
SIXTH AMENDMENT CHALLENGE TO COURTHOUSE DRESS CODES

Courthouses with dress codes require the public to conform to particular standards of attire in order to enter. They may be specific — for example, refusing entry to people wearing shorts, tank tops, hats, or clothing with writing or logos — or general — requiring that all clothing meet a standard like “appropriate”¹ or not “dirty, slovenly, bizarre, revealing, or immodest.”² Where, as in the vast majority of courthouses,³ the public must pass through a security checkpoint, the dress code is enforced by security officers at the point of entry.⁴ Dress codes therefore delegate to security officers the authority to decide who may enter to observe court proceedings, based on their own determinations of who is dressed “appropriately” and who is not.

Largely unconstrained discretion to exclude members of the public from courthouses, and from criminal proceedings in particular, threatens three distinct harms. First, it weakens the key constitutional principle of popular access to, and control over, the courts. Public access to the courts is protected by the First Amendment, Sixth Amendment, Due Process Clauses, and Privileges and Immunities Clause.⁵ These guarantees recognize the importance of public access as both a safeguard of individual liberty and an assertion of popular sovereignty: as the Supreme Court said in *In re Oliver*,⁶ “[t]he knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.”⁷ But if members of the public can be arbitrarily excluded by the government they are supposed to check, such “contemporaneous review” promises little bite. While there is no data on the number of people excluded from courts for their manner of dress (and it is likely highly variable by space and time), reporting across the country suggests that it is not at all uncommon.⁸

¹ See Jona Goldschmidt, “Order in the Court!”: *Constitutional Issues in the Law of Courtroom Decorum*, 31 *HAMLIN L. REV.* 1, 55 (2008).

² *Id.* at 57 (quoting SISKIYOU COUNTY, CAL. SUPER. CT., LOCAL RULES app. 1 § 4(c)).

³ As of 2013, seventy-four percent of state courthouses had security screening at the point of entry. TIMOTHY F. FAUTSKO ET AL., NAT’L CTR. FOR STATE COURTS, STATUS OF COURT SECURITY IN STATE COURTS, at iv (2013), <https://cdm16501.contentdm.oclc.org/digital/collection/facilities/id/184> [<https://perma.cc/4CN8-TNWG>].

⁴ For example, the author witnessed security at the District of Columbia’s H. Carl Moultrie Courthouse deny entry to a man wearing a tank top.

⁵ See Goldschmidt, *supra* note 1, at 14–15.

⁶ 333 U.S. 257 (1948).

⁷ *Id.* at 270.

⁸ See, e.g., Tom Jones, *Court Dress Code Sparks Outrage*, WSB-TV ATLANTA (July 3, 2012, 5:34 PM), http://www.wsbtv.com/news/local/court-dress-code-sparks-outrage_npmg6/242105894

Second, dress code exclusions pose even greater risks in practice. The standards that security officers are likely to apply in determining who is dressed “appropriately” and what clothing is “disruptive” or “threatening” are likely to be entangled with culture, race, gender, and class.⁹ In the first place, people without much money may be simply unable to afford clothes that satisfy certain standards of formality.¹⁰ Equally important, some notions of what clothes are “professional” have discriminated against people of color.¹¹ Trials that have struggled with perceptions of racial bias, from Nelson Mandela’s to Assata Shakur’s, have involved racist conceptions of what clothing is appropriate for court.¹² It is exceedingly unlikely that the people kept out of courthouses because of what they wear are a random cross section of the community — the impact is likely to fall almost entirely on the poor, minorities, and anyone who rouses the ire of courthouse security.

For a “criminal justice system”¹³ already deeply vulnerable to critiques of race and class bias,¹⁴ the risk that security officers will

[<https://perma.cc/DW22-649K>]; Matt Kaminer, *Courtroom Dress Code Met with Mixed Reactions*, ROCKBRIDGE REP. (Nov. 17, 2016), <http://rockbridgereport.academic.wlu.edu/2016/11/17/courthouse-dress-code-met-mixed-reactions> [<https://perma.cc/8VZ3-SSUR>]; Valerie Rowell, *Courtroom Attire Important to Judges*, COLUMBIA COUNTY NEWS-TIMES (Oct. 24, 2004), http://newstimes.augusta.com/stories/2004/10/24/new_2350788.shtml [<https://perma.cc/V9HG-UGEZ>].

⁹ Cf. SISKIYOU COUNTY, CAL. SUPER. CT., LOCAL RULES app. 1 § 4(c) (“[T]he court[] belong[s] to the people[;] judges cannot impose personal preference as to attire of participants in court proceedings and must be mindful and tolerant of changing fashions and reasonable individual idiosyncrasies.”).

¹⁰ See, e.g., Rowell, *supra* note 8 (“We do [turn people away] all the time, especially [i]n criminal court,’ [chief bailiff Sergeant Leon] Powell said. ‘They will come in shorts. We’ll tell them what [proper] attire is. If they are close to their house, to go get proper attire or go to Wal-Mart and get them a pair of slacks.” (first and fourth alterations in original)).

¹¹ See, e.g., Carmen Rios, *You Call It Professionalism; I Call It Oppression in a Three-Piece Suit*, EVERYDAY FEMINISM (Feb. 15, 2015), <http://everydayfeminism.com/2015/02/professionalism-and-oppression> [<https://perma.cc/8YRC-SG4A>]; see also Jackson Connor, *Remembering the NBA’s Implicitly Racist Dress Code, and the Players Who Were Most Affected*, COMPLEX (Apr. 30, 2014), <http://www.complex.com/style/2014/04/stylish-nba-players-who-were-affected-by-leagues-dress-code> [<https://perma.cc/BL8Y-QD6R>].

¹² See WINNIE MANDELA, PART OF MY SOUL WENT WITH HIM 87 (Anne Benjamin ed., 1984) (“I was banned from wearing my traditional dress [during Nelson Mandela’s Rivonia trial] . . . it inspired people, it evoked militancy — but . . . [i]f I wanted to attend the trial, I had to conform.”); Cheryl Clarke, *Assata Shakur’s Trial*, OFF OUR BACKS, Apr. 1977, at 2, 2 (“[Judge] Appleby told Assata not to wear her African dress in the courtroom because he considered it ‘inappropriate and disrespectful.’”).

¹³ This term, which refers to the complex of federal, state, and local institutions that enforce criminal laws, is meant to suggest neither that these encompass one “system,” see JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 13 (2017), nor that any has yet achieved the goal of dispensing “justice,” see Michael Zuckerman, *Criminal Injustice*, HARV. MAG., Sept.–Oct. 2017, <http://harvardmagazine.com/2017/09/karakatsanis-criminal-justice-reform> [<https://perma.cc/5URR-FXHB>] (“[I]f you say things like ‘the criminal justice system,’ people might get the sense that you’re talking about a system that does justice.” (quoting Alec Karakatsanis)).

¹⁴ See, e.g., WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 44–

disproportionately view black, brown, and poor citizens as inappropriately dressed for court is profound. And the harm is magnified by the fact that these communities already comprise a disproportionate number of the individuals charged with crimes.¹⁵ If public access is supposed to hold the government accountable for the way it prosecutes its citizens, then the presence of racial minorities and the poor in criminal court audiences is vital as a check on the overincarceration of their own communities. Excluding the populations most directly impacted by criminal prosecutions would render the public's information incomplete, feedback unrepresentative, and oversight ineffective.¹⁶ Courtroom audiences that are too wealthy and too white will be less likely to object to (and even to perceive) the biases that plague criminal prosecutions.

Third, the current system marginalizes judicial oversight. The decision of whom to exclude from courthouses is better located with judges in courtrooms, not security officers outside. This is not to suggest that security officers are bad people.¹⁷ Rather, as discussed in Parts II and III, all of the information necessary to determine whether someone can be constitutionally excluded is readily apparent to judges, but structurally unavailable to security officers. Security officers do not know the particulars of the case, the role of the person in question, or the relevant legal precedent. Placing the decision with judges is therefore desirable pragmatically, since they alone are equipped to make it.

Requiring judges to make decisions about the operation of the courts should be an important reminder of their role in the criminal justice system. By entrusting values of constitutional dimension to courthouse security officers, dress codes are consistent with a larger trend away from judicial control of criminal procedure. Scholars have noted the movement away from searching inquiry into the conduct of law enforcement and security personnel, with courts preferring instead to defer to the "expert" judgment of those "on the ground."¹⁸ Whatever the merits

59 (2011).

¹⁵ See PFAFF, *supra* note 13, at 45–46. The victims of crime and their families, to whom courts must also be accountable, are also disproportionately from poor and minority communities. See MELISSA S. KEARNEY ET AL., THE HAMILTON PROJECT, BROOKINGS INST., TEN ECONOMIC FACTS ABOUT CRIME AND INCARCERATION IN THE UNITED STATES 5 (2014), https://www.brookings.edu/wp-content/uploads/2016/06/v8_THP_10CrimeFacts.pdf [<https://perma.cc/9699-BMRR>].

¹⁶ See William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1974 (2008) ("Decisionmakers who neither reap the benefit of good decisions nor bear the cost of bad ones tend to make bad ones. Those sad propositions explain much of the inequality in American criminal justice.")

¹⁷ Cf. Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 201 n.16 (1993) ("I am not suggesting that police officers are inherently untrustworthy or bad people. Instead, my point concerns who controls police power. . . . Society . . . should wean itself off the notion that the police do not need to be regulated by citizens or judges.")

¹⁸ See, e.g., Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV.

of this trend as it applies to corrections facilities and public streets, from which judges are necessarily removed, it presents distinct harms (and can claim fewer justifications) when it advances into courthouses. Yet many judges have delegated to security personnel the judgment of what physical restraints defendants may be required to wear in court, despite the risk of infringing liberty without due process.¹⁹ Others have allowed procedures like immigration detainers to continue the detention of individuals that the court has ordered released, even without probable cause.²⁰ The enforcement of dress codes at the courthouse doors cedes further control of the “palaces of justice”²¹ to security and law enforcement, rather than judges sworn to uphold the Constitution. What’s more, it does so in a way that is highly visible, impossible for anyone who enters a courthouse to miss. It therefore threatens not only underlying constitutional rights to public access, but also the notions of democratic legitimacy with which they are closely associated.²² As the Ninth Circuit has stated, “[w]e must make every reasonable effort to avoid the appearance that courts are merely the frontispiece of prisons.”²³

But for courts or other parties concerned with the risks posed by dress code enforcement at the courthouse steps, constitutional doctrine already offers a viable remedy. This Note argues that the Sixth Amendment right to public trials offers a powerful tool to significantly curtail exclusions based on attire and to relocate that decision with judges and constitutional law. Part I outlines possible avenues for challenging courthouse dress codes and explains the advantages of a Sixth Amendment claim over First Amendment challenges. Part II surveys lower court doctrine, considering the obstacles that courts might raise to such a challenge and offering a roadmap for defendants in avoiding them. Part III offers preliminary observations on the likely outcomes of

1995, 1998–99 (2017); Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291, 308 (2016) (criticizing vague conditions of probation for providing too much power and discretion to probation officers); see also *Terry v. Ohio*, 392 U.S. 1, 22–23 (1968).

¹⁹ See, e.g., *United States v. Zuber*, 118 F.3d 101, 104 (2d Cir. 1997) (“[N]ot surprisingly, in most . . . cases, a district judge will defer to the professional judgment of the Marshals Service regarding the precautions that seem appropriate or necessary in the circumstances.”). But see *United States v. Sanchez-Gomez*, 859 F.3d 649, 653, 666 (9th Cir. 2017) (en banc) (“Courts must decide whether the stated need for security outweighs the infringement on a defendant’s right. This decision cannot be deferred to security providers or presumptively answered by routine policies.” *Id.* at 666.).

²⁰ See, e.g., Christopher N. Lasch, *Federal Immigration Detainers After Arizona v. United States*, 46 LOY. L.A. L. REV. 629, 685 (2013).

²¹ *Sanchez-Gomez*, 859 F.3d at 662.

²² See Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2182 (2014) (“The [courtroom] audience’s power . . . is bolstered by its ability to act based on what it hears: not only through voting . . . but also by contributing to public discourse . . .”).

²³ *Sanchez-Gomez*, 859 F.3d at 665.

the Sixth Amendment claim and the changes it should bring to the practice of courthouses across the country.

I. THE ADVANTAGES OF THE SIXTH AMENDMENT CLAIM

A. *Sixth Amendment Public Trial*

The Sixth Amendment guarantees defendants a “speedy and public trial.”²⁴ But the Supreme Court has rejected the idea that the right is limited by its text to “trials,” extending it to apply also to voir dire²⁵ and suppression hearings.²⁶ In giving content to the public trial right, the Supreme Court has applied a stringent test any time a courtroom “closure” occurs. In *Waller v. Georgia*,²⁷ the Court held that:

[1] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] the trial court must consider reasonable alternatives to closing the proceeding, and [4] it must make findings adequate to support the closure.²⁸

Where these four prongs are not satisfied, the Sixth Amendment right is violated.

While Part II addresses objections to the claim that dress code exclusions are closures for the purposes of the Sixth Amendment, it is sufficient here to note that a courtroom “closure” never requires a chain on the courthouse door. While the Supreme Court has not provided an exact definition of the term, it is clear that measures that prevent only some people, or even only one person, from attending criminal proceedings may nonetheless be considered “closures.”²⁹

The greatest strength of the Sixth Amendment right, however, is the remedy for its violation. The right belongs to the defendant, and only the defendant can assert it.³⁰ Most importantly, it is one of the few rights that remains a “structural error.”³¹ When it is violated at trial or voir dire, prejudice need not be shown, and reversal of a conviction is the required remedy.³² As the Court said in *Waller*, “[w]hile the benefits of

²⁴ U.S. CONST. amend. VI.

²⁵ *Presley v. Georgia*, 558 U.S. 209, 213 (2010) (per curiam).

²⁶ *Waller v. Georgia*, 467 U.S. 39, 47 (1984).

²⁷ 467 U.S. 39.

²⁸ *Id.* at 48.

²⁹ See *infra* Part II, pp. 858–67.

³⁰ See *Gannett Co. v. DePasquale*, 443 U.S. 368, 379–80 (1979) (“The Constitution nowhere mentions any right of access to a criminal trial on the part of the public; its guarantee, like the others enumerated, is personal to the accused.” (citation omitted)).

³¹ See Kristin Saetveit, Note, *Close Calls: Defining Courtroom Closures Under the Sixth Amendment*, 68 STAN. L. REV. 897, 906 (2016).

³² See *Waller*, 467 U.S. at 49 n.9 (“[T]he settled rule of the federal courts [is] that a showing of prejudice is not necessary for reversal of a conviction not had in public proceedings.” (quoting *Levine v. United States*, 362 U.S. 610, 627 n.* (1960) (Brennan, J., dissenting) (alterations in original))).

a public trial are frequently intangible, difficult to prove, or a matter of chance, the Framers plainly thought them nonetheless real.”³³

In *Presley v. Georgia*,³⁴ the Supreme Court decided its first public trial case in twenty-four years. In a per curiam decision, the Court held that the defendant’s right was violated and reversal was required when the trial court excluded the courtroom’s lone spectator during voir dire without making the findings required by *Waller*.³⁵ But *Presley* was not simply a straightforward application of *Waller*: rather, the Court adopted a powerful formulation of the public trial right and placed new, affirmative duties on trial courts. Thus, “trial courts are required to consider alternatives to closure even when they are not offered by the parties”³⁶ — “[t]he public has a right to be present whether or not any party has asserted the right.”³⁷

Even more significantly, the Court said that “[t]rial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials.”³⁸ This powerful obligation, framed in sweeping terms, recognizes the affirmative duty of judges to make sure members of the public are not unnecessarily excluded from courtrooms. Decisions about exclusion are therefore properly, and indeed necessarily, placed with judges. As Professor Jocelyn Simonson has argued, the per curiam decision “reinvigorated the relevance of the Sixth Amendment’s right to a public trial. . . . Lower courts have taken these cues from *Presley*, and a renewed expansion of the Sixth Amendment right has begun.”³⁹

B. First Amendment Public Access

Another potential avenue to challenge courthouse dress codes is the First Amendment right of public access to criminal trials. The Supreme Court has held that the public has a right of access to criminal trials and standing to challenge its exclusion under the First Amendment’s protection of “freedom to listen.”⁴⁰ The First Amendment doctrine is in some respects identical to that under the Sixth Amendment: the four-part *Waller* test was actually wholly transplanted from the First Amendment context, where it was first articulated in *Press-Enterprise Co. v. Superior*

³³ *Id.*

³⁴ 558 U.S. 209 (2010) (per curiam).

³⁵ *Id.* at 213.

³⁶ *Id.* at 214. And, to the extent that the “party seeking to close” the hearing must be the one to provide adequate justification, *id.* (quoting *Waller*, 467 U.S. at 48), courthouse dress codes are proposed and enforced by the government, the same party bringing the prosecution.

³⁷ *Id.*

³⁸ *Id.* at 215.

³⁹ Simonson, *supra* note 22, at 2212–13.

⁴⁰ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980) (plurality opinion) (“Free speech carries with it some freedom to listen.”); *see also id.* at 583 (Stevens, J., concurring).

*Court.*⁴¹ Sixth Amendment doctrine has followed First Amendment doctrine in other ways, too — *Presley*, for example, relied on First Amendment precedent to extend the Sixth Amendment right to voir dire.⁴²

But the differences between the Sixth Amendment and First Amendment rights are not merely formal. The First Amendment right belongs to, and must be asserted by, the public — not the defendant.⁴³ And its violation is not a “structural error” requiring reversal when infringed.⁴⁴

C. *First Amendment Free Speech*

Courthouse dress codes might also be attacked for violating the free speech rights of members of the public.⁴⁵ In the analogous circumstance of schools, dress codes sometimes infringe free speech rights, at least where the banned clothing is nondisruptive and “akin to pure speech.”⁴⁶ Judges analyzing a free speech challenge to dress code standards would first have to determine whether the affected clothing constituted “expressive conduct” within the meaning of the First Amendment.⁴⁷ Even if it did, so long as interests like preserving courtroom decorum were deemed unrelated to suppressing free expression, the relatively relaxed standard of *United States v. O'Brien*⁴⁸ would apply. And even if the dress code failed this undemanding test, it could nonetheless be defended as an allowable restriction of speech on government property. Under this analysis, a courthouse is a nonpublic forum,⁴⁹ and the restrictions

⁴¹ 464 U.S. 501, 510–11 (1984).

⁴² See *Presley*, 558 U.S. at 213 (“The extent to which the First and Sixth Amendment public trial rights are coextensive is an open question, and it is not necessary here to speculate whether or in what circumstances the reach or protections of one might be greater than the other. Still, there is no legitimate reason, at least in the context of juror selection proceedings, to give one who asserts a First Amendment privilege greater rights to insist on public proceedings than the accused has.”).

⁴³ Simonson, *supra* note 22, at 2106.

⁴⁴ See, e.g., *Richmond Newspapers*, 448 U.S. at 562 (plurality opinion); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 601 (1982).

⁴⁵ See U.S. CONST. amend. I; see also Goldschmidt, *supra* note 1, at 63–78.

⁴⁶ See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505 (1969) (internal quotation marks omitted).

⁴⁷ Judges would ask whether “[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.” *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (alterations in original) (quoting *Spence v. Washington*, 418 U.S. 405, 410–11 (1974) (per curiam)).

⁴⁸ 391 U.S. 367 (1968). The dress code would be allowable if it were “within the constitutional power of the Government,” “further[ed] an important or substantial governmental interest,” and if the restriction were “no greater than is essential to the furtherance of that interest.” *Id.* at 377.

⁴⁹ See, e.g., *Mezibov v. Allen*, 411 F.3d 712, 718 (6th Cir. 2005) (“The courtroom is a nonpublic forum, where the First Amendment rights of everyone (attorneys included) are at their constitutional nadir.” (citation omitted)).

are constitutional so long as they are viewpoint-neutral and reasonable in light of the court's intended purpose.⁵⁰

D. Advantages of the Sixth Amendment Claim

Among these three potential options, opponents of courthouse dress codes would do best to pursue the Sixth Amendment claim. The previous sections explored some of the doctrinal obstacles to the free speech challenge. But for both potential First Amendment claims, whether public access or free speech, the greatest shortcomings, and therefore the greatest advantages of the Sixth Amendment claim, are practical ones.

Start with the free speech challenge. Even if a person excluded from the courthouse (perhaps for wearing a tank top) could raise a viable free speech claim, he would have little opportunity or incentive to do so. Because the decision to exclude is made by a security guard, there is no judgment, no reason-giving, and no chance to appeal.⁵¹ Even when exclusions abridge First Amendment rights, those who are excluded likely lack the time, money, and interest to sue security officers for the violation under § 1983⁵² or *Bivens*.⁵³ And even if they did, qualified immunity (and the recent evisceration of the *Bivens* remedy⁵⁴) would raise a significant, perhaps insurmountable, obstacle to recovery.

The First Amendment public access claim is similarly unlikely to generate much litigation. While it is doctrinally more attractive to people who are excluded, they have little incentive to litigate the claim at all. One need not read past the captions of the Supreme Court's cases on the subject to see the narrow subset of cases in which the claim is actually litigated — *Press-Enterprise Co.*, *Richmond Newspapers*, and *Globe Newspaper Co.* pursued their claims to access because well-resourced media companies wanted to be able to cover trials of significant public interest. But for the vast majority of cases, in the vast majority of courtrooms, there will be no press interest at all, let alone motivation to litigate a courtroom closure. And journalists, while not known for being well dressed, are unlikely to be among those deemed

⁵⁰ See *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678–79 (1992).

⁵¹ The most famous courthouse dress code case demonstrates this shortcoming by virtue of the fact that it is not a courthouse dress code case at all. In *Cohen v. California*, 403 U.S. 15 (1971), the Supreme Court vindicated the defendant's First Amendment right to wear his "Fuck the Draft" jacket in the courthouse. See *id.* at 26. But he was not *excluded* from the courthouse. *Id.* at 16. Although the arrest took place in a courthouse corridor, Cohen was charged with violating a statute that criminalized offensive conduct in a variety of public places. *Id.* at 16 n.1, 19. In fact, while Cohen was in the courtroom, a police officer sent a note to the judge suggesting that Cohen be held in contempt — the judge, however, declined to delegate his authority to courthouse security. *Id.* at 19 & n.3. The free speech issue was therefore litigated only because it resulted in criminal charges.

⁵² 42 U.S.C. § 1983 (2012).

⁵³ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

⁵⁴ See *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1859–63 (2017) (barring new *Bivens* claims that differ in any "meaningful" way from ones previously decided).

“inappropriate” for court by security officers. The claim is therefore unlikely to be raised often enough to pose a serious challenge to courthouse dress codes.

The Sixth Amendment claim, in contrast, has its incentive built in. While putative audience members could not raise it on their own behalfs, defendants have every reason to — a violation of the public trial right is structural error that will result in automatic reversal in the event of a conviction. This promise is therefore even more enticing than damages, and it could (and should) be raised as a matter of course by defense lawyers.⁵⁵ And if lawyers fail to raise it, judges should consider it themselves. As *Presley* made clear, “courts are obligated to take every reasonable measure to accommodate public attendance.”⁵⁶ This obligation should include examining the rules that govern the courts judges administer to ensure that they do not exclude more people than the Constitution allows.

While Part III will consider in greater depth the likely outcomes of successful claims, it should take only one or two successes (or even the threat of a future success) in any given jurisdiction to bring down unconstitutional dress codes. Rather than risk reversal of resource-intensive convictions, courts are likely to change their rules preemptively. These changes would result in benefits to the public, who will be more free to observe the workings of criminal courts; defendants, who will see a more representative criminal court audience; and the criminal justice system as a whole, which will be reminded of the duty of judges to ensure compliance with the Constitution.

II. MAKING THE SIXTH AMENDMENT CLAIM

A Sixth Amendment attack on courthouse dress codes is not just theoretically powerful — it is also viable under current doctrine. This Part argues that the four-part *Waller* inquiry (requiring an overriding interest, narrow tailoring, consideration of alternatives, and on-the-record findings) should apply to dress code exclusions and identifies the major objections to this claim. It concludes that in nearly all jurisdictions, such a claim is viable. In jurisdictions where doctrinal obstacles prove insurmountable, those doctrines are unjustified in light of Supreme Court precedent.

⁵⁵ It may be objected that, in some cases, the disadvantages of raising the claim will outweigh the potential benefits. Where, for instance, potentially excluded members of the audience are family or friends of the defendant, he or she might fear “transferred stigma” when the judge is required to make *Waller* findings regarding the person. But many defendants likely want their family and friends present. This is exactly the sort of decision that defense attorneys should empower their clients to make.

⁵⁶ *Presley v. Georgia*, 558 U.S. 209, 215 (2010) (per curiam).

With only occasional guidance from the Supreme Court,⁵⁷ lower courts have had difficulty defining when the *Waller* test applies.⁵⁸ Given that failing to make a required *Waller* finding is structural error requiring mandatory reversal, “[l]ower courts faced with less serious infringements of the public trial right . . . have struggled to reconcile the Court’s precedent with the practical reality of . . . seemingly de minimis violations.”⁵⁹ In response, they have erected a maze of obstacles, not always consistently defined across or even within jurisdictions, to limit the “closures” that require a *Waller* inquiry in the first place.⁶⁰

This Part does not undertake an actual *Waller* inquiry into any specific dress code exclusion — a limited foray into that analysis is presented in Part III. Rather, it argues that the *Waller* inquiry is well suited to dress code exclusions, as a matter of both first principles and lower-court doctrine. As Professor Stephen E. Smith argues in another context,⁶¹ the *Waller* test is a flexible inquiry that need not be feared: rather, courts would benefit from its unflinching application. This is particularly true for dress code violations, where the alternative is unguided and unreviewable decisions by courthouse security, sheltered from constitutional scrutiny.⁶²

This Part considers in turn the intent or affirmative act requirement, triviality doctrine, partial closures, and the requirement of evidence of actual exclusion. It then considers specific arguments that might be raised against the novel dress code claim and outlines the basic strategy that defense attorneys should follow in pursuing the claim.⁶³

⁵⁷ See Saetveit, *supra* note 31, at 900 n.7. Two pieces of student writing have undertaken excellent surveys of lower-court doctrine. Daniel Levitas and Kristin Saetveit have both cataloged the ways in which courts have narrowed or undermined the application of *Waller* and argued that these “innovations” are unjustified. See Daniel Levitas, Comment, *Scaling Waller: How Courts Have Eroded the Sixth Amendment Public Trial Right*, 59 EMORY L.J. 493 (2009). This Note, greatly indebted to their careful research, extends it to a context that neither considers — exclusions of the public based on manner of dress.

⁵⁸ Saetveit, *supra* note 31, at 901.

⁵⁹ *Id.*

⁶⁰ See *id.*; see also Levitas, *supra* note 57, at 499.

⁶¹ See Stephen E. Smith, Commentary, *The Right to a Public Trial and Closing the Courtroom to Disruptive Spectators*, 93 WASH. U. L. REV. 235 (2015). Smith’s article argues that *Waller* should apply to exclusions based on in-court disruptions. *Id.* at 242–46. While he does not consider dress code exclusions, the arguments in this context are at least as strong.

⁶² This Part considers trial, voir dire, and suppression hearings — the contexts to which the “public trial” right has already been applied by the Supreme Court. While Professor Jocelyn Simonson argues persuasively that the right should apply to almost all courtroom proceedings, see Simonson, *supra* note 22, at 2205–19, that argument is outside the scope of this Note.

⁶³ This Part is not an in-depth survey of the law in every state and circuit; rather, it flags the major obstacles that attorneys should look out for in raising jurisdiction-specific claims.

A. Intent or Affirmative Acts

In some jurisdictions, *Waller* is not implicated unless the trial court intentionally closes the courtroom or takes an “affirmative act” to do so. In the Tenth Circuit, for example, “[t]he denial of a defendant’s . . . right to a public trial requires some affirmative act by the trial court meant to exclude persons from the courtroom.”⁶⁴ Without an affirmative act, no “closure” occurs.⁶⁵ The majority of courts, however, have rejected this position. The Seventh Circuit has held that “[w]hether the closure was intentional or inadvertent is constitutionally irrelevant.”⁶⁶

Notably, the intent or affirmative act doctrine has been developed largely in circumstances involving the overlapping authority of judges and courtroom security.⁶⁷ In *United States v. DeLuca*,⁶⁸ for example, the U.S. Marshal initiated a screening procedure without direction from the trial court, requiring that all would-be spectators present written identification for inspection and review.⁶⁹ These cases reflect a sentiment that it is unfair to hold a trial court responsible, by finding structural error, for a procedure it neither initiates nor knows about.⁷⁰ Courthouse dress codes, however, are not such a procedure. While they implicate the same overlap of authority between judges and security, they are highly formalized, usually published or posted, and may even be promulgated by judges in their administrative authority.⁷¹ Appellate courts should therefore be hesitant to find that they are “inadvertent” or not an “affirmative act.”

The Third Circuit, for example, considers whether the trial court “ratifies” the actions of courtroom security.⁷² Whether or not a court announces a dress code from the bench, judges who go to work every day in a building where the public is excluded based on manner of dress

⁶⁴ *United States v. Al-Smadi*, 15 F.3d 153, 154 (10th Cir. 1994) (citations omitted).

⁶⁵ See, e.g., *Bunn v. Lopez*, No. 2:11-cv-1373, 2016 WL 4010038, at *8 (E.D. Cal. July 26, 2016), appeal filed, No. 17-6232 (9th Cir. June 14, 2017).

⁶⁶ *Walton v. Briley*, 361 F.3d 431, 433 (7th Cir. 2004).

⁶⁷ See, e.g., *Walton*, 361 F.3d at 432 (trial held late in the evening when courthouse doors were locked); *Al-Smadi*, 15 F.3d at 153–54 (courthouse doors closed by security at 4:30 PM pursuant to normal practice, even though trial was taking place); *United States v. Keaveny*, No. 98-1605, 1999 WL 525954, at *1 (1st Cir. Mar. 4, 1999) (“[C]onstitutional concerns may be raised even by a court officer’s unauthorized partial exclusion of the public.”).

⁶⁸ 137 F.3d 24 (1st Cir. 1998).

⁶⁹ *Id.* at 32.

⁷⁰ See, e.g., *Martineau v. Perrin*, 601 F.2d 1196, 1197 (1st Cir. 1979) (“The court at no time directed the courtroom doors to be locked It is not possible to determine from behind the bench whether the doors to the courtroom are locked or unlocked.”).

⁷¹ See Goldschmidt, *supra* note 1, at 101 (“One of the methods that courts use . . . is promulgating rules of courtroom decorum.”).

⁷² See, e.g., *United States v. Greene*, 431 F. App’x 191, 196 (3d Cir. 2011) (“Nonetheless, courts of appeals have unfailingly examined whether the trial judge either initiated or ratified the closure . . .”).

certainly know about and ratify the courtroom closure. This is particularly true in light of the Supreme Court's admonition in *Presley* that judges must do everything they reasonably can to accommodate public attendance,⁷³ which calls into question whether the intent or affirmative act requirement can *ever* be sustained.⁷⁴

B. Triviality

The “triviality” doctrine also reflects the concern that not every exclusion should merit the strong medicine that structural error requires.⁷⁵ Although there is a circuit split over whether the Sixth Amendment is subject to such “de minimis” review,⁷⁶ relevant factors (beyond inadvertence) typically include how long the courtroom was closed and whether any of the defendant's family or friends were excluded.⁷⁷ Even courts that accept triviality, however, emphasize its “narrow application.”⁷⁸

Triviality analysis is not “harmless error” review.⁷⁹ Rather, the majority of the circuits “consider whether the closure implicates the values served by the Sixth Amendment as set forth by the Supreme Court in *Waller*.”⁸⁰ These are four: “1) to ensure a fair trial; 2) to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions; 3) to encourage witnesses to come forward; and 4) to discourage perjury.”⁸¹

Dress code exclusions clearly implicate these values. They undermine the fairness of the trial and the need to remind the prosecutor and judge of their responsibilities to the accused. As Simonson points out, the makeup of the criminal courtroom is a powerful accountability mechanism.⁸² A criminal court system with diminished democratic input from the relevant community falls into exactly the trap the Sixth

⁷³ *Presley v. Georgia*, 558 U.S. 209, 215 (2010) (per curiam).

⁷⁴ See Simonson, *supra* note 22, at 2220.

⁷⁵ Some courts consider intent or affirmative acts in their triviality analysis. See, e.g., *Commonwealth v. Cohen*, 921 N.E.2d 906, 919 (Mass. 2010).

⁷⁶ See Simonson, *supra* note 22, at 2222.

⁷⁷ See, e.g., *State v. Taylor*, 869 N.W.2d 1, 11 (Minn. 2015); *People v. Woodward*, 841 P.2d 954, 958 (Cal. 1992).

⁷⁸ *United States v. Gupta*, 699 F.3d 682, 688 (2d Cir. 2012).

⁷⁹ See, e.g., *id.* (“[The triviality standard] is . . . very different from a harmless error inquiry.” (quoting *Peterson v. Williams*, 85 F.3d 39, 42 (2d Cir. 1996))).

⁸⁰ *United States v. Aguiar*, 82 F. Supp. 3d 70, 84 (D.D.C. 2015).

⁸¹ *Peterson*, 85 F.3d at 43 (citing *Waller v. Georgia*, 467 U.S. 39, 46–47 (1984)).

⁸² Simonson, *supra* note 22, at 2194 (“When audiences are excluded, both defendants and the local community lose out on an opportunity to promote fairness and accountability.”); *id.* at 2231 (“Indeed, local movements for social change by low-income populations in urban areas can and do involve courtroom observation . . . [B]oth the defendants and their supporters are explicitly exercising their rights and responsibility to ‘remind[] the participants . . . that the consequences of their actions extend to the broader community.’” (quoting *United States v. Rivera*, 682 F.3d 1223, 1230 (9th Cir. 2012) (alteration in original))).

Amendment seeks to avoid. Excluding members of the community, especially those who are black, brown, and poor, makes it easier for prosecutors and judges to forget the groups who feel the impact of their decisions. And *any exclusion* may impact the ability of witnesses to come forward or make perjury less daunting.⁸³ The risk is particularly great where, as here, exclusions will disproportionately impact communities most likely to have knowledge relevant to the events of the trial or of the honesty of testifying witnesses.⁸⁴

C. Partial Closure

Some courts, while acknowledging that the Sixth Amendment may be violated even if the entire public is not excluded, apply a less stringent version of the *Waller* test to exclusions that affect some, but not all, of the public.⁸⁵ The *Waller* inquiry remains exactly the same, except that the requirement of an “overriding interest” is replaced with some lesser formulation, such as a “substantial reason.”⁸⁶

The partial closure doctrine is the subject of a circuit split and disagreement among state courts.⁸⁷ Some courts have taken the view that the Supreme Court implicitly rejected this doctrine in *Presley*, by applying the full-strength *Waller* test to an exclusion of only one person during jury voir dire.⁸⁸ But this view of the Court’s holding is hard to sustain, since the one person excluded was the only member of the audience, making the case at once an exclusion of one person and a “total closure” of the courtroom.⁸⁹

⁸³ Levitas, *supra* note 57, at 531 (“[I]t is impossible to know how the exclusion of unknown persons may have impacted the proceeding.”).

⁸⁴ See *supra* note 15; cf. FED. R. EVID. 608(a) (“A witness’s credibility may be attacked or supported by testimony about the witness’s reputation for having a character for truthfulness or untruthfulness . . .”).

⁸⁵ See, e.g., *Woods v. Kuhlmann*, 977 F.2d 74, 76 (2d Cir. 1992); *United States v. Sherlock*, 962 F.2d 1349, 1356–57 (9th Cir. 1992); *Nieto v. Sullivan*, 879 F.2d 743, 753 (10th Cir. 1989); *Douglas v. Wainwright*, 739 F.2d 531, 533 (11th Cir. 1984) (per curiam).

⁸⁶ E.g., *Rivera*, 682 F.3d at 1236 (quoting *Sherlock*, 962 F.2d at 1357).

⁸⁷ See *Angiano v. Scribner*, 366 F. App’x 726, 727 (9th Cir. 2010) (“The Circuits are split as to the applicability of the four-part test in *Waller* to ‘partial closures,’ where only one person is excluded from a trial.”); *Saetveit*, *supra* note 31, at 917–19 (reviewing the positions taken by state courts).

⁸⁸ See, e.g., *Drummond v. Houk*, 728 F.3d 520, 527 (6th Cir. 2013) (“*Presley v. Georgia* . . . held that *Waller* applies equally to full and partial courtroom closures . . .”), *vacated on other grounds sub nom.* *Robinson v. Drummond*, 134 S. Ct. 1934 (2014) (mem.); see also *Simonson*, *supra* note 22, at 2213 (“[T]he Court in *Presley* ordered a new trial based on the exclusion of one lone spectator This . . . contradicted the approach of some circuit courts, which had found that when a small number of people are excluded . . . that exclusion requires a lower level of scrutiny.”).

⁸⁹ *Presley v. Georgia*, 558 U.S. 209, 210 (2010) (per curiam). In *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017), the Supreme Court noted the state court’s finding of a full rather than “partial” closure and explained the distinction, but gave no hint it had foreclosed such analysis. *Id.* at 1906.

The partial closure doctrine likely makes a formal distinction without much practical difference,⁹⁰ particularly for the purposes of a challenge to courthouse dress codes. Even if trial courts analyze courthouse dress codes as partial closures, the judge, not security at the front steps, will be making the decision. This alone accomplishes the goal of bringing the operation of the courthouse back within constitutional scrutiny. As for the goal of excluding fewer people from court proceedings, there is little reason to think that analyzing dress code exclusions for whether they are based on a “substantial reason” rather than an “overriding interest” will make much difference.

D. Actual Exclusion Evidence

A small minority of courts has required evidence that at least one person was actually excluded by a courtroom closure.⁹¹ Other courts, including the Second and Third Circuits, have squarely rejected this view, holding that the Sixth Amendment does not require producing an actual person who was excluded.⁹²

As Saetveit notes, the requirement of exclusion evidence is hard to square with precedent. The Supreme Court in *Waller* ignored the question of whether anyone had actually been excluded.⁹³ Requiring evidence of exclusion seems inconsistent with the structural error doctrine, which insists that it is impossible to tell whether prejudice has resulted from a courtroom closure.⁹⁴ And *Waller* teaches that whenever a court excludes the public from a proceeding, it is required not just to have a good reason but also to actually make findings.⁹⁵

So long as the doctrine persists, however, lawyers in a handful of jurisdictions will have to deal with it. Here, it helps that the Sixth Amendment claim is in some sense orchestrated — the public trial right is used as a vehicle to restrict courthouse dress codes. Defense attorneys, therefore, may well enlist a member of the public as an “inappropriately dressed” test case to be excluded from the courthouse.

⁹⁰ See, e.g., *Ayala v. Speckard*, 131 F.3d 62, 70 (2d Cir. 1997) (“It may be doubted whether trial judges can make meaningful distinctions between ‘compelling’ and ‘overriding’ interests or can distinguish between whether such interests are ‘likely to be prejudiced’ or whether there is a ‘substantial probability of’ prejudice.”).

⁹¹ E.g., *State v. Salazar*, 414 S.W.3d 606, 616 (Mo. Ct. App. 2013). “Massachusetts, Minnesota, New Jersey, and Rhode Island have also held that a defendant has no viable public trial claim without evidence of a particular individual denied entry.” Saetveit, *supra* note 31, at 910; see also *id.* at 910 n.80 (citing cases).

⁹² See, e.g., *Peterson v. Williams*, 85 F.3d 39, 44 & n.7 (2d Cir. 1996); *United States ex rel. Bennett v. Rundle*, 419 F.2d 599, 608 (3d Cir. 1969) (en banc); *Lilly v. State*, 365 S.W.3d 321, 331 (Tex. Crim. App. 2012); see also Saetveit, *supra* note 31, at 910–11, 911 n.81.

⁹³ Saetveit, *supra* note 31, at 923 (citing *Waller v. Georgia*, 467 U.S. 39, 48 (1984)).

⁹⁴ *Id.* at 923–24.

⁹⁵ See *United States v. Gupta*, 699 F.3d 682, 687 (2d Cir. 2012) (“In other words, if a court intends to exclude the public from a criminal proceeding, it *must* first analyze the *Waller* factors and make specific findings with regard to those factors.”).

E. Case-Specific Objections

Each of the strands identified above can be understood as an attempt to determine which exclusions or barriers to entry count as “closures,” and therefore implicate *Waller*, and which don’t. Along these lines, several arguments might be raised against recognizing dress code exclusions in particular as courtroom closures. If the heartland closure case is a chain across the door of the courtroom, with no spectators allowed inside, the implementation of a dress code is different in several respects. First, the ban on entry is individualized to particular people. Second, it is based on an action by the excluded person, which the person has an opportunity to avoid.

1. Individualization. — The fact that dress code exclusions apply to particular people, rather than as a blanket ban, does not distinguish them from other cases that are already analyzed as courtroom closures. Several courts have considered security procedures implemented for the protection of witnesses and jurors, typically involving identification requirements or background checks for spectators.⁹⁶ Most courts have analyzed such “screening devices” as closures subject to Sixth Amendment scrutiny.⁹⁷ A recent New York case, accordingly, noted that “[w]hatever we call it, the device implemented here raises the same secrecy and fairness concerns that a total closure does. The defendant’s Sixth Amendment right to a public trial is still implicated.”⁹⁸

Indeed, individualized exclusions are at least as problematic for Sixth Amendment purposes, if not more so. Recalling the purposes of the public trial right, it is hard to see why prosecutors and judges will be better reminded of their responsibilities to the community, perjury will be better deterred, or witnesses will be better encouraged to come forward because officers of the state, at their sole discretion, were able to pick and choose who would be allowed to witness the trial. The Michigan Supreme Court recognized the danger of accepting this argument over a century ago, holding that the state’s constitutional guarantee of a public trial was violated when a security officer excluded citizens at the door pursuant to a judge’s order that only “respectable” citizens were to be admitted.⁹⁹ The court asked:

Is respectability of the citizen who desires to witness a trial to be made a test of the right of access to a public trial, and is that test to be left to the knowledge or discretion of a police officer? Must a citizen who wishes to witness a trial of a person accused, whether he be a friend, an acquaintance,

⁹⁶ See, e.g., *United States v. Shryock*, 342 F.3d 948 (9th Cir. 2003); *United States v. DeLuca*, 137 F.3d 24 (1st Cir. 1998).

⁹⁷ See, e.g., *DeLuca*, 137 F.3d at 33–34; *United States v. Brazel*, 102 F.3d 1120, 1155–56 (11th Cir. 1997).

⁹⁸ *People v. Jones*, 750 N.E.2d 524, 529 (N.Y. 2001) (citations omitted).

⁹⁹ *People v. Murray*, 50 N.W. 995, 1000 (Mich. 1891).

or a stranger to the accused, present to the police officer stationed at the door of the Temple of Justice a certificate of his respectability? If so, by whom shall it be certified? By the mayor, the chief of police, or police commissioners, or by his pastor or clergyman?¹⁰⁰

These questions have found no easy answers in the intervening years. It is no better today to leave public access to a security officer's determination of what is "respectable" or "appropriate."

2. *Opportunity to comply.* — In the first place, the claim that people excluded for violating a dress code are different from those excluded by a paradigm "closure" because they have an opportunity to conform to its requirements is not always true. There are certainly people who don't own and can't afford the kind of clothes that a security officer might require. Even if most — or even a vast majority — do, it would be foolish for the state to act as if there are no exceptions. Unless security officers are to hold something like a *Bearden*¹⁰¹ hearing on the courthouse steps, the time will inevitably come when an excluded person actually *was* unable to afford suitable clothing. If ability to conform really makes a constitutional difference, the claim in this hypothetical case should succeed, and any guilty verdict should be reversed. Given the tremendous risk of such an outcome, even the relatively remote possibility it would occur in any given case should have a significant impact on state practice.

Furthermore, dress code exclusions are not unique for conditioning entry on what a person does or doesn't do. The screening procedure cases, for instance, analyze as courtroom closures requirements that aspiring spectators present photo identification. The argument takes the same form: because you did not come to court, *either* in particular clothing *or* with a particular item, you cannot enter.

Finally, by focusing on what the *spectators* could have done, this argument forgets the mandate of *Presley* to ask what the court can do to ensure maximum public access. A case decided by the Texas Court of Criminal Appeals, *Lilly v. State*,¹⁰² presents a good example. There, the court found that a proceeding held in a prison violated the public trial right.¹⁰³ While the public was not forbidden, "highly restrictive" admission policies allowed visitors to be denied access at the guard's discretion if, for example, "they wore offensive clothing or sought admittance for an 'improper purpose.'"¹⁰⁴ While "many of the individual admittance policies in this case would not, standing alone, necessarily

¹⁰⁰ *Id.* at 998.

¹⁰¹ *Bearden v. Georgia*, 461 U.S. 660, 661–62 (1983) (forbidding incarceration for nonpayment of fines without a determination that the person had the ability to pay).

¹⁰² 365 S.W.3d 321 (Tex. Crim. App. 2012).

¹⁰³ *Id.* at 324.

¹⁰⁴ *Id.* at 331.

amount to a per se closure, the cumulative effect of the Unit's policies undermine[d the court's] confidence that *every reasonable measure was taken to accommodate public attendance* at Appellant's trial."¹⁰⁵ The trial court had therefore failed to live up to its obligation under *Presley*.¹⁰⁶ Proper attention to the command of *Presley* forbids courts from asking what the spectators could have done to gain entry. Instead, judges must take the spectators as they are and ask what they themselves can do to ensure that spectators are not unnecessarily excluded.

Courtroom closures by any name implicate the right of the defendant to a public trial. Thus, Smith has argued persuasively that the *Waller* test should apply even to exclusions of disruptive persons already in the courtroom,¹⁰⁷ and Simonson has argued for an expansive definition of a "closure" that would include procedures that prevent the public from understanding what they observe in court, even as they are actually allowed in.¹⁰⁸ The argument advanced here is much closer to the heartland closure case, since it takes place outside the courtroom and occurs before any actual disruption.

F. Making the Sixth Amendment Claim

Before any proceeding to which the public trial right extends, including suppression hearings, voir dire, and trial, defense attorneys should raise the claim that operating the courthouse with an overly restrictive or vague dress code violates the defendant's right to a public trial. Judges need not fear that dress code claims will become a trap for the unwary jurist — the Supreme Court has suggested, and the majority of state and federal courts have held, that failure to make a contemporaneous objection waives the claim.¹⁰⁹ A sample pleading is provided in Appendix A.¹¹⁰

In raising this claim in the dress code context, attorneys and judges are confronted with a practical obstacle: it may not be clear what even the most sympathetic judge can do at the time the claim is raised. The proceeding is, after all, about to begin — anyone who was excluded at the courthouse steps presumably has already been turned away. Even if a judge were to immediately order the dress code retracted and courthouse security to stand down, most of the harm would have been done.

¹⁰⁵ *Id.* (emphasis added).

¹⁰⁶ *Id.* at 332.

¹⁰⁷ Smith, *supra* note 61, at 242–46.

¹⁰⁸ Simonson, *supra* note 22, at 2226–28.

¹⁰⁹ See *Levine v. United States*, 362 U.S. 610, 619 (1960) (“The continuing exclusion of the public in this case is not to be deemed contrary to the requirements of the Due Process Clause without a request having been made to the trial judge to open the courtroom . . . thereby giving notice of the claim now made and affording the judge an opportunity to avoid reliance on it.”); *Robinson v. State*, 976 A.2d 1072, 1082–83 (Md. 2009) (collecting cases).

¹¹⁰ See *infra* p. 871. Where evidence of actual exclusion is required, the pleading will have to be modified.

And it would be difficult to raise the claim in advance, when it would necessarily be speculative.

In the first place, it bears noting that this problem isn't unique to the dress code context. Same-day remedies may be impossible any time that members of the public are excluded without the knowledge of the judge, and even when the judge herself orders a courtroom closed (since many of those excluded may have already left). Yet trial judges and appellate courts still find the public trial right violated, even when the problem could not have been fixed with a simple order at the time of the proceeding.¹¹¹ This is consistent with the rule of *Presley* that it is the obligation of trial courts to "take every reasonable measure to accommodate public attendance at criminal trials."¹¹² Defense attorneys should therefore make a record of the Sixth Amendment violation and their objection. Even if the trial court judge rejects the claim in their case, choosing to take her chances on appeal if necessary, she may well choose to avoid seeing the issue presented again in the future (indeed, possibly in every case) by preemptively removing or revising the courthouse dress code.¹¹³

Second, a quirk of Supreme Court doctrine affords judges a de facto opportunity to consider the claim in advance. If a defense attorney raises the claim at a pretrial suppression hearing, a judge might reject it. For a judge who structures her decisions to maximize efficiency while minimizing the risk of reversal, this is a relatively low-risk proposition: the Supreme Court has held that, when the public trial right is violated only at a suppression hearing, the proper remedy is not to reverse the conviction but only to repeat the hearing.¹¹⁴ The judge may therefore reject the argument and proceed with the hearing. As *voir dire* and trial approach, however, the risk attending infringement of the Sixth Amendment right increases exponentially, since reversal of any conviction becomes required.¹¹⁵ The court may therefore rationally take the same steps outlined above to prevent a violation of the right at trial, even having refused to find that it was violated during the suppression hearing.

III. RESPONSE TO THE SIXTH AMENDMENT CLAIM

Having argued that the requirements of *Waller* apply to dress code exclusions, this Part turns to the *Waller* hearings themselves. It suggests

¹¹¹ See, e.g., *Lilly*, 365 S.W.3d at 331.

¹¹² *Presley v. Georgia*, 558 U.S. 209, 215 (2010) (per curiam).

¹¹³ In many jurisdictions, judges promulgate these rules under their administrative authority. See Goldschmidt, *supra* note 1, at 101.

¹¹⁴ See *Waller v. Georgia*, 467 U.S. 39, 50 (1984). If the result of the hearing is the same, no new trial is needed. *Id.*

¹¹⁵ See *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 (2006).

that some dress requirements may still be implemented at the courthouse steps, though they will likely be much narrower in scope than current practice. And even if some or even many of the people excluded by courthouse security at the front steps can be constitutionally excluded by the trial court at the courtroom door (an empirical question on which this Note takes no position), doing so via the process prescribed by the Sixth Amendment will offer the benefits of cabining discretion, developing a body of law on the subject, and reasserting the primacy of the Constitution in the administration of criminal courts.

This Part does not undertake to spell out what clothing can and cannot be banned in any particular context. Indeed, it is the core claim of this Note that this decision must necessarily be made in the courtroom, by the judge who knows or has the opportunity to learn all the relevant facts (such as the subject matter of the case, the presence or absence of a jury, or any disruption that results) and not by an outside party who doesn't. In this respect, the author is in no better position than a courthouse security officer. Some preliminary observations, however, are possible.

First, it is not a courtroom closure within the meaning of the Sixth Amendment to exclude someone based on a law of general application. States of dress (or, more to the point, undress) that are not legal on the streets outside the courthouse need not be permitted inside it.¹¹⁶

Second, the Sixth Amendment public trial right cannot require what the Sixth Amendment fair trial right forbids. Lower courts have reached different outcomes on when spectators' courtroom attire violates the defendant's fair trial right.¹¹⁷ In *Carey v. Musladin*,¹¹⁸ the Supreme Court stated that its precedents do not clearly answer the question.¹¹⁹ Concurring in the judgment, Justice Kennedy noted that the case "present[ed] the issue whether as a preventative measure, or as a general rule to preserve the calm and dignity of a court, buttons proclaiming a message relevant to the case ought to be prohibited as a matter of course."¹²⁰ He further reasoned that trial courts may "as a general practice already take careful measures to preserve the decorum of courtrooms, thereby accounting for the lack of guiding precedents on this subject."¹²¹

¹¹⁶ *E.g.*, IND. CODE § 35-45-4-1.5(b) (2017) (outlawing public nudity).

¹¹⁷ Compare *Norris v. Risley*, 918 F.2d 828, 830-31 (9th Cir. 1990) (spectators with "Women Against Rape" buttons at sexual assault trial deprived defendant of fair trial), with *Davis v. State*, 223 S.W.3d 466, 475 (Tex. App. 2006) (spectators wearing medallions with murder victim's picture did not deprive defendant of fair trial).

¹¹⁸ 549 U.S. 70 (2006).

¹¹⁹ *Id.* at 76.

¹²⁰ *Id.* at 81 (Kennedy, J., concurring in the judgment).

¹²¹ *Id.*

It is possible to imagine some “general rules” that might be appropriately administered outside the courtroom. To take an example familiar from restaurant windows, “no shirt, no service” would be unobjectionable, since it is reasonable to think that shirtless spectators would per se interfere with criminal proceedings.¹²² Other rules, however, call for the sort of unguided judgments that courthouse security simply cannot make. The same button or T-shirt might or might not be a ground for exclusion, depending on whether it was relevant to the subject matter of the trial, which courthouse security could almost never know. Consider, for example, the “Kourts Kops Krooks” T-shirt worn by an audience member in *In re Contempt of Dudzinski*.¹²³ While in an ordinary trial it might be an acceptable (or even constitutionally protected) display of criticism of the criminal justice system, in another (such as the trial of a police officer) it may well violate the *defendant’s* rights.

Similar problems apply to other justifications adequate for exclusion. For example, spectators may be excluded when their conduct is threatening to witnesses.¹²⁴ While clothing threatening in some circumstances might be entirely innocuous in others (such as clothing with colors that are associated with gangs), it is possible that some per se rules could be crafted and appropriately administered at the courthouse door. At least one court, for example, has categorically banned “Stop Snitching” T-shirts.¹²⁵ Equally threatening (though not yet the subject of a judge’s ban) are the T-shirts recently worn by police officers in D.C. Superior Court, featuring a white supremacist symbol and the image of the Grim Reaper.¹²⁶

Judges should remember, however, that *Waller* is not a monster under the bed. In almost all cases, exclusions based on manner of dress will be exceedingly quick and painless. The required finding of an overriding interest may be made swiftly, and can be based on the judge’s own observations.¹²⁷ Consideration of alternatives may include asking the person to cover unacceptable clothing or remove an objectionable pin. No formal hearing or written order is required — the court may

¹²² One exception would be the rare case when the person can’t afford a shirt. Since a lack of shoes may not even be noticed in a courtroom, “no shirt, no shoes, no service” is not as clear a case.

¹²³ 667 N.W.2d 68, 70 (Mich. Ct. App. 2003).

¹²⁴ See, e.g., *United States ex rel. Orlando v. Fay*, 350 F.2d 967, 971 (2d Cir. 1965).

¹²⁵ Suzanne Smalley, *Judge Bans Cellphones in Dorchester Courthouse*, BOS. GLOBE (Mar. 13, 2007), http://archive.boston.com/news/local/articles/2007/03/13/judge_bans_cellphones_in_dorchester_courthouse/ [<http://perma.cc/GFD6-W6VD>].

¹²⁶ See Keith L. Alexander & Peter Hermann, *Controversial Police T-Shirt Leads to Dismissal in D.C. Gun Case*, WASH. POST (Aug. 5, 2017), <http://wapo.st/2fiAszw> [<http://perma.cc/3SYX-DWWT>]. The fact that the anti-snitch shirt has been banned and the police T-shirt has not supports this Note’s hypothesis about the impact of discretionary exclusions on communities of color. The fact that this bias will affect judges as well as security officers simply highlights the importance of requiring reason-giving, a record, and an opportunity for appeal.

¹²⁷ Smith, *supra* note 61, at 245.

make its findings orally from the bench.¹²⁸ Nor must findings be individualized — a closure can apply to exclude multiple people in a courtroom at once. As Smith has argued, *Waller* is not a hammer, but a scalpel.¹²⁹

But just because *Waller* will not burden trial courts by requiring an inordinate amount of their limited time does not mean it lacks the ability to effect significant change in the practice of criminal courts. If defense attorneys attack courthouse dress codes on Sixth Amendment grounds, the incentives for trial courts to sharply limit or eliminate them entirely will be significant — if an appellate court were to accept the claim for a voir dire or trial, automatic reversal would be required. In light of this risk and their obligations under *Presley*, trial courts can and should limit or end the use of dress codes in their courthouses.

No matter how many fewer exclusions result from following the requirements of *Waller*, the most important results are likely to be procedural. Relocating the decision to exclude from security personnel to the trial court will limit arbitrariness, allow precedent to develop on dress codes, and reduce the chilling effect on members of the public who must present themselves to unaccountable security officers for inspection. Putting this decision in the hands of courts will make it more constrained, since it will spur the growth of binding precedent, and more accountable, since appeal will be possible.

What's more, the reminder that some determinations are uniquely within the competence of the courts may be valuable. While deferring to law enforcement and security personnel in the field may be desirable, courts in some contexts possess *more* information and competence. Dress codes may well be only a starting point: once the security checkpoint is pierced, the requirements of the Constitution could be reasserted throughout the courthouse.

¹²⁸ *Id.*

¹²⁹ *Id.* at 242.

APPENDIX A — SAMPLE MOTION

1. During the previous [preliminary hearing/voir dire/trial] proceedings of [client] in [matter], [courthouse] was closed to all members of the public whose dress did not satisfy the following standard: [insert dress code standard employed in the courthouse].

2. By excluding these members of the public, and deterring others from even attempting to enter, [courthouse] effects a closure without making the findings required by *Waller v. Georgia*, 467 U.S. 39 (1984), before excluding the public from a court proceeding.

3. This Court has an independent obligation “to take every reasonable measure to accommodate public attendance at criminal trials.” *Presley v. Georgia*, 558 U.S. 209, 215 (2010) (per curiam).

4. Before anyone is excluded from [defendant’s next proceeding] based on their manner of dress, four conditions must be satisfied: “[1] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] the trial court must consider reasonable alternatives to closing the proceeding, and [4] it must make findings adequate to support the closure.” *Waller*, 467 U.S. at 48.

5. When a court fails to make the findings required by *Waller*, the right to a public trial is denied and structural error results. See *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 (2006). Were the trial to result in conviction, reversal would be required.

6. [Defendant] therefore requests that, before conducting [next proceeding] with the courthouse dress code in place, this honorable Court fulfill its duty to “take every reasonable measure to accommodate public attendance.” *Presley*, 558 U.S. at 215.

7. In particular, [defendant] requests that every person seeking entry be allowed into the courtroom, and that the Court make *Waller* findings before anyone is excluded from the courthouse for their manner of dress.