducted fairly.

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78. RESNIK & CURTIS, *supra* note 33, at 303.