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

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

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

III. WHAT DOES IT MEAN TO BE PUBLIC?

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

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

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

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

interpretations of the scope and meaning of the Sixth Amendment right typically refer to earlier historical sources, in England and elsewhere.[8]

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

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

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

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

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

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

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

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

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

11. O'Sullivan & Connell, *supra*

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

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

IV. THE PURPOSES OF THE PUBLIC TRIAL

The ultimate purpose of the public trial is to prevent anything from occurring during the proceedings that would be subject to public condemnation.[29] 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."[30] Both historical and contemporary commentators have emphasized the abuse-deterrence function of the public trial, agreeing that "if trials are speedy and public, powerful officials will be far less likely to use their power against innocent men than if trials are protracted and secret."[31]

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

29. *See In re*

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."[32]

There is, as well, a purpose perhaps served more by the First Amendment's closely related right of public access to trials: enabling an informed and interested citizenry.[33] The late Justice Brennan described

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

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

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adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony."[50]

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

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

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

The fundamental purpose of the Confrontation Clause is to prevent "trial by affidavit,"[54] conviction by documentary hearsay. The distance between face-to-face confrontation and audio-video confrontation is much smaller than the distance between face-to-face confrontation and the presentation of a written document.

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

50. *Id.*

51. *Id.* at 850.

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

53. *Id.* at 862 (Scalia, J., dissenting) (quoting Coy v. Iowa, 487 U. S. 1012, 1016 (( )] T6(1)7G[(a)-6(t)-3( )-1q0. 0 nBT 0 g0 G|

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

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

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

So, an interpretation of the Constitution's words may need to interrogate

the proceeding, and (4) the trial court must make findings adequate to support the closure."[64]

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

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

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

The second instance of closure that could be ameliorated by the use of an online forVVSX

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

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

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

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

access was an effort to avoid running afoul of the ban on "broadcasting" of

the courtroom, the online trial is a meaningful alternative to provide access to members of the public, in order to provide defendants with the "responsible 'auditors'"[78] needed to ensure that their trials are conducted fairly.

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