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"THE RULE" AND THE CONSTITUTION: WITNESS EXCLUSION AND THE RIGHT TO A PUBLIC TRIAL

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Federal and state rules of evidence provide for the exclusion of potential witnesses from the courtroom. But, in criminal proceedings, the Sixth Amendment's right to a public trial presumes that a courtroom will be open. The public trial right has been widely interpreted to restrict even "partial closures" – the exclusion of an individual or group from a criminal courtroom. The rule on witnesses is potentially at odds with the right to a public trial. Witness exclusion, by rule, is almost automatic. The Sixth Amendment, on the other hand, requires heightened scrutiny before individuals may be excluded from the courtroom. Criminal defendants have accordingly objected to the exclusion of witnesses from their trials as violations of the right to a public trial. This short article concludes that there are two reasons that standard implementation of the Rule is not a Sixth Amendment violation. The first is that historical understandings of the Sixth Amendment's public trial right would have contemplated the use of longstanding witness sequestration rules. The second is that witness sequestration causes no meaningful prejudice to the amendment's purposes. This article also concludes that there are some circumstances where sequestration requests must give way to Sixth Amendment demands and proposes an approach to distinguishing between routine exclusions and those that demand a more searching inquiry.

I. INTRODUCTION

The exclusion of witnesses from courtrooms before their testimony is standard practice, in compliance with federal and state rules of evidence.[1] But the exclusion of individuals from a courtroom can violate a defendant's Sixth Amendment right to a public trial.[2] Criminal

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1. *See infra* section II.

2. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .").

defendants have occasionally argued,[3] largely unsuccessfully, that the exclusion of witnesses pursuant to rules of evidence violates their Sixth Amendment right to a public trial. Courts addressing the issue have provided little analysis of the tension between the two commands. But, if the exclusion[4] of particular individuals from a courtroom necessarily implicates the Sixth Amendment's right to a public trial, witness sequestration rules are in trouble.

Federal Rule of Evidence 615 and its state law equivalents are often referred to, shorthand, as "The Rule." [5] That is how common witness sequestration is – out of all the rules of evidence (and manifold other rules that may apply in a legal proceeding), it is honored as "The Rule." The Rule mandates that, on request of a party, potential witnesses must leave the courtroom.[6] The reason is obvious enough. Parties fear that a witness will fabricate or perhaps "adapt" testimony to account for the testimony of other witnesses. It makes sense to want to hear the witness's testimony without the influence upon it of what other witnesses have had to say.

The Sixth Amendment, on the other hand, guarantees, in part, the right to a public trial.[7] It insists on the *presence* of observers, not their exclusion.[8] The scope of the right has been sketched only roughly by the Supreme Court, in few decisions.[9] Most courts, however, apply its strictures to "partial" closures of criminal courtrooms.[10] These partial closures are exclusions of particular members of the courtroom audience, rather than a blanket exclusion of the public from the court.

To the extent that the exclusion of *any* member of the courtroom audience requires constitutional scrutiny, the automatic exclusion that the Rule provides is contrary to the Sixth Amendment's demands. Many courts have interpreted the Sixth Amendment to require careful scrutiny,[11] complete with fact finding, before anyone may be excluded from the courtroom. Accordingly, the common courtroom management practice of witness exclusion may be regularly and repeatedly

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3. *See infra* Section IV.A.

4. Because both words are commonly used, this article will toggle between "exclusion" and "sequestration" and their verb forms.

5. *See* Timothy D. O'Leary, *What Rule?*, 50 J. MO. B. 147 (1994) ("As the trial begins, the attorney for the defendant requests that the court enforce the 'rule.' The judge, knowingly, orders, 'The rule will be enforced.'") (referring to Missouri practice). *See also* Geders v. United States, 425 U.S. 80, 87 (1976) (noting "'the rule on witnesses,' as the practice of sequestering witnesses is sometimes called. . .") (referring to federal practice).

6. FED. R. EVID. 615. The rule applies to both criminal and civil proceedings. *See* FED. R. EVID. 1101(b).

7. U.S. CONST. amend. VI.

8. *Id.*

9. The Supreme Court has addressed the Sixth Amendment right to a public trial only three times in the past fifty years: Waller v. Georgia, 467 U.S. 39 (1984); Presley v. Georgia, 558 U.S. 209 (2010) (per curiam); Weaver v. Massachusetts, 137 S. Ct. 1899 (2017).

10. *See infra* Section III.

11. Such as strict or intermediate scrutiny. *See infra* text accompanying notes 54-69.

unconstitutionally implemented.

The few courts that have faced this issue have by and large treated it summarily, rejecting constitutional challenges to exclusions ordered under the Rule.[12] They have reached the right conclusion, but have not explained it adequately. This short article is intended to provide a more careful analysis. It concludes that there are two reasons that standard implementation of the Rule is not a Sixth Amendment violation. The primary reason is that historical understandings of the Sixth Amendment's public trial right would have contemplated longstanding witness sequestration rules. The second reason is that witness sequestration causes no meaningful prejudice to the amendment's purposes. This article also concludes that there are, nonetheless, rare circumstances where sequestration requests must give way to Sixth Amendment demands and proposes an approach to distinguishing between routine exclusions and those that require a more searching inquiry.

II. THE RULE

Witness sequestration is standard operating procedure for the nation's courts. An example of the practice is Federal Rule of Evidence 615, which provides that: "[a]t a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own."[13] This is no idiosyncrasy of federal law – the states have equivalent rules, effected either by statute,[14] rule[15], or common law.[16] The Rule can claim both a "time-honored pedigree and universal acceptance."[17] This article will largely refer to Rule 615 as a stand-in for the Rule in its various forms; distinctions between different formulations of sequestration are not its focus.

There is no requirement that a witness subject to exclusion under the Rule be included on a witness list, or even be certain to be called. For instance, in *United States v. Warner*,[18] the defendant requested that his wife and ex-wife be permitted to remain in the courtroom, over an exclusion request by the prosecutor. They were not on the government's witness list, "but Defendants [had] not ruled out the possibility that they will be called in Defendants' own case."[19] The court "urge[d] the parties to craft stipulations that would render their testimony unnecessary. Absent such precautions, however, family members who *may be called* as

12. *See infra* Section IV. A.

13. FED. R. EVID. 615.

14. *E.g.,* CAL. EVID. CODE § 777.

15. *E.g.,* OHIO EVID. R. 615.

16. Lynch v. State, 551 S.W.3d 70, 74 (Mo. Ct. App. 2018).

17. Daniel J. Capra & Liesa L. Richter, *"The" Rule: Modernizing the Potent, but Overlooked, Rule of Witness Sequestration*, 63 WM. & MARY L. REV. 1, 5 (2021).

18. United States v. Warner, No. 02 CR 506, 2005 WL 2367769, at *12 (N.D. Ill. Sept. 23, 2005).

19. *Id.*

witnesses will be excluded from the courtroom."[20] The cases have not proposed any necessary degree of probability of being called before the Rule may be enforced against a potential witness.[21]

Rule 615 excepts some categories of witnesses from its scope, permitting some potential witnesses to remain in the courtroom.[22] This exception includes parties,[23] persons essential to presenting a party's claim or defense,[24] and those statutorily permitted to remain.[25]

"The rule is mandatory and requires that witnesses be excluded pursuant to a sequestration request."[26] Indeed, "Rule 615 carries a presumption favoring sequestration"[27] over finding a witness exempt from the Rule's exclusion requirement:

Because a court may only decline to grant a party's request to sequester particular witnesses under one of the Rule 615 exemptions, the rule carries a strong presumption in favor of sequestration. The party opposing sequestration therefore has the burden of demonstrating why the pertinent Rule 615 exception applies . . . and "why the policy of the Rule in favor of automatic sequestration is inapplicable in that situation."[28]

Like other evidentiary rulings,[29] appellate review of trial court sequestration decisions is performed under an abuse of discretion standard.[30]

The Rule serves a truth-seeking function: "excluding or sequestering witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy, and collusion."[31] Sequestration is imposed "to lessen the danger that [a witness's] testimony will be influenced by hearing what other witnesses have to say, and to increase the likelihood that [witnesses] will confine themselves to truthful

20. *Id*. (emphasis added).

21. *E.g.,* United States v. Villa-Guillen, 490 F. Supp. 3d 470, 476 (D.P.R. 2020) (referring to "potential witness" without describing likelihood of witness being called).

22. FED. R. EVID. 615.

23. FED. R. EVID. 615(a)-(b).

24. FED. R. EVID. 615(c) (including, for example, "an expert needed to advise counsel in the management of the litigation. . ."). FED. R. EVID. 615 Advisory Committee notes.

25. FED. R. EVID. 615(d). (including, for example, victims of crimes pursuant to the Crime Victims' Rights Act). *See* 18 U.S.C.S. § 3771 (2015).

26. Oliver B. Cannon & Son, Inc. v. Fid. & Cas. Co. of New York, 519 F. Supp. 668, 678 (D. Del. 1981); United States v. Collins, 340 F.3d 672, 680 (8th Cir. 2003) ("Sequestration of most witnesses is mandatory when requested. . ."). Historically, the Rule appears to have been discretionary, but requests were commonly indulged. *E.g.*, Holder v. United States, 150 U.S. 91, 92 (1893) ("Upon the motion or suggestion of either party, such a direction as that in question is usually given."). Some states make the Rule discretionary. *E.g.,* MASS. R. CRIM. P. 21 (Massachusetts rule providing that the judge "may" order witness exclusion).

27. Opus 3 Ltd. v. Heritage Park, Inc., 91 F.3d 625, 628 (4th Cir. 1996).

28. United States v. Jackson, 60 F.3d 128, 135 (2d Cir. 1995) (citations omitted).

29. Gen. Elec. Co. v. Joiner, 522 U.S. 136, 141 (1997).

30. United States v. Oropeza, 564 F.2d 316, 326 (9th Cir. 1977) ("Sequestration of witnesses [is a matter] within the discretion of the court.").

31. FED. R. EVID. 615 Advisory Committee Notes.

statements based on their own recollections."[32] Evidence scholar Dean John Wigmore wrote breathlessly of the Rule's "supreme excellence,"[33] describing it as, next to cross-examination, "one of the greatest engines that the skill of man has ever invented for the detection of liars in a court of justice."[34]

III. THE RIGHT TO A PUBLIC TRIAL

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."[35] Like many constitutional rights, however, the right to public trial is not absolute.[36] Courtrooms may be closed to the public in some situations.[37]

The right to a public trial extends to many aspects of the trial, from suppression hearings,[38] to *voir dire*,[39] to sentencing.[40] The right to a public trial also applies to the states, incorporated through the Fourteenth Amendment's due process guarantee.[41] The right may yield to other rights or interests, but only in rare circumstances, and "the balance of interests must be struck with special care."[42] A violation of the right to a public trial is considered "structural" and thus not subject to harmless error review.[43]

The Sixth Amendment's right to a public trial manifests "[t]he traditional Anglo-American distrust for secret trials."[44] The ultimate purpose of the public trial is to prevent anything from occurring during the proceedings that would be subject to public condemnation.[45] 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."[46] Both historical and contemporary commentators have

32. Perry v. Leeke, 488 U.S. 272, 281–82 (1989).

33. John H. Wigmore, *Sequestration of Witnesses*, 14 HARV. L. REV. 475, 482 (1901).

34. *Id.*

35. U.S. CONST. amend. VI.

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

37. *See, e.g.*, United States v. Akers, 542 F.2d 770, 772 (9th Cir. 1976) (per curiam) ("The court had been advised that the proceedings would be disrupted if the verdict were unfavorable to the appellants. The court could properly conclude that the threat of harm dictated partial closing of the proceedings.").

38. *Waller*, 467 U.S. at 43.

39. *See* Presley v. Georgia, 558 U.S. 209, 213 (2010).

40. *See* United States v. Rivera, 682 F.3d 1223, 1237 (9th Cir. 2012).

41. *In re* Oliver, 333 U.S. at 273.

42. *Waller*, 467 U.S. at 45.

43. *See* Neder v. United States, 527 U.S. 1, 8 (1999) (citing *Waller*).

44. *In re* Oliver, 333 U.S. 257, 268 (1948).

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

46. State v. Silvernail, 831 N.W.2d 594, 607 (Minn. 2013) (Anderson, J., dissenting) (citing Louis D. Brandeis, Other People's Money and How the Bankers Use It, 92

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."[47]

Beyond this primary abuse-deterrent purpose, a truth-seeking function is also purportedly served by the public availability of proceedings. Philosopher Jeremy Bentham contended 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."[48]

The Supreme Court has set forth a specific set of purposes it believes are served by the right to a public trial.[49] 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."[50]

In *Waller v. Georgia*,[51] the Supreme Court set forth the test trial courts should apply to determine whether courtroom closure is appropriate.[52] The Court held that courtroom closure must satisfy a four-part test to properly comply 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.[53]

The *Waller* test is rigorous.[54] The test is in the nature of "strict scrutiny" review.[55] Like other government actions reviewed under a strict

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(1914)).

47. Max Radin, *The Right to a Public Trial*, 6 TEMP. L.Q. 381, 381 (1932); *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 BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS 54 (W.C. Little & Co. 1872) (1764).

48. 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.").

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

50. *Id.*

51. *Id.* at 48.

52. *Id.*

53. *Id.* (adopting test from a courtroom closure case arising under the First Amendment). *See also* Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 511-12 (1984)).

54. Johnson v. Sherry, 586 F.3d 439, 447 (6th Cir. 2009).

55. *See generally* Stephen E. Smith, *What's in A Name? Strict Scrutiny and the Right to A Public Trial*, 57 IDAHO L. REV. 447 (2021). *Cf. In re* Reporters Comm. for Freedom of the Press, 773 F.2d 1325, 1354 (D.C. Cir. 1985) (citing *Press-Enterprise*, 464 U.S. at 509-11) (Observing "[t]he Supreme Court has most recently spoken as if closure orders

scrutiny standard, the government must demonstrate a strong interest, along with a solution applied that has been narrowly tailored to serve that interest.[56]

The *Waller* test has been applied not only to complete closures of trial proceedings, but also to partial closures of court proceedings.[57] "Partial closures" have been described in a variety of ways, but one succinct definition may be that a "partial closure results in the exclusion of certain members of the public while other members of the public are permitted to remain in the courtroom."[58] It occurs "when some of the public is allowed into the courtroom."[59] Another commentator explains partial closures by example:

> In a partial closure, for example, only members of the defendant's family might be excluded from the courtroom during the testimony of a single witness. 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."[60]

Although the Supreme Court has never ruled on a partial closure case, there are indications that it would consider a partial closure to be a species of closure which would require constitutional scrutiny. For instance, in one early case, the Court opined that "an accused is at the very least entitled to have his friends, relatives and counsel present."[61] This suggests that excluding someone in this category would implicate the Sixth Amendment. More recently, the Court wrote "[t]he problems that may be encountered by trial courts in deciding whether some closures are necessary, or even in deciding *which members of the public should be admitted when seats are scarce*, are difficult ones."[62] This suggests that the exclusion of *some* spectators is not outside the scope of the Sixth Amendment.

Outside the Supreme Court, it is widely agreed that "[b]oth partial and total closures burden the defendant's constitutional rights."[63] But, most courts have applied a slightly different version of the *Waller* test to

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must meet the test of strict scrutiny. . .").

56. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 800 (2006) (explaining strict scrutiny as a two-factor inquiry, requiring that "the governmental ends are compelling" and "the law is a narrowly tailored means of furthering those governmental interests.").

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

58. State v. Sams, 802 S.W.2d 635, 639 (Tenn. Crim. App. 1990).

59. Kristin Saetveit, *Close Calls: Defining Courtroom Closures Under the Sixth Amendment*, 68 STAN. L. REV. 897, 926 (2016).

60. Daniel Levitas, *Scaling* Waller: *How Courts Have Eroded the Sixth Amendment Public Trial Right*, 59 EMORY L.J. 493, 534–35 (2009) (quoting Woods v. Kuhlmann, 977 F.2d 74, 76 (2d Cir. 1992)).

61. *In re* Oliver, 333 U.S. at 272.

62. Weaver v. Massachusetts, 137 S. Ct. 1899, 1909 (2017) (emphasis added).

63. Judd v. Haley, 250 F.3d 1308, 1315 (11th Cir. 2001). *E.g.*, United States v. Allen, 34 F.4th 789, 797 (9th Cir. 2022) (subjecting partial closure to Sixth Amendment scrutiny).

partial closures.[64] While three of the four *Waller* factors remain unchanged when a court reviews a partial closure, these courts provide that in a partial closure case an "overriding interest" need not be shown; instead, they require only a "substantial reason."[65] "[T]he difference between the two standards is not perfectly clear, other than the fact that the reviewing court knows that the 'substantial reason' standard is a more lenient standard than the 'overriding interest' standard."[66] This "modified *Waller* test"[67] used in partial closure cases hews very closely to *Waller* in its original form.[68] The modified *Waller* test simply minimizes the showing necessary under *Waller*'s first factor addressing the strength of the government interest. It is a type of "intermediate" scrutiny.[69]

There are reasons to doubt the validity of the partial closure doctrine. Partial closures may not be closures at all. The good-government goals of the right to a public trial are satisfied by the doors of the court being open to the public, generally; specific exclusions are only faintly significant. The possibility of any member of the public entering the courtroom at any time, and perusing the proceedings for their integrity, should keep all the trial's players from engaging in behavior that reduces the fairness of proceedings. [70]

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64. *See, e.g.*, United States v. Simmons, 797 F.3d 409, 413-14 (6th Cir. 2015) (citations omitted) ("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.").

65. *See, e.g.*, *Woods*, 977 F.2d at 76 (applying "substantial reason" test); Commonwealth v. Downey, 936 N.E.2d 442, 449 n.12 (Mass. App. Ct. 2010) (citing Commonwealth v. Cohen (No. 1), 921 N.E.2d 906, 921 (Mass. 2010) ("When a closure is partial, a 'substantial reason' rather than an 'overriding interest' may suffice to justify the closure.")). *But see Turrietta*, 308 P.3d at 967 (holding *Waller*'s "overriding interest" factor applies in partial closures excluding only some courtroom spectators); People v. Jones, 750 N.E.2d 524, 529 (N.Y. 2001) (holding, in the partial closure context, that "[w]hen the procedure requested impacts on a defendant's right to a public trial, nothing less than an overriding interest can satisfy constitutional scrutiny. . .").

66. *See Turrietta*, 308 P.3d at 967. For purposes of this discussion, it is unnecessary to establish the relative showings that must be made under each standard.

67. This article will use this phrase throughout.

68. *See Simmons*, 797 F.3d at 414 ("All federal courts of appeals that have distinguished between partial closures and total closures modify the Waller test so that the 'overriding interest' requirement is replaced by requiring a showing of a 'substantial reason' for a partial closure, but the other three factors remain the same.").

69. In some areas of constitutional law, courts familiarly apply "tiered scrutiny" to review government actions. These tiers include rational basis scrutiny, intermediate scrutiny, and strict scrutiny. Clark v. Jeter, 486 U.S. 456, 461 (1988) (describing tiers of scrutiny in Equal Protection context). Intermediate scrutiny typically requires that a government action further "an important or substantial governmental interest. . ." United States v. O'Brien, 391 U.S. 367, 377 (1968), and "be substantially related to achievement of those objectives." Craig v. Boren, 429 U.S. 190, 197 (1976).

70. Even were there some small degree of danger to the defendant, other ameliorative processes have long existed to ensure that no damage is done. We have both transcripts and the availability of a robust, regular appeals process. As far back as 70 years ago, one 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

Nonetheless, despite partial closures implicating the Sixth Amendment only minimally, the weight of the jurisprudence treats partial closures as subject to a significant degree of constitutional scrutiny.[71] The great majority of courts have subjected partial closures to the reduced form of *Waller* scrutiny described above. Some courts have gone further, holding that the full set of *Waller* protections applies to even partial closures.[72] That is, they conclude that *Waller*'s requirement of an "overriding" government interest in support of closure is required even for partial closures.[73] Some commentators have taken a similarly absolutist stance, contending that full *Waller* scrutiny is triggered by any exclusion of a spectator from a courtroom.[74] Whatever the form of the test used to scrutinize them, partial closures are a well-established facet of Sixth Amendment law.

IV. THE POTENTIAL CONFLICT BETWEEN THE RULE AND THE RIGHT TO A PUBLIC TRIAL

The Rule's regime of mandatory witness exclusion, reviewable only for abuse of discretion, is different in kind from – and at odds with – the scrutiny courts apply to the exclusion of individuals under the partial closure doctrine. Partial closures – the exclusion of individuals from the courtroom – are typically reviewed under the modified *Waller* test, a type of intermediate constitutional scrutiny. They are not instituted as a matter of course, but only after careful consideration of the need for the closure, and the possibility of alternative ways to satisfy that need. If the exclusion of an individual or some group of people is considered a closure of some type, and if that designation triggers heightened scrutiny, a mandatory, automatic exclusion under the Rule – on mere request – seems unconstitutional.

If the exclusion of *anyone* may be considered a Constitutionally-suspect courtroom closure, witness sequestration must comply with constitutional requirements. Cases analyzing partial closures do not seem to make distinctions about who is excluded.[75] If anyone is required to stay outside, a partial closure has occurred, and a modified *Waller* analysis must be applied to justify the exclusion. The Constitution, of course, prevails over rules of evidence.[76] On their faces, the Rule and the

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> 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.

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

71. *See supra* notes 57-69 and accompanying text.

72. *E.g.*, State v. Turrietta, 2013-NMSC-036, ¶ 4, 308 P.3d 964, 970.

73. *Id.*

74. Saetveit, *supra* note 59, at 926, Levitas, *supra* note 60, at 535.

75. *See supra* notes 57-69 and accompanying text.

76. *E.g.*, Safarik v. United States, 62 F.2d 892, 897 (8th Cir. 1933) ("A rule of practice must not be allowed for any technical reason to prevail over a constitutional right.") (internal citation omitted).

Constitution conflict.

There are significant obstacles posed to witness sequestration if the scrutiny required by the modified *Waller* partial closure approach is made categorically applicable to the exclusion of witnesses. They are threefold: (1) that the interest advanced to justify the closure is found "likely to be prejudiced," (2) that the closure be "no broader than necessary," and (3) that specific findings be made.[77]

Applying some parts of the modified *Waller* test to particular witness sequestrations may be easy. For instance, in many cases, sequestration will serve an important purpose – the truth-seeking purpose of preventing a witness from crafting testimony.[78] The test, however, requires not only an important purpose, but a finding that the purpose sought to be advanced is "likely to be prejudiced."[79] This may be very difficult to determine in an individual case, and very burdensome to explore. For example, if the concern is collusion between witnesses, must there be an extensive proffer of their potential testimony to examine areas of potential overlap? Recall that witness exclusion happens on request under the Rule.[80] But, a public trial analysis does not accept automatic closures.[81] Automatic exclusion fails to consider what the specific testimony may be and the seriousness of the risks of witness collusion (or other witness concerns). A response that witness sequestration has a tendency, *generally*, to further truth-seeking would be inadequate.[82] Heightened scrutiny typically requires individualized assessment, not resort to generalization: "reliance on the 'aggregate' and on probabilities [would indicate an abandonment of] heightened scrutiny, which requires a direct rather than approximate fit of means to ends."[83] If exclusion is automatic, on request, it fails to assess the likelihood that the truth-seeking function of exclusion would be impaired *without the specific exclusion order at issue*.

Related to the prejudice requirement, the requirement that the closure – the exclusion of the witness – be narrowly tailored and "no broader than necessary" to accomplish that purpose[84] may also be difficult to justify in a sequestration order. Narrow tailoring requires

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

78. *See, e.g.*, United States v. McPherson, 587 F. App'x 556, 566 (11th Cir. 2014) (concluding that the Rule's goal of preventing false testimony is a "substantial reason" under the modified *Waller* analysis).

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

80. FED. R. EVID. 615.

81. *See Waller*, 467 U.S. at 48 (providing conditions that must be met for a closure to pass constitutional muster).

82. State v. Decker, 2018 ND 43, ¶ 10, 907 N.W.2d 378, 384 (condemning reliance on "a generic, broad rationale [that] would permit courtroom closure nearly any time.").

83. Metro Broad., Inc. v. F.C.C., 497 U.S. 547, 620 (1990) (O'Connor, J. dissenting), *overruled* by Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995). *See also* Johnson v. California, 543 U.S. 499, 521 (2005) (noting, in race discrimination case, the court's preference for individualized assessment over generalization).

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

perhaps a "least restrictive alternative,"[85] and at least the consideration of alternatives.[86] To determine if there is a danger to honest testimony, the court may, again, need extensive proffers to determine what the parties will testify about, and how they might influence each other. The broad injunction of "witnesses out" would have to be replaced with a more nuanced assessment of possible outcomes. A Sixth Amendment-sensitive inquiry might result in *some* witnesses being sequestered, while others are permitted to remain.

Moreover, *Waller*'s test (including the modified partial closure version), requires the entry of findings sufficient to support the decision, that is, an explanation for why the decision to exclude is appropriate in a particular case.[87] But, sequestration orders are rarely supported by detailed findings: "[i]n practice, it is most common for trial courts to enter highly abbreviated orders on the subject."[88] An order indicating only that the excluded person was a potential witness should be inadequate to document the necessity of exclusion.

To the extent the partial closure doctrine is a viable one, and to the extent witness exclusion is a partial closure by definition, the Rule's mandatory application and presumptive applicability are at odds with the Sixth Amendment's more nuanced demands. The modified *Waller* test requires individualized determinations of both the interest at stake and the likelihood that the interest will be prejudiced without exclusion.[89] The test requires that closures *not* be mandatory on request, but be ordered only on a strong showing of need and appropriateness.[90] And, indeed, the partial closure doctrine presumes the *invalidity* of the closure – the starting point is one of openness that must be overcome.[91] This is the opposite of the approach under the Rule, which presumes witnesses will be excluded.[92]

A. Judicial Responses to the Conflict

Some criminal defendants have identified the possibility that witness exclusion may effect a partial closure of the courtroom, and have complained that their Sixth Amendment rights were violated by the requirement that witnesses leave the courtroom. The courts have almost uniformly rejected these challenges, typically in a summary way. For instance, in *State v. Culkin*,[93] the defendant claimed that his right to a public trial was violated when the trial court excluded his father from the

85. Sable Commc'ns of California, Inc. v. F.C.C., 492 U.S. 115, 128 (1989).

86. *Waller* makes this explicit, providing, in its third prong, that the trial court "must consider reasonable alternatives" to closure. *See Waller*, 467 U.S. at 48.

87. *See id*.

88. OHIO EVID. R. 615 staff note 2003 amendment.

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

90. *Id.*

91. *See* Williams v. Burt, 949 F.3d 966, 975 (6th Cir.), *cert. denied*, 141 S. Ct. 276 (2020).

92. *Opus 3 Ltd.*, 91 F.3d at 628.

93. State v. Culkin, 35 P.3d 233, 238 (Haw. 2001).

courtroom as a potential prosecution rebuttal witness, in accordance with Hawaii's version of the Rule.[94] Without significant analysis – and no mention of the *Waller* test – the Supreme Court of Hawai'i rejected the contention.[95]

First, the court noted the truth-seeking purposes of the Rule.[96] The court then acknowledged the abuse deterrence purpose of the right to a public trial.[97] It then concluded that "the right to a public trial is not implicated by the exclusion of a potential witness pursuant to the witness exclusionary rule. Both the witness exclusionary rule and the right to a public trial ensure, inter alia, the appearance of fairness at trial."[98] The court did no more than note that each procedure has a salutary purpose. It did not wrestle with the ways in which they are potentially at odds.

The Georgia Supreme Court faced a similar situation in *Nicely v. State*.[99] There, the defendant alleged that sequestration of his father under Georgia's version of the Rule[100] violated his Sixth Amendment right to a public trial.[101] The Court wrote that the defendant did:

> not point us to a single case in which the sequestration of a witness was held to violate the right to a public trial, and we have found none. To the contrary, we have found case upon case in which courts have held that the rule of sequestration ordinarily does not even implicate the right to public trial, much less infringe upon it.[102]

Court after court makes similar statements about the inapplicability of Sixth Amendment rules to sequestrations.[103] Some have concluded,

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94. *Id.* at 258.

95. *Id.*

96. *Id.* at 259.

97. *Id.*

98. *Id.* This conclusion was reiterated by the Intermediate Appeals Court of Hawai'i in State v. Jin Wang, 445 P.3d 145 (Haw. Ct. App. 2019).

99. Nicely v. State, 733 S.E.2d 715, 720 (Ga. 2012).

100. GA. CODE ANN. § 24-6-615 (West).

101. *Nicely*, 733 S.E.2d at 720.

102. *Id.*

103. Com. v. Collins, 21 N.E.3d 528, 541 (Mass. 2014) ("It is plain that, *after* the jury are sworn, a sequestration order that excludes from the court room all persons whom the parties have identified as potential witnesses at trial does not constitute a partial closure and therefore requires no specific findings that the sequestration is necessary."); People v. McRae, 47 Misc. 3d 619, 623 (N.Y.Crim. Ct. 2015), *aff'd*, 61 Misc. 3d 155(A), 112 N.Y.S.3d 409 (N.Y. App. Term. 2018) ("A common exception to the right of the public to attend a trial is the witness sequestration rule."); State v. Hancock, 379 P.3d 1024, 1027 (Az. Ct. App. 2016) ("[W]e have found no cases, in Arizona or elsewhere, holding that exclusion of potential witnesses violated the right to a public trial."); People v. Jones, 2020 CO *45 n.2, 464 P.3d 735, 741 (2020) (". . .it is well-accepted that sequestration orders do not implicate this right."); Daly v. United States, No. 97-CV-2385 TCP, 2012 WL 1672932, at *3 (E.D.N.Y. May 10, 2012) (". . .the test related to courtroom closures is simply inapplicable to the subject of Daly's habeas petition which concerned the exclusion of potential witnesses under FRE 615."); United States v. Love, 743 F. App'x 138, 138 (9th Cir. 2018) ("Rule 615 sequestrations do not violate the Sixth Amendment's public-trial guarantees."); People v. Nevarez, 245 A.D.2d 173, 173, 665 N.Y.S.2d 890, 890 (N.Y. App. Div. 1997) ("She was properly excluded since the prosecutor, whose good faith was unchallenged by defendant at

taking an outlier position, that the partial closure worked by sequestration is permissible because partial closures are not constitutionally significant.[104] At least one court has taken a semantic route to its conclusion, opining that once someone is designated as a "witness" they are no longer a part of the "public" contemplated by the phrase "public trial."[105]

Courts have occasionally been receptive to the idea that the Sixth Amendment may need to be considered when issuing a witness sequestration order. In one Eighth Circuit case, the Court of Appeals, while again concluding summarily that the trial court had not abused its discretion in ordering exclusion under the Rule, noted that the trial court had considered the public trial implications of sequestration: "to the extent that the exclusion . . . amounts to a partial closure of the proceedings, the district court made express findings as to why partial closure was warranted under the circumstances."[106] A subsequent Eighth Circuit case, however, simply presumed the applicability of the Rule over a public trial objection.[107]

A recent unpublished Ninth Circuit case determined that a sequestration order, by its terms, satisfied constitutional requirements for a partial closure under the modified *Waller* test.[108] The court recounted that "[t]he government subpoenaed [defendant's] nephew and another observer and invoked Rule 615, and the district court excluded them under that rule."[109] Concluding that this was neither an abuse of discretion as an evidentiary ruling, nor a violation of the right to a public trial, the court presumed that the exclusion worked a partial closure of

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trial, identified her as a potential witness, and the court's discretionary determination 'did not implicate defendant's right to a public trial.'") (citation omitted).

104. Buckman v. Roden, No. 13-CV-11413-IT, 2015 WL 1206348, at *4 (D. Mass. Mar. 17, 2015) (holding that sequestration order did not violate the right to a public trial because it does not protect against partial closures); Zornes v. Smith, No. 16-CV-1730 (ECT/KMM), 2020 WL 4288312, at *7 (D. Minn. July 27, 2020) (holding that sequestration order did not violate the right to a public trial because it was not objectively unreasonable for court to believe right does not protect against partial closures); State v. Jordan, 325 S.W.3d 1, 53 (Tenn. 2010) (holding that "the rule does not threaten any" of the interests protected by the right to a public trial).

105. Tharp v. State, 362 Md. 77, 95, 763 A.2d 151, 160 (Md. 2000) (concluding that the Rule "is a clear exception to a criminal defendant's right to a public trial. In effect, those sequestered by Rule 5–615 are no longer considered members of the general public for purposes of exclusion from the courtroom during criminal proceedings, and a criminal defendant's right to a public trial is in no way damaged by proper sequestration under [Maryland] Rule 5–615."). This approach has some appeal, but the right to a public trial seems less about a talismanic identification of an "in" or "out" group than about a presumption of openness that can be overcome only with sufficient justification. Historical understanding of the scope of openness, as I argue here, is one such justification.

106. United States v. Blanche, 149 F.3d 763, 770 (8th Cir. 1998).

107. United States v. Ricker, 983 F.3d 987, 995 (8th Cir. 2020), as corrected (Dec. 29, 2020), *cert. denied*, 141 S. Ct. 2687, 210 L. Ed. 2d 843 (2021).

108. United States v. Sanchez, 853 Fed.Appx. 141, 143-44 (9th Cir. 2021).

109. *Id.* at 143.

the courtroom.[110] It held the closure was permissible, concluding that "because the government proffered a legitimate basis for the subpoena, there was a 'substantial reason' for the partial closure."[111] The court did not inquire into the case-specific strength of that "legitimate basis," however, nor investigate the other elements of the modified *Waller* test.

There are examples of courts performing a more detailed Sixth Amendment analysis in response to a request for sequestration. For instance, in *State v. Daugherty*,[112] the defendant claimed that the trial court violated his right to a public trial when it sequestered subpoenaed witnesses from the courtroom. He alleged that "the subpoenas were a sham device designed to exclude the friends and family members from the trial."[113] The court of appeals noted that the trial court had performed a *Waller*-like review of the exclusion in entering its order.[114] It "made a record of its basis for exclusion and the identity of potential witnesses and that record shows that the court balanced the defendant's right to a public trial with the State's interest in preserving the integrity of potential witnesses. Thus, Daugherty's constitutional claim fails."[115]

The issue of a potential "sham device," a weaponization of the Rule, has been the only instance in which a public trial objection has been able to overcome sequestrations under the Rule. *Addy v. State*[116] and *State v. Sams*[117] aptly illustrate the danger to public trial interests that witness sequestration requests may pose. Both involve prosecutors invoking the Rule in bad faith, not to exclude individuals based on their status as witnesses, but for some other reason.

In *Addy*, the prosecutor identified six members of the courtroom audience as potential witnesses and requested that they be "placed under the rule as potential witnesses."[118] Defendant's counsel protested immediately, indicating that the spectators were "not witnesses, they are friends of the Defendant's [sic]. They are not going to testify."[119] The prosecutor responded, indicating that she was going to call them.[120]

The defense attorney, recognizing the subterfuge, explained the public trial problem to the trial court:

> Your honor, before they are excluded, I would ask that they be released from the Rule. They have no knowledge of any of the facts of this case. They are friends of the Defendant. The Prosecution has chosen to swear these people in for the sole purpose of getting them outside the courtroom. She has no idea who they are or what they are going to say. We object, Mr. Addy

110. *Id.* ("The government concedes that excluding the nephew constituted a partial closure.").
111. *Id.* at 143-44.
112. State v. Daugherty, 2002 Wash. App. LEXIS 395, at *1 (Wash. Ct. App. 2002).
113. *Id.* at *2.
114. *Id.*
115. *Id.*
116. Addy v. State, 849 S.W.2d 425, 426 (Tex. App. 1993).
117. State v. Sams, 802 S.W.2d 635, 637 (Tenn. Crim. App. 1990).
118. *Addy*, 849 S.W.2d at 426.
119. *Id.*
120. *Id.*

> has the right to have these people present in the courtroom as they have no, no information concerning anything having to do with this case, and I would ask the Court to inquire if the Court chooses, but to deprive Mr. Addy of access to his friends in a public courtroom is a deprivation of his rights as guaranteed to him by the 6th Amendment, and we would ask the Court to, at the very least, make an inquiry of each of these folks.[121]

The Court enforced the Rule against the spectators, relying on the prosecutor's assertion that there was a "great possibility" that she would call the spectators.[122] Ultimately, she did not call any of the excluded audience members, and, in a colloquy with the trial court, indicated her reason for excluding them had not been for sequestration purposes, but because she "felt there was a grave security issue with our informant."[123]

The Court of Appeals concluded that Addy's right to a public trial had been violated.[124] It specifically concluded that witness sequestration could not be invoked to exclude spectators in furtherance of non-sequestration purposes:

> The State claims that the mandatory language of Tex.R.Crim.Evid. 613, the "exclusion of witnesses rule," permits it to identify any spectator as a witness and have that person removed from the courtroom. We disagree. If this were true, the prosecution would have unlimited power to control who stayed in the courtroom during trial by merely invoking the provisions of the "exclusion of witnesses rule" to those it considered undesirable as spectators.[125]

In *State v. Sams*, the Tennessee Court of Criminal Appeals similarly condemned a prosecutor's pretextual use of the Rule.[126] There, the prosecutor contended that the defendant's family members were creating a disturbance in the courtroom by speaking loudly during the proceedings.[127] Responding to this purported disturbance, the prosecutor told the court that he had, "served five (5) subpoenas, had the officers serve five (5) subpoenas on those people, and since the defendant has asked for the rule, I would ask that they step out."[128] The trial court ordered sequestration of the spectators.[129]

The Criminal Court of Appeals easily identified the bad faith invocation of the rule, writing that "[t]he statements made by the assistant district attorney general make it crystal clear that he used the subpoena power of the trial court as a subterfuge for excluding the appellant's relatives from the courtroom. He had no intention of calling these individuals as witnesses."[130] Accordingly, the court subjected the

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121. *Id.* at 426-27.
122. *Id.* at 427.
123. *Id.* at 428.
124. *Id.* at 430.
125. *Id.* at 429.
126. *Sams*, 802 S.W.2d at 641.
127. *Id.* at 636.
128. *Id.*
129. *Id.*
130. *Id.* at 637.

exclusion of the defendant's family members to a partial closure analysis.[131] It concluded that their exclusion foundered on the first element of the modified *Waller* test – no "substantial reason" existed to remove the family members from the courtroom.[132] The defendant's conviction was reversed.[133]

Disingenuous use of sequestration requests is not unheard of. For example, while the court acceded to the following exclusion, the facts suggest a non-testimonial purpose to the invocation of the Rule:

During a break in the cross-examination of the government's witness Todd Middleton, he indicated his intention to recant his testimony. The Assistant United States Attorney ("AUSA") advised the Court that he believed that two women in the gallery "might have 'had something to do with' Middleton's sudden repudiation of his testimony." The AUSA then moved for the exclusion, under Federal Rule of Evidence 615, of all of Daly's relatives as well as co-defendants Warren Nadel and Vincent Lopez on the basis they were potential witnesses. The Court ordered the exclusion of "all relatives of the defense . . . from the trial on the motion of the United States Attorney."[134]

A better conclusion here would have been to follow the lead of *Sams* and subject the exclusion of the relatives to a modified *Waller* analysis. The purpose of the exclusion was facially unrelated to any prospective testimony by the relatives. In the absence of any relationship between exclusion and testimony, the Rule has no application.

V. THE RULE AND THE RIGHT TO A PUBLIC TRIAL CAN COEXIST

Standard implementation of the Rule will not result in Sixth Amendment violations. Historical understandings of the Sixth Amendment's public trial right would have contemplated longstanding witness sequestration rules. Moreover, witness sequestration ordinarily causes no meaningful prejudice to the amendment's purposes.

A. The History of Witness Sequestration

The best reason for courts to resist assertions that the Sixth Amendment should overcome witness sequestration requests is the history of coexistence of the Rule and the right to a public trial. The provenance of witness sequestration is long. "The merit of such a rule has been recognized since at least biblical times."[135] Accordingly, the original – and ongoing – understanding of an open courtroom would have been one that is open *except* to potential witnesses.

Originalists, of course, may especially value the historical

131. *Id.* at 640.
132. *Id.*
133. *Id.* at 641.
134. *Daly*, 2012 WL 13176319 at *1.
135. *Opus 3 Ltd.*, 91 F.3d at 628.

evidence.[136] But one need not adhere to the project of originalism to recognize the value of history in determining the scope of a constitutional right: "[v]irtually everyone agrees that the specific intentions of the Framers count for something."[137] Original meaning provides guidance, perhaps not binding, but at least highly instructive. "Original understanding is therefore a component of pragmatist constitutional adjudication."[138]

Post-ratification history also matters to the act of constitutional interpretation. "[I]interpretation of the Constitution is guided by a Government practice that 'has been open, widespread, and unchallenged since the early days of the Republic.'"[139] The Supreme Court recently relied on a post-ratification "history of regulating off-premises signs" to determine that such regulation was permitted, and not an example of content discrimination prohibited by the First Amendment.[140] The court noted that the types of signs at issue "were not present in the founding era, but as large outdoor advertisements proliferated in the 1800s, regulation followed. As early as 1932, the Court had already approved a location-based differential for advertising signs."[141] The court concluded that "[t]he unbroken tradition of on-/off-premises distinctions counsels against the adoption of [a] novel rule."[142] The Rule shares a similar "unbroken tradition" of implementation.

The history of the Rule, in times proximate to ratification of the Sixth Amendment[143] and in the centuries subsequent, suggests that its validity

136. *E.g.*, United States v. Vaello Madero, 142 S. Ct. 1539, 1556 (2022) (Gorsuch, J., concurring) (invoking "legally justified tools . . . including not just the Constitution's text and its original understanding but the Nation's historical practices. . ."); Carpenter v. United States, 138 S. Ct. 2206, 2250 (2018) (Alito, J. dissenting) ("[H]istory . . . tells us what was on the minds of those who ratified the Fourth Amendment and how they understood its scope.").

137. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 881 (1996).

138. Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1380 (1990). *See also* Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 24–25 (2009) ("Not a single self-identifying non-originalist of whom I'm aware argues that original meaning has no bearing on proper judicial constitutional interpretation. To the contrary, even those scholars most closely identified with non-originalism . . . explicitly assign original meaning or intentions a significant role in the interpretive enterprise.").

139. Dep't of Com. v. New York, 139 S. Ct. 2551, 2567 (2019) (quoting NLRB v. Noel Canning, 573 U.S. 513, 572 (2014) (Scalia, J., concurring in judgment)). *See* United States v. Gaudin, 515 U.S. 506, 519 (1995) ("[U]niform postratification practice can shed light upon the meaning of an ambiguous constitutional provision.").

140. City of Austin, Texas v. Reagan Nat'l Advert. of Austin, LLC, No. 20-1029, 2022 WL 1177494, at *7 (U.S. Apr. 21, 2022).

141. *Id.*

142. *Id. See* Williams-Yulee v. Florida Bar, 575 U.S. 433, 446 (2015) (recognizing "history and tradition of regulation" as relevant when considering the scope of the First Amendment).

143. 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. 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 53, at 388 ("It is likely that the word 'public' was introduced into the list of the rights

has gone unquestioned. While there is little or no 18th or 19th Century law directly confronting the relationship between the Rule and the right to a public trial, when the right was added to the Constitution, the Rule was a familiar tool of courtroom management. The "trial" that the Sixth Amendment required to be "public" was one that anticipated existing sequestration procedures.[144]

Professor Wigmore, in a seminal article on witness sequestration, canvassed the Rule's history.[145] He begins by recounting the biblical story of Susanna, in the Book of Daniel.[146] The story has been often retold in subsequent accounts of witness sequestration rules.[147] In short, Susanna was accused of adultery, on the accounts of two maids.[148] Daniel said, "[p]ut these two aside, one far from another, and I will examine them."[149] Questioning them individually, he heard different stories from each, putting the lie to their testimony about Susanna.[150] Wigmore writes that "[f]rom almost the beginning of our recorded trials, the story is found repeatedly cited, and was a favorite text of invocation."[151] He reported the story of Susanna appearing in texts from the 15th Century[152] and reports of trials in the 17th Century.[153] He asserts that "[f]rom the beginning of this epoch, and onwards, it is clear that the practice [of sequestration] was well known and often used [and] has persisted in this manner without essential change."[154] While Wigmore was reporting only on the Rule's history, and not its interaction with the right to a public trial, his identification of the widespread use and familiarity of the rule simultaneously identifies a bedrock principle of trials. The original understanding of a public trial was one that simultaneously incorporated the Rule.

While most writers on the Rule have relied (rightfully) on Wigmore's

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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.").

144. Of course, some evidence rules have changed since the 18th Century. For instance, "[d]isqualification [of witnesses with an interest in the proceeding] greatly narrowed the range of potential witness testimony at common law trial. The most valuable witnesses (the parties and their privies) were routinely unavailable." John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168, 1185 (1996). Today, of course, Rule 615 and equivalents expressly permit parties to testify.

145. Wigmore, *supra* note 21.

146. *Id.* at 476.

147. *E.g.*, Sarah Chapman Carter, *Exclusion of Justice: The Need for A Consistent Application of Witness Sequestration Under Federal Rule of Evidence 615*, 30 U. DAYTON L. REV. 63 (2004); Matthew M. Valcourt, *Rule 615-Beyond the Walls of the Courtroom Proper: Efficacious Truth-Seeking Device or Toothless Tiger?,* 10 SUFFOLK J. TRIAL & APP. ADVOC. 115 (2005).

148. Wigmore, *supra* note 21, at 475.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 476 n.3.

153. *Id. See also id.* at 482-84.

154. *Id.* at 478.

historical research to explain the rule's pedigree,[155] this article attempts to append a few notes to the historical record subsequent to ratification. References to the Rule in early 19th Century cases and treatises, for instance, make it even clearer that the Rule was, as Wigmore asserts, "well known and often used" rather than a novelty. By doing so, the case is made stronger that excluding a witness was considered a standard courtroom management tool, rather than an unconstitutional partial closure of the courtroom.

Many 18th and 19th Century evidence treatises include portions setting forth the Rule. Some do not describe it, but none indicate that the Rule is *not* a standard trial management tool.

The treatises are occasionally explanatory, but some report only results in prior cases, much like the squibs in a digest or in notes of decision. An example of the latter is provided in Charles Viner's 1792 treatise which reports: "[w]here two witnesses were produced as witnesses, to prove a bond suspected of forgery, the Court upon motion ordered the witnesses to be examined apart, and the one not in the hearing of the other." [156] The Viner treatise was cited in support of evidentiary principles in three Supreme Court cases at the turn of the 19th Century, suggesting its weight as a source.[157] The Underhill and Wharton treatises similarly catalog citations to numerous 19th century witness sequestration cases, without significant commentary.[158]

More explanatory, descriptive coverage of the Rule is included in other treatises, including editions of Simon Greenleaf's *A Treatise on the Law of Evidence*. Greenleaf was a legal commentator of consequence; an early Yale Law Journal review of his treatise stated that "to quote from Greenleaf is to quote law."[159]In his 1842 edition, Greenleaf writes that "[i]f the judge deems it essential to the discovery of Truth, that the witnesses *should be examined out of the hearing of each other,* he will so order it; and this order upon the motion or suggestion of either party is rarely withheld."[160] In a later edition, he writes that "[i]n the ordinary practice of the court, the witnesses are examined apart from each other, no witness being allowed to be present during the examination of another who is called before him."[161]

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155. *See* Carter *supra* note 113.

156. 12 CHARLES VINER, A GENERAL ABRIDGEMENT OF LAW AND EQUITY 47 (London, G. G. J. and J. Robinson, T. Payne, E. and R. Brooke, T. Whieldon and J. Butterworth; and L. White 2d ed. 1792).

157. Church v. Hubbart, 6 U.S. 187, 207 (1804); Gelston v. Hoyt, 16 U.S. 246, 301 (1818); Doe ex dem. Patterson v. Winn, 30 U.S. 233, 242 (1831).

158. H.C. UNDERHILL, A TREATISE ON THE LAW OF CRIMINAL EVIDENCE § 359 (Indianapolis, Bowen-Merrill 1898); FRANCIS WHARTON, A TREATISE ON THE LAW OF EVIDENCE IN CRIMINAL ISSUES § 446 (Rochester, Lawyers Co-operative Pub. Co. 1912).

159. Book Review, 9 YALE L.J. 72 (1899) (reviewing SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE (John Henry Wigmore ed., 16th ed. The Lawbook Exchange, Ltd. (2001) (1899)).

160. 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 432 (Boston, C.C. Little & J. Brown 1842).

161. 3 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 491 (Boston, C.C. Little & J. Brown 13th ed. 1876). Although included in a section on courts-martial, this

Further prescriptive material adding to the case that the Rule was well known in early American history is provided in the Notes to Phillipps' Treatise on the Laws of Evidence, from 1839.[162] The Rule is described in some procedural detail:

> [w]here witnesses are ordered to withdraw, each party furnishes his list of them to the sheriff, whose duty it then becomes to take charge of them, and see that they are kept out of the hearing of each other's examination; and if the order be violated, he will then know it and apprise the party.[163]

Review of the Gilbert and Bathurst treatises[164] reveals no references to witness sequestration.

Cases from the early 19th Century also indicate awareness, use, and the propriety of witness sequestration. Many are cited in the foregoing treatises, some are mentioned by Wigmore.[165] The few others available, like many 18th and 19th Century decisions, tend to be quite cursory. They are cited not for their depth of analysis, but for their acknowledgement of the Rule.

For example, in the 1830 case *Com. v. Knapp*,[166] the court provided familiar language describing the Rule: "[i]n a capital trial, the Court, upon motion, will exclude from the courtroom all the witnesses except the one under examination."[167] In the 1834 case *United States v. Gibert*,[168] the court, recounting the course of trial, reported that witnesses had been sequestered in a trial for robbery on the high seas. Describing the rule as non-mandatory, the 1840 case *Keith v. Wilson*[169] wrote that the Rule "appears from all the authorities, [to be] not an inflexible rule, but the exclusion of a witness under it must depend somewhat on the discretion of the court."[170]

Judge William Cranch, of the District of Columbia Circuit, provided mixed signals on the rule. In the 1834 case *United States v. Woods*,[171] he "observed that . . . if [the court] had been originally asked to exclude all the witnesses on both sides, except the one under examination, it is probable the court would have granted it."[172] In an 1808 case, however,

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was not intended to be limited to such courts. He indicates that courts-martial "are bound, in general, to observe the rules of evidence by which the courts of criminal jurisdiction are governed." *Id.* at § 476.

162. ESEK COWEN, NOTES TO PHILLIPPS' TREATISE ON THE LAWS OF EVIDENCE 720 (Gould Banks 1839).

163. *Id.*

164. *See generally* GEOFFREY GILBERT, LAW OF EVIDENCE (Philadelphia, Joseph Crukshank 7th ed. 1805); EARL H. BATHURST, THE THEORY OF EVIDENCE (Dublin, Sarah Cotter 1761).

165. Wigmore, *supra* note 21.

166. Com. v. Knapp, 26 Mass. 496, 505 (1830).

167. *Id.*

168. United States v. Gibert, 25 F. Cas. 1287, 1293 (C.C.D. Mass. 1834).

169. Keith v. Wilson, 6 Mo. 435, 441 (Mo. 1840).

170. *Id.*

171. United States v. Woods, 28 F. Cas. 762, 763 (C.C.D.D.C. 1834).

172. *Id.*

he appeared to express concern about the rule. In *Joice v. Alexander*,[173] defendant's counsel:

> [S]uggested that the witnesses for the petitioner were of bad character, and believed they would not testify fairly if permitted to hear each other's testimony, and moved the court to direct that all the plaintiff's witnesses but one should be excluded from the court room, which THE COURT granted; CRANCH, Chief Judge, *doubting very much as to the propriety of such a practice as a general rule*, without some further evidence of combination or corruption.[174]

This indicates that Judge Cranch had some hesitation about the rule, but the excerpt suggests that his issue may not have been with sequestration, generally, but with basing a sequestration order on an assertion about the personal qualities of the witnesses.

In any event, Cranch's hesitation about applying the Rule in *Joice* is very much the exception. In case after case, and treatise after treatise, judges and commentators acknowledge and apply the Rule. There is no history of the Rule that indicates that it is anything but commonplace. No "founding father," no ratifier, and no judge in the 18th or 19th Century would have thought that it was at all unusual to exclude potential witnesses. Their visions, and our ongoing understandings, of a public trial were and are ones that would accommodate this standard procedure.

B. Witness Sequestration is Consistent with the Purposes of the Right to a Public Trial

As indicated above, if witness exclusion orders must be subjected to modified *Waller* analyses as a matter of course, they will have difficulty passing muster.[175] The mandatory nature of exclusion orders, issued on request, is at odds with the mechanics and demands of heightened scrutiny. The first response to this is the historical one – the history of the practice indicates no one expected heightened scrutiny of each sequestration request. But this seems inadequate, standing alone. It should further be shown that sequestration does not damage the goals of the right to a public trial. Accordingly, some review of the relationship between the Sixth Amendment's purposes and the practice of witness exclusion makes sense. On top of historical practice, sequestration procedures are congruent with Sixth Amendment values.

The Supreme Court has explained that 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."[176]

The first purpose is to deter trial actors from engaging in rights-denying behavior. The Sixth Amendment's abuse-deterrence purpose will

173. Joice v. Alexander, 13 F. Cas. 907, 907 (C.C.D.D.C. 1808).
174. *Id.* (emphasis added).
175. *See supra* Section IV.
176. *Waller*, 467 U.S. at 46.

be minimally implicated in most cases of witness exclusion, as in other partial closures. If the right to a public trial is about shining sunlight on the proceedings, the presence of any members of the public should achieve that. The exclusion of an individual or small group places a vanishingly small impediment in the way of the Sixth Amendment's goal of fair procedure.

It may be useful to consider the possible abuses that the right to a public trial could prevent. Courts invoking the right frequently describe its purpose as preventing "the abuses which history shows were brought about by secret trials."[177] At the most egregious – and, frankly, preposterous – end would be physical intimidation of the defendant: torture, a forced confession.[178] The presence of *any* observer should be an adequate deterrent to keep the prosecutor or judge from engaging in overtly wrongful behavior. So, are there more believable wrongs that a judge or prosecutor might perpetrate in a courtroom in which someone has been excluded? These would have to be wrongs that are more in the nature of *malum prohibitum* – wrongs that are not obvious but made illegal by positive law. These might include violations of evidence rules, or improper communications between prosecutor and judge. These actions should be objected to by defense counsel (who would certainly be present).[179] Moreover, they might be rectified on appeal. But to the extent that the possibility of some real-time response by an in-court observer is required to ensure fairness, there is no reason to believe that the presence of a particular fact witness will dissuade the judge or prosecutor from engaging in gross legal error. Moreover, very few lay witnesses would have the knowledge necessary to discern the nature of the legal wrong taking place before them.

The Supreme Court has indicated that the presence of friends and family is a particular concern of the Sixth Amendment.[180] Of those witnesses potentially excluded by the Rule, there's no question that a family member, who is also a potential witness, will be more interested in and attuned to the way a trial is conducted than will a spectator "off the street." Family members may, indeed, be the best auditor of the proceedings, making sure that no rights-denying tricks are played by the judge or prosecutor (if they possess the knowledge of what those tricks might be). But to the extent the right to a public trial exists to remind the prosecutor and judge of their duties, the presence of any eyes should almost always suffice:

> [T]he presence of others may affect human experience in various ways: it

177. State v. Croak, 118 So. 703, 704 (La. 1928).

178. Forced confessions outside the courtroom are perhaps less preposterous. *See Coerced to Confess: How U.S. Police Get Confessions* (Mar. 20, 2019), Al Jazeera, www.aljazeera.com/features/2019/3/20/coerced-to-confess-how-us-police-get-confessions [perma.cc/92EF-VTGZ].

179. A jury might also be present, but the right to a jury is provided textually in the Sixth Amendment, independently from the right to a public trial. This indicates that the presence of a jury alone does not satisfy the right to a public trial.

180. *In re* Oliver, 333 U.S. at 268.

> 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.[181]

So long as there are observers, or even the possibility of observers (not all trials are well-attended), the Sixth Amendment's commitment to ensuring fair proceedings is satisfied. Fair proceedings are not ordinarily compromised by excluding a potential witness, including a family member of the defendant, from the courtroom. Even if a witness is excluded, trial participants still know that their actions are subject to review by any other auditor who may enter the courtroom.

The second purpose of the right to a public trial, encouraging witnesses to come forward, stems 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.[182] Nothing about witness sequestration conflicts with this "witness-attraction" function.

Finally, the same is true of purpose of discouraging perjury. This purpose is achieved in a straightforward way, with the sunlight of publicity.[183] 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. An excluded witness will do an even better job of accomplishing this goal. Indeed, impeding perjury is the point of witness exclusion: "[i]t exercises a restraint on witnesses 'tailoring' their testimony to that of earlier witnesses; and it aids in detecting testimony that is less than candid."[184] The excluded witness lays in wait precisely to capture the unwary perjurer, not from the audience, but from the witness stand, typically with the guidance of counsel.

There is minimal-to-no prejudice done to the purposes of the right to a public trial by the exclusion of witnesses in the courtroom. Taken in combination with sequestration's "unbroken tradition" of use, invocation of the Rule should almost never trigger a *Waller* analysis.

VI. AN APPROACH TO THE LIMIT CASES

But there are limits to this broad acceptability. The right to a public trial will be implicated in some situations, warranting Sixth Amendment

181. Thomas J. L. van Rompay, Dorette J. Vonk, Marieke L. Fransen, *The Eye of the Camera Effects of Security Cameras on Prosocial Behavior*, 41 ENVIRONMENT & BEHAVIOR 60, 61-62 (2009) (citations omitted) (reviewing previous research).

182. *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.").

183. *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.").

184. Geders v. United States, 425 U.S. 80, 87 (1976).

scrutiny. As the *Addy*[185] and *Sams*[186] cases indicate, there are instances where witness exclusion and the right to a public trial will meaningfully conflict. Accordingly, courts should have tools that can enable them to both honor standard practice and protect constitutional rights. If a prosecutor invokes sequestration in a way that eliminates significant public participation, and a defendant can make an initial showing of bad faith, a court should determine whether a suspicious blanket sequestration order is appropriate.

Consistent with both historical practice and present-day forms of the Rule, the default, the presumption, should be exclusion on request. The provenance of the practice is too long and too familiar to be disturbed. When the Rule is invoked, potential witnesses, as identified by either side (and not subject to a statutory or common law exception) should be excluded. That presumption should be almost irrebuttable when the witness has no personal connection to the defendant. The courts have been most solicitous of defendants' public trial rights when friends and family are involved.[187] That solicitousness is not due to strangers to the defendant. No case subjecting a sequestration order to *Waller*-like scrutiny has involved non-affiliated individuals.

But there is no indication that the Rule has applied with any less force to family and friends, historically. The Rule applies to all witnesses. Indeed, family and friends may be precisely the people who, as witnesses, most need to be discouraged from changing their testimony in a way to help the parties to whom they are intimately connected. So even when a friend or family member is excluded, the presumption in favor of sequestration should be strong, though not irrebuttable.

If the Rule should be liberally implemented, what sort of showing might justify subjecting a sequestration request to a modified *Waller* analysis? It seems like too much to ask to require prosecutors to proffer the testimony they might seek from a prospective family member or friend.[188] First, that would preview their approach, which is at odds with the principle of sequestration, based on *not* letting a witness know what's coming. Of course, that might be remedied by a proffer *in camera*. Second, and more important, prosecutors and defendants themselves may not know what is coming. Prosecutors may identify a family member or friend as a potential witness based on a hunch, a belief that the story may unfold in such a way that the testimony may – not necessarily *will* – become appropriate or necessary. Given the vagaries of trial and testimonial development, the prosecutor should have wide berth to identify and exclude potential witnesses, including family and friends.

All that said, there will still be instances where the right to a public

185. *See generally Addy*, 849 S.W.2d at 425.

186. *See generally Sams*, 802 S.W.2d at 635.

187. *In re* Oliver, 333 U.S. at 268.

188. This kind of showing is required, however, under the Crime Victims Rights Act, 18 U.S.C.S. § 3771, which permits exclusion of certain crime victims only when there is clear and convincing that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.

trial is implicated, and a modified *Waller* analysis is appropriate. Again, *Addy* and *Sams* provide apposite illustrations.[189] In each of those cases, the defendant's counsel argued that not only was the testimony of the putative witnesses unlikely, but it was also near-certain not to come. Moreover, in each case the court identified an ulterior motive behind the sequestration request. When either of these conditions is plausibly advanced, a court should inquire further.

If the defense asserts an ulterior motive, that the sequestration request is a sham or subterfuge, some investigation is warranted. In a case where the prosecutor has *admitted* a non-sequestration purpose for the request, as in *Daly*,[190] the Court should subject the exclusion to a modified *Waller* analysis. The reason is simple – it is not a request under the Rule at all, it is a request to exclude a member of the public from the courtroom.

In cases where the prosecutor does not reveal a non-sequestration purpose, the decision should turn on the plausibility of the prosecutor's request. When the defense asserts a lack of witness knowledge, some inquiry by the court is appropriate, while remaining attentive and deferent to the possibility that the witness may possess some relevant information. If the prosecutor cannot provide a plausible reason for why a spectator – asserted by the defense to be without pertinent knowledge – should be excluded as a witness, a modified *Waller* analysis is appropriate, because an unintelligible request for sequestration suggests a non-sequestration purpose.

VII. CONCLUSION

Given the overwhelming historical evidence of the common implementation of witness sequestration and the daily use of the procedure in courtrooms around the country, it can only be seen as a standard, ubiquitous tool of courtroom management. The concept of a public trial contemplates and incorporates the principle of witness exclusion. Moreover, witness sequestration, ordinarily, does no damage to the values of the right to a public trial. Even in those cases where defendant-affiliated persons are excluded under the Rule, it should be presumed that exclusion under the Rule is valid. It is, of course, extremely unlikely that prosecutors invoke sequestration to pursue a *sub rosa* proceeding in which they and judges in their sway may collude to pursue an unfair trial. There are occasions, nonetheless, when the Rule is invoked in bad faith. In those cases, the requested exclusion of witnesses should not go unscrutinized. A bad faith request for sequestration should pass through the crucible of the modified *Waller* analysis that is applied to partial courtroom closures to test them for their congruence with the Constitution.

189. *See supra* notes 84-99 and accompanying text.
190. *Daly*, 2012 WL 13176319 at *1.