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# The Criminal Court Audience in a Post-Trial World

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ARTICLE

THE CRIMINAL COURT AUDIENCE  
IN A POST-TRIAL WORLD

*Jocelyn Simonson*

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## THE CRIMINAL COURT AUDIENCE IN A POST-TRIAL WORLD

Jocelyn Simonson\*

*Legal scholars today criticize the lack of public participation in the criminal justice system as a barrier to democratic accountability, legitimacy, and fairness. When searching for solutions, these critiques bypass consideration of the audience members who attend criminal court each day — people who fill courtrooms to watch the cases in which their friends, family, and community members have been either victimized or accused of a crime. Overlooking these audience members is a mistake, for the constitutional function of the audience is one uniquely suited to help restore public participation and accountability in a world without juries.*

*The Constitution protects the democratic function of the local audience through both the Sixth Amendment right to a public trial and the First Amendment right of the public to attend criminal court. This Article argues that these rights apply with full force in the routine criminal courtroom, where arraignments, pleas, and sentencings, rather than trials, are taking place. Recognizing and enforcing the constitutional protection of the audience will require local criminal courts to grapple with widespread issues of public exclusion from the courtroom. Doing so has the potential to play a part in reinvigorating the lost connection of the public to the realities of routine criminal justice, linking a generally disempowered population to mechanisms of government accountability and social change.*

### INTRODUCTION

The Sixth Amendment provides for twin engines of public accountability for the prosecution of crimes: the right to a jury trial and the right to a public trial.<sup>1</sup> These two constitutional mechanisms — the jury and the audience — assure both defendants and communities that every prosecution will take place in full view and with the participation of the public.<sup>2</sup> Today, a criminal jury trial is a

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<sup>1</sup> U.S. CONST. amend. VI.

<sup>2</sup> Complementing the Sixth Amendment jury right are the Fifth Amendment right to indictment by grand jury, U.S. CONST. amend. V, and the Article III jury provision, U.S. CONST. art. III, § 2, cl. 3.

rare phenomenon.<sup>3</sup> Criminal court audiences, in contrast, are everywhere. On any given weekday across America, throngs of people attempt to gain access to local courtrooms to watch the cases in which their friends, family, and community members have been either victimized or accused of a crime. While audience members sit waiting for the one case they are there to see, they also view other short appearances — pleas, sentencings, case conferences, and adjournments — that together make up criminal adjudication in the world of plea bargaining. These audience members often constitute the only representatives of the public observing the criminal justice system in action. This reality makes the audience more important than it has been in centuries past. Instead of serving as a complement to the jury system, the audience *is* the public representation in the criminal courtroom.

Many scholars lament the lack of public participation in American criminal justice today, especially in state courtrooms adjudicating low-level cases: now that the vast majority of criminal cases end in guilty pleas rather than in jury trials, the public has minimal input into and receives little information about the behind-the-scenes decisions and negotiations that lead to these plea bargains.<sup>4</sup> However, scholarly analyses of the criminal justice system generally overlook the constitutional function of the audience, concentrating instead on the lost role of the jury as the representative of the public.<sup>5</sup> As a result, these scholars' suggestions for reform often focus either on creative ways to increase the role of juries in courtroom proceedings<sup>6</sup> or on building new

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<sup>3</sup> About ninety-five percent of criminal convictions result from pleas. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, tbl.5.46.2004 (2004), [www.albany.edu/sourcebook/pdf/t5462004.pdf](http://www.albany.edu/sourcebook/pdf/t5462004.pdf), archived at <http://perma.cc/ZL2E-VM9G> (detailing that ninety-five percent of state felony convictions in 2004 resulted from pleas); *id.* tbl.5.24.2009, [www.albany.edu/sourcebook/pdf/t5242009.pdf](http://www.albany.edu/sourcebook/pdf/t5242009.pdf), archived at <http://perma.cc/9AWG-BNSE> (finding that ninety-six percent of federal criminal cases during fiscal year 2009 that did not end in dismissal ended with a guilty plea).

<sup>4</sup> See, e.g., Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 920–31 (2006); Alexandra Natapoff, *Deregulating Guilt: The Information Culture of the Criminal System*, 30 CARDOZO L. REV. 965, 983–85 (2008).

<sup>5</sup> See, e.g., ROBERT P. BURNS, *THE DEATH OF THE AMERICAN TRIAL* 117–18 (2009); Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 927 (1994); Laura I. Appleman, *The Plea Jury*, 85 IND. L.J. 731, 741–46 (2010); Paul Butler, *The Case for Trials: Considering the Intangibles*, 1 J. EMPIRICAL LEGAL STUD. 627, 629–35 (2004). Two exceptions to the jury-centric approach are Professor Stephanos Bibas's description of the decline in lay participation, not only as jurors but also as prosecutors and judges, see Bibas, *supra* note 4, at 912–14, 932–33, and Professor Alexandra Natapoff's analysis of the information culture of the criminal justice system and its erosion of the information available to both defendants and the public, see Natapoff, *supra* note 4, at 982–85. Neither of these analyses, however, focuses on the audience.

<sup>6</sup> See, e.g., Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1363–66 (2012); Appleman, *supra* note 5, at 750–59; Bibas, *supra* note 4, at 959–60; Josh Bowers, *The Normative Case for Normative Grand Juries*, 47 WAKE FOREST L. REV. 319, 343–49 (2012); Roger A. Fairfax, Jr., *Grand Jury*

community justice institutions outside of the courtroom that promote local participation in discretionary decisionmaking.<sup>7</sup>

This single-minded focus on the jury as a constitutional fix inside the courtroom is a mistake. For the criminal court audience is not just normatively important; it is *constitutionally important*. The criminal court audience is protected by both the defendant's right to a public trial under the Sixth Amendment<sup>8</sup> and the public's right to access criminal proceedings — the “freedom to listen” — under the First Amendment.<sup>9</sup> As a result, the audience can and should be a central constitutional mechanism for popular accountability in modern criminal justice.<sup>10</sup> This Article demonstrates that the Sixth and First Amendment rights together protect the ability of community members sitting in local courtrooms to promote fairness and accountability in the post-trial world.

This Article's doctrinal claim is that the protections of the Sixth and First Amendment rights to a public trial extend with full force into the nontrial criminal courtroom. The seed of this claim is the nascent expansion of the Sixth Amendment right, which has recently begun to follow a path that initially appeared in First Amendment jurisprudence, extending its reach in a small number of cases into courtrooms in which pleas and sentencings, rather than trials, are taking place.<sup>11</sup> Echoing throughout Sixth and First Amendment jurisprudence in both the trial and nontrial contexts is the idea that the function of the public in the criminal courtroom goes beyond the protection of individuals to implicate the ability of citizens to participate

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*Innovation: Toward a Functional Makeover of the Ancient Bulwark of Liberty*, 19 WM. & MARY BILL RTS. J. 339, 354–58 (2010); Adriaan Lanni, *The Future of Community Justice*, 40 HARV. C.R.-C.L. L. REV. 359, 394–99 (2005); Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 872–78 (2003); Meghan J. Ryan, *Juries and the Criminal Constitution*, 65 ALA. L. REV. (forthcoming 2014); see also *infra* notes 25–30 and accompanying text.

<sup>7</sup> See, e.g., Richard A. Bierschbach & Stephanos Bibas, *Notice-and-Comment Sentencing*, 97 MINN. L. REV. 1, 34–68 (2012) (proposing notice-and-comment procedures for policing and prosecutorial charging policies); Dan M. Kahan, *Reciprocity, Collective Action, and Community Policing*, 90 CALIF. L. REV. 1513, 1527–38 (2002) (describing benefits of “reciprocal cooperation” between police and communities under new community policing models); Anthony C. Thompson, *It Takes a Community to Prosecute*, 77 NOTRE DAME L. REV. 321, 338–44 (2002) (describing community prosecution initiatives, in which prosecutors partner with local community members to set criminal justice priorities).

<sup>8</sup> “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .” U.S. CONST. amend. VI.

<sup>9</sup> *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980) (plurality opinion) (“Free speech carries with it some freedom to listen.”).

<sup>10</sup> In addition, many state constitutions provide expansive protection for the audience by requiring open courtrooms in all proceedings. See Judith Resnik, *Constitutional Entitlements to and in Courts: Remedial Rights in an Age of Egalitarianism: The Childress Lecture*, 56 ST. LOUIS U. L.J. 917, 923, app. 1 (2012) (collecting constitutional provisions).

<sup>11</sup> See, e.g., *United States v. Thompson*, 713 F.3d 388, 393–94 (8th Cir. 2013); *United States v. Rivera*, 682 F.3d 1223, 1230 (9th Cir. 2012); see also *infra* notes 186–202 and accompanying text.

in democracy and to hold the criminal justice system accountable. In effect, today the Sixth and First Amendments together create a *right to a public criminal adjudication*, one that recognizes and protects the constitutional power of the local audience in the criminal courtroom. The constitutional values underlying these rights support this Article's normative claim: that promoting the inclusion of the audience is more important than ever in the post-trial world, in which audiences are drawn from poor communities and communities of color that are disproportionately affected by, but have little input into, local criminal justice policies.

The right to a public criminal adjudication has profound implications for routine criminal justice today. To be a member of an audience is itself a form of public participation, for there is power in the act of observation: audiences affect the behavior of government actors inside the courtroom, helping to define the proceedings through their presence.<sup>12</sup> Once the audience leaves the courtroom, the experience of observation then serves a host of functions connected to democracy: it furthers public discourse, checks the government through democratic channels, and promotes government legitimacy.<sup>13</sup> As Professors Judith Resnik and Dennis Curtis have demonstrated powerfully in their recent work on courthouses, these are longstanding historical functions of the audience in public adjudication.<sup>14</sup> Observation can only be powerful, however, when there is something substantive to observe.<sup>15</sup>

Rather than welcoming the public into courthouses, court administrators around the country often exclude audiences from nontrial courtrooms, either because state courthouses are too crowded to accommodate all community members in attendance,<sup>16</sup> or because of more pointed policies under which officials forbid members of the public from entering nontrial courtrooms<sup>17</sup> or deliberately conduct pro-

<sup>12</sup> See AKHIL AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE* 118 (1997) ("The people . . . do not need to wait until Election Day to make a difference; their very presence in the courtroom can help discourage judicial misbehavior."); JUDITH RESNIK & DENNIS CURTIS, *REPRESENTING JUSTICE* 300-02 (2011).

<sup>13</sup> See RESNIK & CURTIS, *supra* note 12, at 300-02; Lani Guinier, *The Supreme Court, 2007 Term — Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 18-32 (2008).

<sup>14</sup> See RESNIK & CURTIS, *supra* note 12, at 300-10.

<sup>15</sup> *Id.* at 301.

<sup>16</sup> See, e.g., *Courthouses Overcrowded—No Court Case = No Go*, WGNS RADIO (Jan. 9, 2008), <http://wgns.wordpress.com/2008/01/09/courthouses-overcrowded-no-court-case-no-go>, archived at <http://perma.cc/M3EH-H99K> (describing overcrowded criminal courthouse in Richmond County, Virginia); Dan Walters, *Infighting Among the Judges*, U-T SAN DIEGO (May 1, 2012, 12:00 AM) <http://www.utsandiego.com/news/2012/may/01/walters-infighting-among-the-judges/>, archived at <http://perma.cc/S86N-RMC3> (describing video of "scene after scene of overcrowded courtrooms" in California).

<sup>17</sup> See, e.g., *Heckman v. Williamson Cnty.*, 369 S.W.3d 137, 160 n.122 (Tex. 2012) (describing published policy in one county in Texas that excludes all nondefendants from observing first ap-

ceedings at volume levels inaudible to the audience.<sup>18</sup> On top of these tangible forms of exclusion, nontrial proceedings themselves are often rushed and routinized, blocking the audience members in attendance from understanding what is being said in front of them.<sup>19</sup> When court officials exclude the audience from attending or listening in the courtroom, their actions underscore the relative political powerlessness of residents of neighborhoods most affected by local criminal justice policies. Truly recognizing and enforcing the constitutional protection of the audience will therefore require local criminal courts to grapple with issues of public exclusion from the courtroom, including the implicit exclusion that occurs when the bulk of plea bargaining happens out of view and earshot of the audience. In order to be effective, this grappling must happen not only on a case-by-case basis, but also through local administrative and policy efforts to increase the accessibility of routine criminal justice.

Part I of this Article lays out its conceptual backbone, distinguishing between the two constitutional representatives of the public in the criminal courtroom: the jury and the audience. This Part outlines both the promise and the crisis of the criminal court audience today: the promise of the audience to promote fairness and accountability in criminal justice, and the roadblocks to fulfilling this promise set up by courthouses across the country. Parts II and III then present a novel account of the constitutional importance of the audience in the nontrial courtroom. Part II argues that the foundational Supreme Court cases establishing the parameters of both the Sixth and First Amendment rights to a public trial depend on the same core normative concepts: the democratic importance of the local audience and the audience's ability to promote fairness and accountability in criminal justice. Part III then identifies and analyzes the recent extension of these rights into the world of plea bargaining, laying out the scope and parameters of both the Sixth and First Amendment rights in criminal courtrooms hearing nontrial matters. Part IV considers the implications for today's criminal court audience of the constitutional rules and values underpinning the rights to a public trial. The robust enforcement of open courtrooms in nontrial proceedings, including those seen as routine or mundane, presents an opportunity to link a generally disem-

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pearances in criminal court); R. Robin McDonald, *Public Shut Out of Georgia Courts*, FULTON COUNTY DAILY REP., July 3, 2012, at 1 (detailing courtroom exclusions of family members and clergy members in four counties in Georgia).

<sup>18</sup> See, e.g., *State ex rel. Law Office of the Montgomery Cnty. Pub. Defender v. Rosencrans*, 856 N.E.2d 250, 253 (Ohio 2006) (describing a criminal court in Ohio that refused to turn on its sound amplification system even though it was working).

<sup>19</sup> See *infra* notes 72–76 and accompanying text.

powered population to mechanisms of government accountability and social change.

### I. THE JURY AND THE AUDIENCE

The jury and the audience fill complementary constitutional roles.<sup>20</sup> The jury is composed of neutral citizens from the surrounding area without prior knowledge of the case at hand, while the audience contains individuals there to observe or participate in cases in which they have a personal interest. The jury listens to evidence and determines facts and guilt in individual cases, while the audience observes, learns about, and then reacts to what is said and decided inside the courtroom. Taken together, these two constitutionally protected roles allow for local communities to participate in and hold accountable their criminal justice institutions.

While scholars of criminal justice have focused on the constitutional and democratic importance of juries, and advocated for the expansion of both petit and grand juries into plea bargaining procedures, they have largely ignored the potential of the audience to have an impact on contemporary criminal justice. They have also failed to recognize the audience as an important population in its own right, representative — in many state criminal courthouses, at least — of poor communities and communities of color that are disproportionately affected by criminal justice policy. The constitutional protection of the audience need not be enforced at the expense of the jury right; this Article begins with the premise that both the jury and the audience have a valuable constitutional role to play in criminal justice. However, a myopic focus on the jury overlooks both the potential of the audience to fulfill a democratic role in the criminal justice system and the barriers to that potential created by contemporary practices of exclusion.

#### A. A Critique of the Jury-Centric Approach

The jury has largely disappeared from today's criminal courtroom.<sup>21</sup> This disappearance is a substantial loss for participation in

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<sup>20</sup> See AMAR, *supra* note 12, at 120 ("Closely linked to the public trial idea is the jury trial idea."); SUSAN N. HERMAN, *THE RIGHT TO A SPEEDY AND PUBLIC TRIAL* 25 (2006) ("Jurors represent the community when they decide guilt or innocence, but the entire community is still interested in the prosecution and therefore must be permitted to attend, just as they might have been on the jury itself.");

<sup>21</sup> More than ninety-five percent of criminal cases end in pleas. See sources cited *supra* note 3. Even when criminal trials do happen, many of them do not involve juries because the charges are low-level offenses. See *Duncan v. Louisiana*, 391 U.S. 145, 159 (1968) (observing that jury trial is not required for petty offenses when possible sentence is less than six months); T. Ward Frampton, Comment, *The Uneven Bulwark: How (and Why) Criminal Jury Trial Rates Vary by State*, 100 CALIF. L. REV. 183 (2012) (describing prevalence of bench trials).



and accountability of the criminal justice system.<sup>22</sup> While citizen participation on juries historically facilitated public input into charging decisions and determinations of guilt and punishment, the modern plea bargaining regime has transferred this power to elite actors who make behind-the-scenes decisions about whom to arrest, what to charge, and what plea bargains to strike.<sup>23</sup> Scholars and practitioners alike are concerned with this shift in power and information away from the populace, and especially with the ways in which such a shift has eroded the democratic nature of the criminal justice system, implicating both the system's legitimacy and its fairness.<sup>24</sup>

When scholars consider what role the Constitution might play in remedying this decline in public participation inside the courtroom, their analyses tend to focus on the constitutional roles of petit and grand juries and the possibility of extending the jury's role into the world of plea bargaining. One recurring proposal, for instance, involves convening juries to review discretionary decisions that currently lack civilian input. These include "plea juries" that review plea bargains before they take place,<sup>25</sup> "sentencing juries" with input into sen-

<sup>22</sup> The constitutional importance of the jury is linked — often, but not always — to the ideal of democratic participation. See *Powers v. Ohio*, 499 U.S. 400, 407 (1991) ("[W]ith the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process."); see also JOHN GASTIL ET AL., *THE JURY AND DEMOCRACY* 154–72 (2010); Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 207 (1995); Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 48–60 (2003) (describing the constitutional role of the jury as both a safeguard of liberty and a means of popular participation in the criminal justice system); Jenny E. Carroll, *The Jury's Second Coming*, 100 GEO. L.J. 657, 698 (2012) ("The post-*Apprendi* jury . . . is a second coming of the Founders' vision of the citizen as the ideal source of legal meaning."); Andrew Guthrie Ferguson, *Jury Instructions as Constitutional Education*, 84 U. COLO. L. REV. 233, 235–36 (2013) ("[T]he jury was constitutionally designed to keep judicial power in the hands of the people and to teach the skills necessary for participatory democracy[.]"). Note, however, that the connection between juries and democracy is a contested one. See Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1426–27 n.19 (2004) (highlighting the potential for bias or caprice in jury decisionmaking); cf. JEFFREY ABRAMSON, WE, THE JURY, at xxix (2d ed. 2000) ("[T]he jury, like the democracy in whose image it is formed, will probably always fall short of our expectations for ourselves . . .").

<sup>23</sup> See BURNS, *supra* note 5, at 117–20 (describing the loss of citizen participation through juries and the resulting transfer of power to elites); Appleman, *supra* note 5, at 733 (describing the "secretive, back-room status" of the current system); Bibas, *supra* note 4, at 913–14, 932–33 (describing decline in lay participation); Natapoff, *supra* note 4, at 982–86 (describing the erosion of information available to both defendants and the public).

<sup>24</sup> See, e.g., GREG BERMAN & JOHN FEINBLATT WITH SARAH GLAZER, *GOOD COURTS* 15–30 (2005); Alschuler & Deiss, *supra* note 5, at 927; Appleman, *supra* note 5, at 733–34; Bibas, *supra* note 4, at 946–47; Bowers, *supra* note 6, at 319–23; Butler, *supra* note 5, at 629–36; Lanni, *supra* note 6, at 387–98 (connecting loss in popular participation in criminal justice to overly harsh criminal justice policies); William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1974 (2008); Kevin K. Washburn, *Restoring the Grand Jury*, 76 FORDHAM L. REV. 2333, 2348 (2008).

<sup>25</sup> See Appleman, *supra* note 5, at 750–61; Bibas, *supra* note 4, at 959–60; Fairfax, Jr., *supra* note 6, at 354–58 (proposing that grand juries review plea bargains and sentencing determina-

tencing outcomes,<sup>26</sup> juries that participate in suppression hearings and make Fourth Amendment determinations,<sup>27</sup> and “bail juries” that review pretrial detention decisions.<sup>28</sup> Scholars also point to the potential of the grand jury to increase local input into prosecutorial policies, suggesting that grand juries give prosecutors specific recommendations regarding the kinds of cases that they should prosecute.<sup>29</sup>

These proposals are attractive in many ways: they bring local voices into an elite-dominated system, giving citizens direct input into decisions by police, prosecutors, and defendants that affect their communities; they educate citizens about the workings of the system; and they have the potential to increase the legitimacy of the system itself. While not necessarily mandated by the Constitution, these proposals are also deeply connected to the constitutional values underlying the rights to petit and grand juries in criminal cases.<sup>30</sup>

This focus on juries, however, makes it sound as if the Constitution’s only mechanism for popular participation in criminal justice is to empanel community members and place them on juries. It forgets that the Constitution also relies on the public nature of criminal adjudication — on the audience sitting inside the courtroom. The jury is a complement to, and not a substitute for, the audience.

To protect the local criminal court audience is to do something very different than to promote the increased use of juries. It is to recognize the power that can come from observation itself. Consider the effects

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tions); Lanni, *supra* note 6, at 394–405 (proposing grand and petit juries drawn from local areas that review charging, sentencing, and policy-making decisions); Mazzone, *supra* note 6, at 872–78 (describing “plea panels” that function like juries).

<sup>26</sup> See Bibas, *supra* note 4, at 959–60; Fairfax, Jr., *supra* note 6, at 357–58 (proposing that grand juries review sentencing determinations); Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 365–69 (2003); Ryan, *supra* note 6 (proposing that juries determine whether a punishment is “cruel and unusual” under the Eighth Amendment).

<sup>27</sup> See Ryan, *supra* note 6 (arguing that juries should determine issues of reasonableness under the Fourth Amendment); see also Erik Luna, *The Katz Jury*, 41 U.C. DAVIS L. REV. 839, 840 (2008) (putting forth a “thought experiment” in which juries decide whether a search has occurred so as to trigger Fourth Amendment protection).

<sup>28</sup> See Appleman, *supra* note 6, at 1361–66.

<sup>29</sup> See Bowers, *supra* note 6, at 321, 343–49 (proposing “a misdemeanor grand jury that would address the normative — or *extralegal* — question of whether a public-order charge is equitably appropriate in the particular case,” *id.* at 321); Lanni, *supra* note 6, at 399 (describing how local grand juries could advise prosecutors on “general . . . charging and bargaining policies”); cf. Washburn, *supra* note 24, at 2378–80 (proposing that grand juries be drawn from local communities to facilitate community participation and accountability).

<sup>30</sup> See, e.g., Appleman, *supra* note 5, at 732–36 (discussing the constitutional import of juries in the world of plea bargaining in light of recent Supreme Court decisions); Bowers, *supra* note 6, at 323–30 (connecting the grand jury’s constitutional power to make normative determinations to his proposal for normative grand juries in low-level cases); Mazzone, *supra* note 6, at 877 (suggesting that bringing juries into the plea bargain process restores the public’s constitutional right to participate via jury); Washburn, *supra* note 24, at 2348–49 (discussing the democratic values embodied in citizen review by grand juries).

that an audience can have on a routine criminal proceeding — for example, an arraignment or a plea allocution — at which no jurors are present. When community members gain access to a nontrial courtroom, their presence in court does not just affect the case that they are there to see. The effect of their presence in the courtroom can be to change the nature of the nontrial proceedings as well.<sup>31</sup> Audience members watch the players in the courtroom; they react to what they see and hear through facial expressions, laughs, and grumbles. Most of all, they sit, look, and listen. Their presence can have a palpable effect on the speakers in the courtroom. Simply by sitting and listening, audience members have the potential to play out what Resnik and Curtis have identified as one of the central historical functions of observers in adjudication: “denying the government and disputants unchecked authority to determine the social meanings of conflicts and their resolutions.”<sup>32</sup>

The audience’s power, born from its physical presence in the courtroom, is bolstered by its ability to act based on what it hears: not only through voting for district attorneys, sheriffs, and sometimes judges, but also by contributing to public discourse at local gatherings, protests, or even in casual conversations with neighbors.<sup>33</sup> Witnessing local criminal justice policies at play in routine cases informs audience members’ opinions about the efficacy and fairness of those policies. Those audience members can then engage in conversation and debate in informal settings — with family members, neighbors, co-workers, and even while waiting in line at the courthouse — that contribute to the flow of opinion in the “wild” (that is, unregulated) public sphere.<sup>34</sup> These informal methods of political participation are crucial if “af-

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<sup>31</sup> See AMAR, *supra* note 12, at 118. The idea that observers have an effect on individuals’ actions simply through observation — sometimes referred to as the observer effect or the Hawthorne effect — is borne out in social psychology as well. See generally PHILIP G. ZIMBARDO & ANN L. WEBER, *PSYCHOLOGY* 445 (1994) (discussing studies that measure the effects of an audience on an individual performing a task).

<sup>32</sup> RESNIK & CURTIS, *supra* note 12, at 302; see also Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 87 (2011) (“The presence of the public divests both the government and private litigants of control over the meanings of the claims made and the judgments rendered and enables popular debate about and means to seek revision of law’s content and application.”).

<sup>33</sup> See RESNIK & CURTIS, *supra* note 12, at 300–02.

<sup>34</sup> Jürgen Habermas, *Political Communication in Media Society: Does Democracy Still Enjoy an Epistemic Dimension? The Impact of Normative Theory on Empirical Research*, 16 COMM. THEORY 411, 416 (2006) (“[A]ttitudes [about political issues] are influenced by everyday talk in the informal settings or episodic publics of civil society at least as much as they are by paying attention to print or electronic media.”); see also 3 ANTONY DUFF ET AL., *THE TRIAL ON TRIAL* 270 (2007) (noting that the normative importance of public criminal courtrooms is “grounded in the critical independence that liberal democracies ought to afford their citizens”); RESNIK & CURTIS, *supra* note 12, at 300 (describing how courtroom observation can enrich the public sphere).

fectured locals<sup>35</sup> are to have input into more formal political decision-making. Indeed, modern courtrooms are often the sole sites in which the public can witness the adjudication of disputes and thereby hold the state accountable for the ways in which it administers that adjudication.<sup>36</sup> In these ways, the potential for audience empowerment through observation contributes to both the legitimacy and the overall fairness of proceedings.<sup>37</sup>

The act of observing can also connect audience members to outside movements for social and legal change,<sup>38</sup> including those movements that focus explicitly on local issues of policing, prosecution, and punishment. Some local movements recognize the political power that comes from courtroom observation; these movements include organizing initiatives that gather community members to attend court in support of young people accused of crimes<sup>39</sup> and “courtwatch” programs, volunteer networks that promote the prosecution of specific categories of crimes — often domestic violence — by following specific cases and attending court when those cases are on the calendar.<sup>40</sup>

An audience’s effect on a criminal proceeding may not always be a purely positive one. In jury trials, in particular, spectators sitting in visible support of a victim or a defendant have the potential to influence, and possibly bias, the outcome of a proceeding.<sup>41</sup> Even with

<sup>35</sup> This is Bibas’s term. See Bibas, *supra* note 4, at 914 n.6.

<sup>36</sup> This is demonstrated by both the disappearance of public forms of punishment, see MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* 9 (Alan Sheridan trans., 1977), and the emergence of the courthouse as a locus of openness and public debate around the time of the founding of the American republic, see Resnik, *supra* note 10, at 923 (describing the requirement of open courtrooms in the majority of state constitutions); Jonathan D. Rosenbloom, *Social Ideology as Seen Through Courtroom and Courthouse Architecture*, 22 *COLUM.-VLA J.L. & ARTS* 463 (1998) (describing the openness of colonial courthouses and their emphasis on the inclusion of the public).

<sup>37</sup> See Resnik, *supra* note 32, at 87–88 (connecting publicity and audience inclusion to other constitutional formations of the concept of fairness).

<sup>38</sup> See Guinier, *supra* note 13, 47–48 (describing how words spoken in court, specifically oral dissents, can reach larger audiences and influence movements for social and legal change).

<sup>39</sup> See, e.g., *Keep Shaka Shakur Free!—Bronx County Criminal Court*, ALL THINGS HARLEM, (Apr. 20, 2012, 11:13 AM), <http://www.peopletribune.org/pdfs/pt.2012.05.pdf>, archived at <http://perma.cc/F9CU-G7GT>; Robin Yeamans, *Fighting for Justice by Court Watching*, PEOPLE’S TRIB., May 2012, at 11, archived at <http://perma.cc/JXT3-6NQQ>; see also Sarah Geraghty & Melanie Velez, *Bringing Transparency and Accountability to Criminal Justice Institutions in the South*, 22 *STAN. L. & POL’Y REV.* 455, 468–70 (2011) (discussing courtwatching groups connected to movements to increase the fairness of criminal justice institutions).

<sup>40</sup> See, e.g., Candace McCoy & Galma Jahic, *Familiarity Breeds Respect: Organizing and Studying a Courtwatch*, 27 *JUST. SYS. J.* 61, 63 (2006); LEGAL MOMENTUM, LEGAL RESOURCE KIT: A GUIDE TO COURT WATCHING IN DOMESTIC VIOLENCE AND SEXUAL ASSAULT CASES (2005), archived at <http://perma.cc/U8G8-829B>; Vito Signorile, *Klein’s Court Watchers Program Makes Precense [sic] Known*, BRONX TIMES, Feb. 17, 2011, archived at <http://perma.cc/Z93T-CMBK>.

<sup>41</sup> See Pamela H. Bucy, *Courtroom Conduct by Spectators*, 48 *U. LOUISVILLE L. REV.* 579, 589–91 (2010); Laurie L. Levenson, *Courtroom Demeanor: The Theater of the Courtroom*, 92

nontrial proceedings, there is no guarantee that the presence of the public in the courtroom will serve to improve the behavior of the judge, the prosecutor, and the defense as they speak and act on the record. Indeed, if the influence of spectators creates unfairness for a defendant, it is the court's constitutional responsibility to respond and exclude those spectators accordingly.<sup>42</sup> That said, in the absence of bias against the defendant or unruly behavior that disrupts the proceedings, the presence of the public in the courtroom can be a constructive form of public participation in criminal justice. For criminal cases in particular, the presence of an audience reminds the judge and the prosecutor that they have a responsibility to the public to ensure the fairness of the proceedings.<sup>43</sup>

These functions of the audience — as a method of accountability and as an engine of democracy — are not simply aspirational; they are embedded in the constitutional protections of the First and Sixth Amendments. Before turning to the constitutional conception of the local audience in the nontrial courtroom, however, it is worth concentrating on some aspects of the audience's experience today: first, the identity of the audience as a distinct and important population in its own right, and second, the widespread patterns of audience exclusion in today's criminal courtrooms.

### *B. Distinguishing the Audience from the Jury*

The audience varies from the jury not only in its function, but also in its composition. This section will make the claim that, compared to the jury, the audience is both closer to the criminal justice system and further away: closer to the arrests that originate in local neighborhoods and the policies that affect audience members' everyday lives, and further from the power to affect the criminal justice system through traditional democratic methods. This section's focus is on the composition of the audience in state criminal courtrooms, in particular nontrial courtrooms adjudicating low-level offenses, for these courtrooms hear

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MINN. L. REV. 573, 587 (2008); see also RESNIK & CURTIS, *supra* note 12, at 303 (“[O]ne should not romanticize spectatorship.”).

<sup>42</sup> See *infra* notes 236–38 and accompanying text.

<sup>43</sup> See *Waller v. Georgia*, 467 U.S. 39, 46 (1984) (observing that a public hearing “ensure[s] that judge and prosecutor carry out their duties responsibly”); *United States v. Rivera*, 682 F.3d 1223, 1230 (9th Cir. 2012) (“The presence of the public at sentencing reminds the participants, especially the judge, that the consequences of their actions extend to the broader community.”); Milner S. Ball, *The Play's the Thing: An Unscientific Reflection on Courts Under the Rubric of Theater*, 28 STAN. L. REV. 81, 86 (1975) (“The public not only monitors what happens in the courtroom but may also help the active participants keep their perspective, thereby prompting them to perform their proper roles.”).

the vast majority of criminal cases in the United States.<sup>44</sup> The depiction I offer is not universal — for example, while there are crowded courtrooms in many state courthouses, there is little public presence in many federal district courtrooms<sup>45</sup> — but the trends I identify are nevertheless significant.

Who are the members of the criminal court audience? They are people who wait in lines and fill courtrooms to watch the cases in which they or their friends, family, or community members appear as victims, defendants, or witnesses to a crime.<sup>46</sup> As such, they are more likely than not to be poor people, people of color, or both. Overwhelmingly, people arrested for crimes in the United States are poor people of color, predominantly African Americans and Latinos.<sup>47</sup> Victims, too, disproportionately come from the same communities.<sup>48</sup> In contrast, many affluent Americans and white Americans do not set foot in a criminal courthouse unless they are called for jury service or to act in a professional capacity. As a consequence, even in counties with majority-white populations, it is not surprising to walk into a local criminal courtroom and find an audience consisting overwhelmingly of individuals of color. To be sure, not every single audience member in every single courtroom is a poor person of color: some defendants, victims, and their supporters come from privileged backgrounds; the institutional press reports on particularly famous or sordid cases; school groups attend court to learn about the criminal justice system; and some courtwatching groups are made up of middle-class citizens who

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<sup>44</sup> See Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1320 (2012) (cataloguing evidence that misdemeanors account for at least eighty percent of new state criminal cases each year); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 280–82 (2011); Ronald F. Wright, Response, *It's the Reply, Not the Comment: Observations About the Bierschbach and Bibas Proposal*, 97 MINN. L. REV. 2272, 2280 (2013) (“State courts rather than federal courts sentence over ninety percent of all felons each year, and over ninety-nine percent of the misdemeanants.”).

<sup>45</sup> See RESNIK & CURTIS, *supra* note 12, at 280–90.

<sup>46</sup> See, e.g., William Glaberson, *Waiting Years for Day in Court*, N.Y. TIMES, Apr. 14, 2013, at A1 (describing how “victims, defendants, witnesses or supportive relatives” all wait outside the Bronx criminal courthouse, “where the line to get inside often stretches down the block and around the corner”).

<sup>47</sup> For accounts of the racial and economic disparities in criminal justice, see MICHELLE ALEXANDER, *THE NEW JIM CROW* 97–126 (2010); HUMAN RIGHTS WATCH, *DECADES OF DISPARITY: DRUG ARRESTS AND RACE IN THE UNITED STATES* (2009), *archived at* <http://perma.cc/XPE7-647F>; WILLIAM J. SABOL ET AL., U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN: PRISONERS IN 2008, at 2 (2009), <http://www.bjs.gov/content/pub/pdf/po8.pdf>, *archived at* <http://perma.cc/F7RG-WGCF?type=pdf>; BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* 34–51 (2006).

<sup>48</sup> See JENNIFER L. TRUMAN & MICHAEL R. RAND, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN: CRIME VICTIMIZATION, 2009, at 5 tbl.5 (2010), <http://bjs.ojp.usdoj.gov/content/pub/pdf/cvo9.pdf>, *archived at* <http://perma.cc/63WP-F62W?type=pdf>.

want to monitor the ways in which courts treat other groups.<sup>49</sup> My contention, however, is that these are rare occurrences in state criminal courtrooms.

The criminal court audience on which I focus represents a constituency with a significant stake in the workings of the criminal justice system — they are there, after all, because they are personally affected by at least one case on the calendar. While they wait for that one case to be called, audience members also watch the other cases that come before the same judge<sup>50</sup>: cases involving other people accused of crimes that occurred within their community. As many scholars have shown, crimes, arrests, and prosecutions affect not only individuals, but also entire communities.<sup>51</sup> The “affected locals” in the audience, then, are witnessing cases that not only affect their own lives, but also have acute effects on the common experiences they share with their neighbors. Moreover, attending and observing the adjudication of low-level criminal cases is, for many people, their most frequent form of interaction with the workings of their local government.<sup>52</sup>

Audience members observe much more than the one case they are there to see because, in most state criminal courtrooms, dockets are full with dozens if not hundreds of cases, often more cases than the court is

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<sup>49</sup> See, e.g., Marianne Stecich, *Keeping an Eye on the Courts: A Survey of Court Observer Programs*, 58 JUDICATURE 468, 478 (1975) (describing a courtwatch group in Pennsylvania motivated by the conviction that “[t]he regular appearance of middle class persons appears to affect the behavior of both court officials and police”).

<sup>50</sup> Indeed, for many individuals involved in the criminal justice system, the bulk of their experience in the system is one of sitting and waiting, only to learn that they must come back on another day to again sit and wait, until their case is resolved. See MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT* 222–24, 241–43 (1979); Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 662–68 (2014).

<sup>51</sup> See, e.g., DONALD BRAMAN, *DOING TIME ON THE OUTSIDE* (2004) (examining impact of incarceration on families); AMANDA PETTERUTI & NASTASSIA WALSH, *JUSTICE POLICY INST., JAILING COMMUNITIES: THE IMPACT OF JAIL EXPANSION AND EFFECTIVE PUBLIC SAFETY STRATEGIES* 2–3 (2008) (describing impact of pretrial detention on communities), archived at <http://perma.cc/9DMB-48NV>; ANTHONY C. THOMPSON, *RELEASING PRISONERS, REDEEMING COMMUNITIES* 45–122 (2008); M. Chris Fabricant, *War Crimes and Misdemeanors: Understanding “Zero-Tolerance” Policing as a Form of Collective Punishment and Human Rights Violation*, 3 DREXEL L. REV. 373, 406–13 (2011) (detailing “the aggregation of the communal harms,” *id.* at 406, caused by zero-tolerance policing in one neighborhood in Brooklyn); Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, 6 OHIO ST. J. CRIM. L. 173, 202–06 (2008) (discussing the social consequences of mass incarceration); Dorothy E. Roberts, *Criminal Justice and Black Families: The Collateral Damage of Over-Enforcement*, 34 U.C. DAVIS L. REV. 1005, 1006–09 (2001) (describing the effect of incarceration of African American males on families and communities).

<sup>52</sup> See JONATHAN SIMON, *GOVERNING THROUGH CRIME* 4–5 (2007) (describing how the poor are governed through crime); Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1490 (2005) (“[T]he criminal system is a dominant form of governance in poor black neighborhoods.”).

equipped to handle on a given day.<sup>53</sup> There are a number of factors that account for these crowded courtrooms. Most obviously, there has been a dramatic rise in arrest and prosecution rates over the last fifty years.<sup>54</sup> The rise has been especially pronounced among low-level criminal offenses, resulting in sharp increases in the number of cases in misdemeanor courts.<sup>55</sup> Moreover, the ubiquity of pleas means that court administrators can put many cases on one courtroom's calendar — a plea allocution may take a matter of minutes, while a trial can last for days or weeks. Finally, budgetary restraints on local governments have meant that courthouse facilities cannot always keep up with the rise in caseloads.<sup>56</sup> As a result, to be a member of the audience in the average criminal courtroom is to watch not one criminal case, but a series of short proceedings involving a range of participants and accusations.<sup>57</sup> One defendant's appearance will be witnessed not just by his own supporters, possibly a victim<sup>58</sup> or co-defendant, and other waiting defendants, but also by members of his community who are there to provide support for or observe other defendants and other victims in other cases.

While audience members are close to the cases and policies at play inside the courtroom, they are also a population that is unlikely to

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<sup>53</sup> See, e.g., Chris Evans, *Courthouse Facing Overcrowding, Handicap Facility Issues*, GUTHRIE NEWS, May 21, 2012, archived at <http://perma.cc/8HDU-BKLQ> (describing courtroom in Logan County, Oklahoma, in which there were over 200 misdemeanor cases on the calendar and defendants were forced to wait outside); see also Issa Kohler-Hausmann, *Misdemeanor Justice: Control Without Conviction*, 119 AM. J. SOC. 351, 367 (2013) (describing a New York City courtroom with 185 cases on the calendar, with audience members "spilled out into the hallway").

<sup>54</sup> During the forty-year period between 1962 and 2002, the number of criminal defendants in state and federal courts more than doubled. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 492–93 (2004). Total incoming caseloads reported by state courts between 2000 and 2009 further increased by eight percent. *Id.*; see also R. LAFONTAIN ET AL., COURT STATISTICS PROJECT, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2009 STATE COURT CASELOADS 20 (2011), archived at <http://perma.cc/6JLT-HR4N>.

<sup>55</sup> See, e.g., Douglas L. Colbert, *Baltimore's Pretrial Injustice*, BALT. SUN, Jan. 6, 2003, at 9A (reporting that increased arrests for "low-level" crimes in Baltimore have strained its courts and jails); cf. Vickie Ferstel, *Zero Tolerance Policies Create Court Problems*, ADVOC. (Baton Rouge), Jun. 13, 2001, at 7B (describing how an increase in low-level arrests of juveniles has burdened Louisiana's courts).

<sup>56</sup> See, e.g., John DiMotto, *The Right to a Public Trial*, BENCH AND BAR EXPERIENCES (Aug. 2, 2011, 12:57 PM), <http://johndimotto.blogspot.com/2011/08/right-to-public-trial.html>, archived at <http://perma.cc/6NUJ-NS4F> (Milwaukee judge describing how budget cuts threaten the right of public access to courtrooms); Walters, *supra* note 16 (describing rift among two groups of California state court judges over how to deal with cutbacks in state court financing).

<sup>57</sup> See Kohler-Hausmann, *supra* note 53, at 375 ("[Defendants] must . . . sit patiently in a crowded courtroom, sometimes all day, watching the seemingly inscrutable logic of other cases being called and courtroom lulls, waiting for their 60–120 seconds in front of the judge.")

<sup>58</sup> The majority of crimes prosecuted today, such as violations of drug laws, firearm possession, or "quality of life" offenses, do not have a discrete or named victim. See SIMON, *supra* note 52, at 75–79.



have a substantial voice in how the criminal justice system is administered. Many are disenfranchised due to their contacts with the criminal justice system,<sup>59</sup> their age,<sup>60</sup> or their status as noncitizens.<sup>61</sup> Even those audience members who are technically part of the democratic process are unlikely to have much political power. Criminal justice policies that disproportionately affect minority individuals — policies that include but are not limited to felon disenfranchisement — also reduce the political clout of the communities of which those individuals are a part.<sup>62</sup> This result occurs in part because the relative voting strength of neighborhoods and communities dissipates with felon disenfranchisement laws.<sup>63</sup> But the effects go beyond the voting registers. As Professor Dorothy Roberts has demonstrated, contemporary crimi-

<sup>59</sup> As of 2010, 5.85 million Americans are unable to vote due to state laws restricting voting rights for those convicted of crimes, and one of every thirteen African American citizens of voting age cannot vote. See CHRISTOPHER UGGEN ET AL., THE SENTENCING PROJECT, STATE-LEVEL ESTIMATES OF FELON DISENFRANCHISEMENT IN THE UNITED STATES, 2010, at 1–2 (2012); see also ALEXANDER, *supra* note 47, at 158–61 (describing the disenfranchisement of individuals with criminal records, both through blanket prohibitions on voting by felons and through byzantine bureaucratic processes for restoring voting rights).

<sup>60</sup> While the voting age is eighteen in every state, many states prosecute younger teenagers as adults. See generally AARON KUPCHIK, JUDGING JUVENILES: PROSECUTING ADOLESCENTS IN ADULT AND JUVENILE COURTS (2006).

<sup>61</sup> While it is difficult to measure the number of noncitizens victimized or arrested for crimes, the Bureau of Justice Statistics estimates that in 2008, nearly 48,000 noncitizens were incarcerated in local jails, and more than 94,000 noncitizens were incarcerated in state and federal prisons. See TODD D. MINTON & WILLIAM J. SABOL, U.S. DEP'T OF JUSTICE, JAIL INMATES AT MIDYEAR 2008 — STATISTICAL TABLES 6 tbl.8 (2009), <http://www.bjs.gov/content/pub/pdf/jimo8st.pdf>, archived at <http://perma.cc/BS6-EZKM?type=pdf>; HEATHER C. WEST & WILLIAM J. SABOL, U.S. DEP'T OF JUSTICE, PRISON INMATES AT MIDYEAR 2008 — STATISTICAL TABLES 19 tbl.20 (2009), <http://www.bjs.gov/content/pub/pdf/pimo8st.pdf>, archived at <http://perma.cc/66BH-BBDZ?type=pdf>. These numbers do not include noncitizens arrested but not detained in jail or prison.

<sup>62</sup> See TRACI BURCH, TRADING DEMOCRACY FOR JUSTICE: CRIMINAL CONVICTIONS AND THE DECLINE OF NEIGHBORHOOD POLITICAL PARTICIPATION 75–104 (2013); Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1282 (2005) (“Prisoners are disenfranchised in virtually every state, often even after release. Those with an interest in this population — their families, friends, and sometimes their communities — currently do not have a strong voice in the political process.” (citations omitted)); Bibas, *supra* note 4, at 915 n.7 (noting that residents of high-crime neighborhoods “may . . . be even more politically powerless than other outsiders, which may exacerbate their alienation [from the criminal justice system]”); Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; or, Why Don't Legislatures Give A Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1088–92 (1993); Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1161 (2004); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1291–98 (2004) (describing how mass incarceration “destroys social citizenship”).

<sup>63</sup> See Karlan, *supra* note 62, at 1161 (describing how “[c]riminal disenfranchisement laws . . . operate as a kind of collective sanction,” reducing the political clout of minority communities); Roberts, *supra* note 62, at 1291 (arguing that “[m]ass incarceration dramatically constrains the participation of African American communities in the mainstream political economy”).

nal justice policies “destroy[] the social networks and resources necessary for communities to have a say in the political process and to organize local institutions to contest unjust policies.”<sup>64</sup> In this way, some contemporary criminal justice policies — policies that play out in the routine criminal courtroom — reduce not only the voting strength of affected communities, but also the capacity of those communities to pursue political change.

These features of the audience’s experiences stand in sharp contrast to the experiences of juries. Unlike audience members, jurors must be disinterested residents of the county — to be picked for a jury, they generally cannot have any familiarity with the parties or the circumstances of the incident in question. When deliberating, they are required to ignore any outside opinions about criminal justice policy and instead apply the law to the facts as instructed. The audience, in contrast, is made up of *interested* members of the community — individuals in attendance precisely because they care and know about at least one case on the day’s calendar. The audience is permitted to relate what it sees and hears to its larger experiences and make connections to local policy decisions, while the jury — as well as the judge and the parties — must confine their statements and analyses to the case at hand.<sup>65</sup>

In addition, while audiences contain many men of color and noncitizens, juries are unlikely to include substantial numbers of either population. This phenomenon occurs because, in addition to excluding noncitizens, the majority of states and the federal government ban from jury service anyone convicted of a felony, which excludes approximately thirty percent of African American men from jury service.<sup>66</sup> Indeed, men are underrepresented on juries.<sup>67</sup> Even for minorities al-

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<sup>64</sup> Roberts, *supra* note 62, at 1295; see also BURCH, *supra* note 62, at 5–10; WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 63–120 (2011) (describing a historical trajectory in which democratic participation dies out for African American communities affected by both crime and the criminal justice system); Lanni, *supra* note 6, at 389 (high crime communities “are likely to have less political clout in influencing legislation, law enforcement, and charging policies, both because of reduced social capital and community organization and, in some cases, because of the disenfranchisement of some community members with criminal records” (citations omitted)); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 510 (2001).

<sup>65</sup> Cf. Ball, *supra* note 43, at 101–05 (comparing the audience’s relation of what it observes to “a greater drama of human realities not limited to rules or abstractions,” *id.* at 105). Some juries and judges certainly engage in nullification, but they are not supposed to. See Carroll, *supra* note 22, at 660–61; Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877, 947–55 (1999).

<sup>66</sup> See Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 170–71 (2003) (examining data and concluding that between twenty-nine percent and thirty-seven percent of the adult black male population has been convicted of a felony).

<sup>67</sup> In New York, for example, statewide statistics show a gap between the percentage of jurors who identify as male and the percentage of males in the adult population. See ANN PFAU,

lowed into the jury pool, evidence suggests that they are more likely to be eliminated from criminal jury panels, especially in serious or capital cases.<sup>68</sup> The poor and the homeless are also unlikely to serve on juries due to permanent residence requirements.<sup>69</sup> Moreover, because courts draw jury pools at the county level, venirees themselves do not start out as representative of the neighborhoods within those counties that are most affected by criminal justice policies.<sup>70</sup> In these ways, the criminal court audience has greater exposure to the criminal justice system, but less input into its governing laws and policies, than do jurors from more affluent neighborhoods in the same county.

Audience members are not asked to “serve” as disinterested fact-finders and communal representatives. Nor are they attracted to the courthouse by famous or newsworthy stories in the way that the institutional press is.<sup>71</sup> Instead, audience members arrive at their local courthouse because of actual events in their communities that have affected them or their loved ones. Most audience members are not there by choice; they are there because they have been drawn into the criminal justice system in a way that may very well have been beyond their control. But, if they can get through the courtroom doors, they have an effect on the proceedings they witness and serve a series of functions that are directly related to democratic values.

### C. *The Exclusion of the Audience Today*

Today, criminal court audiences are excluded from courtrooms across the United States. These practices of exclusion underscore and reinforce the political inequalities described above, interfering with audience members’ ability to fulfill their constitutional role as democratic participants in routine criminal justice. Audience exclusion occurs on multiple levels. This section will focus on physical exclusion from courtrooms, but physical exclusion is intimately connected to the exclusion that occurs when courts rush through nontrial appearances and say little of substance on the record. The processing of low-level

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CHIEF ADMIN. JUDGE OF THE STATE OF N.Y., FIRST ANNUAL REPORT PURSUANT TO SECTION 528 OF THE JUDICIARY LAW 7 (2011), *archived at* <http://perma.cc/77AW-JBQ4>.

<sup>68</sup> See EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION 14–27 (2010), *archived at* <http://perma.cc/52PZ-H7FT> (detailing ongoing problem of racial bias in jury selection in eight southern states).

<sup>69</sup> See Appleman, *supra* note 5, at 774 (“[C]ulling the plea jury only from citizens with fixed residences discriminates against the poor, the homeless, and the young — many of whom do not have permanent addresses from which they can be called to serve.”).

<sup>70</sup> See Washburn, *supra* note 24, at 2378–80.

<sup>71</sup> Very few criminal prosecutions are adjudicated in front of audiences that contain members of the institutional press. See RONALD L. GOLDFARB, TV OR NOT TV: TELEVISION, JUSTICE, AND THE COURTS 155 (1998) (“Less than 1 percent of the hundreds of thousands of criminal cases each year get even a line of press notice.”).

offenses in crowded courtrooms is a rushed and routinized affair<sup>72</sup>: decisions are made behind the scenes by experienced players;<sup>73</sup> adjournments are frequent;<sup>74</sup> and the proceedings are hurried, at times happening in a matter of seconds rather than minutes or hours.<sup>75</sup> The parties are unlikely to discuss at length the decisions of the police and prosecution, the perspectives of the victims, or the character or conduct of the accused, with the result that audience members may not receive meaningful information about the cases they observe. This rushed process is in itself a form of exclusion: when the content of what is said on the record in open court does not adequately reflect what is happening in that courtroom, audience members are unable to react to or have an influence on the outcomes of the proceedings they witness.

Local audiences are also *physically* excluded from nontrial criminal courtrooms. The haste and routinization with which courts handle appearances is closely connected to physical exclusion from courtrooms. Indeed, the two reinforce each other: because court calendars are so long and courtrooms so crowded, cases are rushed and little is said. And because cases are rushed and little is said, the court system does not prioritize the ability of the public to see and to hear what is happening. While there is no singular experience of the local audience in criminal court, this section identifies a series of widespread trends in audience physical exclusion that are found in local courthouses, both urban and rural, across the country.<sup>76</sup>

Physical exclusion takes its simplest form in official policies banning any spectators from entering misdemeanor courtrooms, a practice found in arraignment and other nontrial courtrooms. In Georgia as

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<sup>72</sup> See STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* xix–xx (2012) (describing the “lawyerized reality of amoral, cookie-cutter plea bargaining,” *id.* at xx); Kohler-Hausmann, *supra* note 50, at 622 (describing the processing of misdemeanor cases as “rapid and informal, but . . . not random or mechanical”).

<sup>73</sup> See Natapoff, *supra* note 4, at 984.

<sup>74</sup> In New York City, for example, the average misdemeanor case that survives arraignment will ordinarily last a year or more, and a defendant must return to court multiple times before the case is finally resolved, so that “[t]he vast majority of [misdemeanor] appearances involve no substantive action by the court or parties.” Ian Weinstein, *The Adjudication of Minor Offenses in New York City*, 31 *FORDHAM URB. L.J.* 1157, 1172 (2004).

<sup>75</sup> In one North Carolina courtroom, for example, a criminal court judge estimated that she had ninety seconds to spend on each case on her calendar in a given day. *Focal Point: Trials and Tribulations*, RALEIGH-DURHAM WRAL (Sept. 30, 2012), <http://www.wral.com/news/local/documentaries/video/1039253/#/vid1039253>; see also Nancy Gertner, *From “Rites” to “Rights”: The Decline of the Criminal Jury Trial*, 24 *YALE J.L. & HUMAN.* 433, 436–37 (2012) (describing the nature of quick, nonsubstantive plea colloquies and sentencings in federal court).

<sup>76</sup> My evidence of these trends is largely anecdotal. This is, in part, because physical exclusion from nontrial courtrooms so rarely leads to litigation, let alone published judicial decisions — not because the exclusion is constitutional, but because it happens so quickly and/or routinely that it is not always questioned.

recently as 2012, for example, four state counties contained nontrial criminal courtrooms that were closed to the public, either through a locked door or through the posting of a guard at the entrance to check the reason for someone's presence.<sup>77</sup> Similarly, Williamson County, Texas, has instituted a permanent policy of exclusion in its misdemeanor arraignment courtroom, a place where bail determinations are made and guilty pleas may take place. As the published policy states: "Due to the limited only [sic] space, only the defendant is allowed in the courtroom for the first appearance setting. (No children, spouses, parents, or friends.)"<sup>78</sup>

Physical exclusion also takes place when courthouse administrators follow a practice of excluding community members from courtrooms due to lack of space. For example, on a recent day in Bedford County, Tennessee, over one hundred cases were docketed in a single criminal courtroom, causing a large number of defendants and community members to attempt to enter the courtroom. The circuit court clerk's response was to permit only defendants to remain in the courtroom.<sup>79</sup> Whatever occurred in that courtroom — some cases ended in guilty pleas, some in motion schedules, and some were granted routine continuances — people there to support or observe were not allowed to see or hear what happened inside.<sup>80</sup> This trend is repeated around the nation, usually accompanied by official statements regarding concerns with overcrowding and safety.<sup>81</sup>

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<sup>77</sup> See Complaint at 2–3, *Fuqua v. Pridgen*, No. 1:12-CV-93 (WLS) (M.D. Ga. June 21, 2012) [hereinafter *Fuqua* Complaint], archived at <http://perma.cc/N63L-UN45>; Settlement Agreement at 2, *Fuqua*, No. 1:12-CV-93 (WLS) (M.D. Ga. Nov. 4, 2013) [hereinafter *Fuqua* Settlement Agreement], archived at <http://perma.cc/6QEC-8BLH>; Sarah Geraghty & Melanie Velez, *Bringing Transparency and Accountability to Criminal Justice Institutions in the South*, 22 STAN. L. & POL'Y REV. 455, 469 (2011) (describing the closing of courtrooms in Georgia); R. Robin McDonald, *Public Shut Out of Georgia Courts*, FULTON CNTY. DAILY REP., July 3, 2012, at 1.

<sup>78</sup> *Heckman v. Williamson Cnty.*, 369 S.W.3d 137, 161 n.122 (Tex. 2012) (finding these facts sufficient to grant standing under the First Amendment to a woman who was unable to view her daughter's court appearance).

<sup>79</sup> Brian Mosely, *Steps Taken to Reduce Courthouse Overcrowding*, SHELBYVILLE TIMES-GAZETTE, Dec. 18, 2011, archived at <http://perma.cc/4S3U-8WUQ>. This was not a unique occurrence in that courthouse. As the same reporter described a similar scene earlier that year: "While spectators sometimes come to observe the action in court, there are so many defendants that there is simply not enough room for everyone to sit. This announcement [that only defendants may be in the courtroom] sends about 30 people who were present for moral support or transportation into the outside hallway." Brian Mosely, *A Matter of Justice*, SHELBYVILLE TIMES-GAZETTE, Jan. 30, 2011, archived at <http://perma.cc/5NMG-BBZ7>.

<sup>80</sup> Mosely, *A Matter of Justice*, *supra* note 79.

<sup>81</sup> See, e.g., Ken Clark, *Solutions for Overcrowded Pocono Courtrooms*, POCONO BUS. J., June 2007, at 1; *Courtrooms Overcrowded*, *supra* note 16 (describing a Richmond County, Virginia, Fire Marshal who ordered the exclusion of "those who did not have legitimate business in a court room," causing a crowd of people to mill outside the courthouse); DiMotto, *supra* note 56 (Milwaukee judge describing how budget cuts threaten the right of public access to courtrooms); Evans, *supra* note 53 (describing a Logan County, Oklahoma, courtroom in which there were 201

Physical exclusion can also occur in a more ad hoc manner, one that is difficult to document and often accompanied by an institutional sense that the observation of routine, nontrial cases carries little importance. For example, a defense attorney in the Bronx described to me how, one day in June 2012, her teenage client arrived in a criminal courtroom with twelve or thirteen supporters from a local community group that organizes support for young people accused of crimes. When the group sat inside the courtroom — in which there were plenty of empty seats — a court officer told the attorney that the observers could not stay in the courtroom because “this is not a trial,” and therefore the public had “no business” there.<sup>82</sup> Other exclusionary practices are subtler. For example, in Moraine, Ohio, judicial administrators of a court presiding over misdemeanors and traffic violations refused to turn on a sound amplification system inside of a courtroom so that the members of the public could hear the proceedings — despite the fact that the amplification system could be turned on by the flick of a switch.<sup>83</sup> Both of these examples demonstrate how physical exclusion is reinforced by court officials’ sense that the content of what is said on the record is not important when dealing with the routine processing of criminal cases.

If to recognize the audience is to acknowledge the power they have to participate through observation,<sup>84</sup> then to fail to recognize them — to exclude them — is to do something significant as well. When courthouse administrators deliberately exclude community members from criminal courtrooms, whether by instituting completely closed courtrooms; excluding family members, victims, and other nondefendants from observing court; or simply by keeping the volume too low for the audience to hear, they send a very specific message to an already disempowered population: that they do not count as users of courts or as participatory citizens. One additional example demonstrates how meaningful the transfer of power to the local audience as observers can be. Amy Bach, in her book *Ordinary Injustice*, de-

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misdemeanor cases scheduled to be heard in a space that fit only twenty-five people, so that the majority of people were “forced to stand outside”); Jesse Hughes, *County Commission Approves New General Sessions Judgeship*, TENNESSEAN, Dec. 18, 2013, archived at <http://perma.cc/PDR6-MC2C> (describing long lines, crowds in the hallways, and crunched conditions inside criminal courtrooms); Walters, *supra* note 16 (describing video of “scene after scene of overcrowded courtrooms” shown to California’s statewide Judicial Council).

<sup>82</sup> Email from Marne Lenox, Attorney, Bronx Defenders, to author (July 10, 2012) (on file with the Harvard Law School Library).

<sup>83</sup> The Ohio Supreme Court held that this did not violate the First Amendment — not because the proceeding did not fall under the right to a public trial, but because that right did not demand the use of a public amplification system. See *State ex rel. Law Office of Montgomery Cnty. Pub. Defender v. Rosencrans*, 856 N.E.2d 250, 255 (Ohio 2006).

<sup>84</sup> See *supra* notes 31–40 and accompanying text.

scribes a crowded nontrial criminal courtroom in Georgia in which the judge spoke quietly and without electronic amplification, resulting in a “bored” and “restless” audience, until attorney Steve Bright stood up from his place in the audience and asked that the public be allowed to hear what was happening.<sup>85</sup> Bach described the feeling of sitting in that audience: “In a court where people had grown accustomed to being ignored, merely asking the judge to speak louder was blasphemously glorious.”<sup>86</sup> Of course, an ordinary observer would not be able to speak out of turn from the audience the way that a privileged lawyer was able to do here. But this anecdote demonstrates that audience inclusion matters even for nontrial courtroom appearances that may seem routine and mundane. When a judge speaks to a crowded courtroom with a recognition that audience members are observing, the power transfer can be felt by everyone in attendance.

Conversely, when courts deny local community members entry into a criminal courtroom or the ability to understand proceedings, they deny them power as well. When audiences are excluded, both defendants and the local community lose out on an opportunity to promote fairness and accountability. This is a loss not only for innocent defendants, but also for individuals who are technically guilty but are prosecuted based on policies or procedures with which they disagree and about which they would like their community to learn.<sup>87</sup>

In sum, though the influence of juries and the press on the goings-on in local criminal courtrooms has faded, audience members remain as observers of the workings of routine criminal justice. As long as there are arrests and prosecutions, the audience will not stop seeking entry into courtrooms, and they will not stop listening to what is said there. Professor Albert W. Alschuler and Andrew G. Deiss, in their 1994 article lamenting the decline of the jury in America, describe the state of the criminal courtroom in this way:

The American right to jury trial . . . [is] a goner. Unpropertied white men, African-Americans, the members of other minority groups, and women have taken their places in the concert hall, but the orchestra has disbanded. The protagonists on both sides of the nineteenth-century battle over the authority of judge and jury to resolve questions of law have suffered resounding defeat. Today prosecutors are the judges of law and fact.<sup>88</sup>

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<sup>85</sup> AMY BACH, *ORDINARY JUSTICE* 35–37 (2009).

<sup>86</sup> *Id.* at 36.

<sup>87</sup> In this way, I take issue with Professor Akhil Amar’s belief that the role of the public in the courtroom is to “make life more difficult for the guilty.” Akhil Reed Amar, *Foreword: Sixth Amendment First Principles*, 84 *GEO. L.J.* 641, 680 (1996); see also *id.* at 677 (“Guilty defendants as a whole . . . may be less enthusiastic about public trials, just as they may be less enthusiastic about speedy ones.”).

<sup>88</sup> Alschuler & Deiss, *supra* note 5, at 927.

Alschuler and Deiss's point in this paragraph is to lament the loss of juries, the loss of trials, and the rise of prosecutorial discretion and power in the world of plea bargaining.<sup>89</sup> But their metaphor of the courtroom as a concert hall also highlights an important point, which is that while juries may be gone, the audience is still there. The courtroom is full of poor people and people of color who have been drawn into the criminal justice system as defendants, victims, and their families, neighbors, and supporters, but who have little input into the priorities and policies governing that system. If the system includes them in the courtroom and acknowledges their presence, then they can serve an important constitutional function in the absence of the jury.

## II. THE AUDIENCE AND THE RIGHT TO A PUBLIC TRIAL

The presence of the audience at nontrial proceedings is not only normatively significant; it is also constitutionally protected. This Article's central constitutional argument is one that most courts have yet to take head on — that the Sixth and First Amendment rights to a public trial apply with full force to the protection of the audience in the post-trial world. What happens during routine court appearances — a bail determination, an on-the-record plea discussion, a plea allocution, a sentencing — is the sum of the criminal justice system that is visible to the public. While the Supreme Court has not addressed whether the right to a public trial extends to these specific categories of court appearances, lower courts have extended the First Amendment freedom to listen as far as bail hearings, sentencings, and plea allocutions.<sup>90</sup> Recently, a few courts have also extended the Sixth Amendment right to a public trial to nontrial court appearances, based in large part on a little-noticed Supreme Court case, *Presley v. Georgia*,<sup>91</sup> that addressed the Sixth Amendment right for the first time in twenty-four years.<sup>92</sup> Courts disagree, however, on the scope of the rights in the nontrial courtroom. In early 2013, for example, a district court in Georgia ruled that plaintiffs, including defendants' family members and clergy, had stated a cognizable First Amendment claim where they were excluded from courtrooms in which arraignments and calendar calls took place.<sup>93</sup> Around the same time, the Eighth Circuit

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<sup>89</sup> See *id.* at 921–27.

<sup>90</sup> See, e.g., *United States v. Eppinger*, 49 F.3d 1244, 1252–53 (7th Cir. 1995) (sentencings); *United States v. Haller*, 837 F.2d 84, 86 (2d Cir. 1988) (pleas); *In re Wash. Post Co.*, 807 F.2d 383, 389 (4th Cir. 1986) (pleas and sentencings); *United States v. Chagra*, 701 F.2d 354, 363–64 (5th Cir. 1983) (bail hearings).

<sup>91</sup> 130 S. Ct. 731 (2010) (per curiam).

<sup>92</sup> See *infra* notes 180–91 and accompanying text.

<sup>93</sup> Order of Feb. 20, 2013, *Fuqua v. Pridgen*, No. 1:12-CV-93 (WLS) (M.D. Ga. Feb. 20, 2013), 2013 WL 3938517 [hereinafter *Fuqua* Order of Feb. 20, 2013], archived at <http://perma.cc/HYD7>



recognized the expansion of the Sixth Amendment to sentencing proceedings for the first time but found that the brief exclusion of individuals from a courtroom did not rise to a constitutional violation.<sup>94</sup> The uneven nature of these rulings raises questions about the reach and effect of these rights for routine criminal justice today.

Before addressing these questions head on in Part III, here I parse through the origins and normative underpinnings of the two rights to a public trial. Doing so reveals that the jurisprudence surrounding both rights moves beyond a focus on the protection of the truth-seeking function of a trial to concentrate on the function of the local audience as a check on abuses of power and a mechanism of democratic accountability. These values serve more than a normative purpose; doctrinally, they support the extension and enforcement of these rights in the nontrial courtroom, for one of the central questions a court must ask when determining whether either right applies to a particular proceeding is whether the presence of the public serves the underlying values of the right.<sup>95</sup>

While I have been referring to both rights as the “right to a public trial,” they are of course quite different from each other — they “belong” to different parties, operate differently, and result in different legal standards. The Sixth Amendment protects an individual defendant’s right to have a public audience at his criminal proceeding through the mechanism of the right to a public trial. In contrast, the First Amendment protects the public’s right to access criminal proceedings through a combination of the freedoms of speech, press, and assembly — together, the “freedom to listen.”<sup>96</sup> Only a defendant can invoke the Sixth Amendment right, while a nonparty to the case can invoke the First Amendment right.<sup>97</sup> Moreover, the two rights can sometimes conflict. A defendant may oppose the unwanted publicity that comes with press coverage of her case, especially in notorious or

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-YBWW (denying in part defendant judges’ motions to dismiss plaintiffs’ claims that courtrooms hearing “bond hearings, arraignments, calendar calls, and other criminal matters” had been closed in violation of the First Amendment).

<sup>94</sup> See *United States v. Thompson*, 713 F.3d 388, 394–96 (8th Cir. 2013) (recognizing for the first time the extension of the Sixth Amendment right to sentencing proceedings but finding no constitutional error in excluding a defendant’s entire family during the testimony of a witness).

<sup>95</sup> See *Press-Enter. Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1, 8 (1986) (noting that the Supreme Court considers whether the public’s presence “plays a significant positive role in the functioning of the particular process in question”); *Waller v. Georgia*, 467 U.S. 39, 46–47 (1984) (assessing the extension of the Sixth Amendment to a suppression hearing with reference to the values served by public access).

<sup>96</sup> *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576–77 (1980) (plurality opinion).

<sup>97</sup> See *Gannett v. DePasquale*, 443 U.S. 368, 379–80 (1979).

high-profile cases.<sup>98</sup> And a defendant may also object to the closed-door testimony of certain witnesses — for example, undercover officers<sup>99</sup> or child victims.<sup>100</sup>

Despite these differences and potential conflicts, however, the Supreme Court jurisprudence surrounding the two rights presents strikingly similar conceptions of the value of open criminal courtrooms. *In re Oliver*,<sup>101</sup> the seminal Sixth Amendment right to a public trial case, concerned one defendant's closed-door trial proceeding. The Court could have decided the case solely based on its concern for protecting the individual liberty and dignity of the defendant. Instead, the Court based the importance of the individual right on community values that include the historic function of the local audience as a check on government overreaching.<sup>102</sup> The seminal First Amendment case, *Richmond Newspapers, Inc. v. Virginia*,<sup>103</sup> was brought by a professional media organization and could have been a case about the right of the institutional press to enter courtrooms and report on trials to the general public.<sup>104</sup> Instead, the Court's decision concentrated on the importance of observation by the local community as audience. While the Court has not addressed the extension of the First and Sixth Amendment rights beyond trial, voir dire, or the taking of testimony in a hearing, its subsequent decisions addressing both rights further highlight the ways in which the two rights serve similar constitutional values. Each feature of this common focus — (a) the audience as a check on government abuse; (b) the connection between courtroom observation, self-government, and democracy; and (c) the focus on protecting an audience of local community members, rather than the institutional press — is essential to a complete understanding of these rights in the post-trial world.

#### A. Checking Abuses of Power

In both its Sixth and First Amendment cases, the Supreme Court has stressed that the right to a public trial is, in large part, about the connection between the audience's presence and curtailing abuses of

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<sup>98</sup> See, e.g., *Sheppard v. Maxwell* 384 U.S. 333, 335 (1966); *Estes v. Texas*, 381 U.S. 532, 538–39 (1965); see also MARJORIE COHN & DAVID DOW, *CAMERAS IN THE COURTROOM* 26–38 (1998); GOLDFARB, *supra* note 71, at 20–55.

<sup>99</sup> See, e.g., *U.S. ex rel. Lloyd v. Vincent*, 520 F.2d 1272, 1273 (2d Cir. 1975).

<sup>100</sup> See, e.g., *Bell v. Jarvis*, 236 F.3d 149, 168 (4th Cir. 2000).

<sup>101</sup> 333 U.S. 257 (1948).

<sup>102</sup> *Id.* at 270–71.

<sup>103</sup> 448 U.S. 555 (1980).

<sup>104</sup> Indeed, scholars often describe *Richmond Newspapers* as if it were a case about the press. See, e.g., GEOFFREY R. STONE ET AL., *THE FIRST AMENDMENT* xvii (2d ed. 2003) (categorizing *Richmond Newspapers* under “Freedom of the Press”); KATHLEEN SULLIVAN, *FIRST AMENDMENT LAW* 459 (5th ed. 2003) (same).

power on the part of officials and other actors in the courtroom. In *Oliver*, decided in 1948, the Court incorporated a defendant's Sixth Amendment public trial right under the Fourteenth Amendment, invalidating a Michigan practice in which a judge-led grand jury proceeding could result in a finding of guilt.<sup>105</sup> Although *Oliver* focused on the historical importance and tradition of the public trial,<sup>106</sup> the majority opinion also stressed that public adjudication ensures the ability of the audience to affect the fairness of criminal proceedings through observation. The presence of the local audience assures the defendant and the community that the government will be kept in check: "The 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."<sup>107</sup> As the Court would continue to do in future cases, it quoted Jeremy Bentham for the proposition that, in criminal court, "[w]ithout publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account."<sup>108</sup> The *Oliver* decision thus concentrates on the protection of an accused's right to be treated fairly, but stresses that the presence of the public helps ensure fairness in the conduct of administrators of criminal justice more broadly.

This concept reverberates throughout the Court's First Amendment jurisprudence as well. *Richmond Newspapers*, for example, focused on the "nexus between openness, fairness, and the perception of fairness" — not just in the outcome of guilt or innocence, but in the administration of justice itself.<sup>109</sup> Then, *Press-Enterprise Co. v. Superior Court of California*<sup>110</sup> (*Press-Enterprise I*), which expanded the First Amendment right to voir dire, focused on the necessity of ensuring the overall "fairness" of procedures rather than simply the accuracy of a

<sup>105</sup> 333 U.S. 257.

<sup>106</sup> As it would later do in its First Amendment cases, the Court began by reaching back to the historical foundations of public adjudication, as well as to the practices of the states — all but four states had constitutional provisions guaranteeing a public trial right, and the vast majority had statutes specifying that trials be held in public — to confirm the sanctity of the right. *Id.* at 267–68. This focus may be, in part, because the Sixth Amendment right was not a greatly debated topic at the time of the constitutional conventions, but instead acknowledged an important and consistent tradition of open courtrooms in criminal proceedings. See HERMAN, *supra* note 20, at 18–21 ("Including the right to a public trial in the [Sixth Amendment] seems to have been more a codification [of custom] than a change of direction or an act of defiance." *Id.* at 19.).

<sup>107</sup> *Oliver*, 333 U.S. at 270; see also *id.* ("[T]he guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution.")

<sup>108</sup> *Id.* at 271 (quoting 1 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 524 (1827)).

<sup>109</sup> 448 U.S. 555, 570 (1980) (plurality opinion); see also *id.* at 592 (Brennan, J., concurring in the judgment) (referring to history of public trials as checks on the abuse of power).

<sup>110</sup> 464 U.S. 501 (1984).

trial's outcome.<sup>111</sup> Public voir dire "gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system."<sup>112</sup>

The Court's most emphatic declaration of the potential of the audience to check abuses of power came later, in the same term as *Press-Enterprise I*, when the Court extended the Sixth Amendment right to a public trial to a pretrial suppression hearing in *Waller v. Georgia*.<sup>113</sup> As critics of *Waller's* reasoning point out, this decision was the first time that the Supreme Court went beyond a literal reading of the Sixth Amendment<sup>114</sup> — and it did so unanimously and without much discussion about the text of the Amendment. The suppression hearing in *Waller* involved the admissibility of evidence obtained by wiretaps of over 150 homes, implicating the privacy interests of their residents and resulting in thirty-six separate indictments under the state's RICO statute.<sup>115</sup> The Court's decision stressed that the importance of a public suppression hearing goes beyond the determination of whether a constitutional violation renders a piece of evidence inadmissible at a defendant's trial; public observation of a hearing can also "ensur[e] that judge and prosecutor carry out their duties responsibly."<sup>116</sup> A suppression hearing brings the conduct of police and prosecutors to light: prosecutors must "'justify the propriety of their conduct in obtaining' the evidence"<sup>117</sup> and police officers must justify their own procedures and defend themselves against allegations of potential misconduct.<sup>118</sup> In this way, the individual defendant's right to an open suppression hearing meshes with the public's interest in holding the police and prosecutors in the defendant's community accountable for their choices. As the wide-ranging wiretaps at issue in the hearing demonstrate, a single defendant's case may be the only chance to test a police procedure that implicates community-wide interests. While the Court's decision did not rest on this reasoning alone,<sup>119</sup> this line of ar-

<sup>111</sup> *See id.*

<sup>112</sup> *Id.* at 508.

<sup>113</sup> 467 U.S. 39 (1984).

<sup>114</sup> *See, e.g.,* Sanjay Chhablani, *Disentangling the Sixth Amendment*, 11 U. PA. J. CONST. L. 487, 530 (2009) (arguing that a guarantee of open pretrial proceedings is more appropriately located in the Due Process Clause).

<sup>115</sup> 467 U.S. at 41–42, 47 n.5.

<sup>116</sup> *Id.* at 46 (emphasis added).

<sup>117</sup> *Id.* at 47 (quoting *United States ex rel. Bennett v. Rundle*, 419 F.2d 599, 605 (3d Cir. 1969)).

<sup>118</sup> *Id.* (explaining that the right of access is "particularly strong" because "[t]he public in general . . . has a strong interest in exposing substantial allegations of police misconduct to the salutary effects of public scrutiny").

<sup>119</sup> *See* HERMAN, *supra* note 20, at 79 (noting the Court's relative "reserve" when discussing the public interest at stake in *Waller*).

gument in *Waller* has important implications for other nontrial proceedings that invite scrutiny of local police and prosecutorial practices.

*B. Enhancing Self-Government and Democracy*

Related to the audience's ability to facilitate the accountability of public officials is the idea that the audience's presence enhances self-government and democracy among local citizenry. This idea, most prominent in the Supreme Court's First Amendment cases, derives from Justice Brennan's structural conception of the purpose of free speech.<sup>120</sup> As Justice Brennan once stated: "[T]he First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self government. . . . [A] right of access to criminal trials . . . is to ensure that this constitutionally protected discussion of governmental affairs is an informed one."<sup>121</sup> In *Richmond Newspapers*, for example, the Court held for the first time that, under the First Amendment, the public has a right of access to criminal trial proceedings, as well as standing to challenge the denial of this access, under the First Amendment.<sup>122</sup> This First Amendment right to access criminal proceedings derives from a combination of the freedoms of speech, press, and assembly, which provide the public with a right "not only to speak or to take action, but also to listen, observe, and learn."<sup>123</sup>

Justice Brennan's concurring opinion in *Richmond Newspapers* described the freedom to listen as emanating from a "structural" conception of the role of the First Amendment, which "embodies more than a commitment to free expression and communicative interchange for their own sakes[;] it has a *structural* role to play in securing and fostering our republican system of self-government."<sup>124</sup> As Professor Alex-

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<sup>120</sup> See generally William J. Brennan, Jr., Assoc. Justice, U.S. Supreme Court, Address at the Dedication for the S.I. Newhouse Center for Law and Justice (Oct. 17, 1979), in 32 RUTGERS L. REV. 173 (1979) ("[T]he First Amendment protects the structure of communications necessary for the existence of our democracy." *Id.* at 176.); William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965) [hereinafter Brennan, *Meiklejohn Interpretation of the First Amendment*].

<sup>121</sup> *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604-05 (1982) (citations omitted) (internal quotation marks omitted).

<sup>122</sup> *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (plurality opinion); see also *id.* at 582 (Stevens, J., concurring).

<sup>123</sup> *Id.* at 578 (plurality opinion); see also *id.* at 576-77.

<sup>124</sup> *Id.* at 587 (Brennan, J., concurring in the judgment) (citing, among others, JOHN HART ELY, *DEMOCRACY AND DISTRUST* 93-94 (1980); THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 7 (1970); ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948); and Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 23 (1971)).

ander Meiklejohn, a particularly strong influence on Justice Brennan,<sup>125</sup> had written:

[T]he First Amendment is not, in the first instance, concerned with the “right” of the speaker to say this or that. It is concerned with the authority of the hearers to meet together, to discuss, and to hear discussed by speakers of their own choice, whatever they may deem worthy of their consideration.<sup>126</sup>

Under this “structural” conception of the First Amendment — so named because it reinforces the democratic structure of the entire Constitution rather than only the rights of individual speakers — a historically open proceeding that serves an important function in democracy is implicated in the First Amendment’s protections of democratic debate and governmental accountability. If there were any doubts about this emphasis on the democratic role of the audience in *Richmond Newspapers* — Justice Brennan’s opinion was a concurrence in the judgment only, joined solely by Justice Marshall<sup>127</sup> — the majority of the Court adopted the structural conception of the freedom to listen two years later, in *Globe Newspaper Co. v. Superior Court*,<sup>128</sup> when the Court stated unequivocally that “[u]nderlying the First Amendment right of access to criminal trials is the common understanding that a major purpose of that Amendment was to protect the free discussion of governmental affairs.”<sup>129</sup>

The Sixth Amendment’s right to a public trial, as articulated in *Oliver*, provides part of the “structure” that creates the freedom to listen. In other words, the right to a public trial falls under First Amendment protection in part because of the guarantee of the Sixth Amendment — a guarantee that the Court emphasized is not only for the benefit of defendants. Indeed, although *Oliver* concerned an individual Sixth Amendment right, the *Oliver* Court recognized that the benefits of the right extend beyond the individual to implicate, at least, the exposure of potential governmental abuses in the “forum of public opinion.”<sup>130</sup> In this way, the democratic value of the audience emerged early on in the Court’s rulings. As Second Circuit Judge Calabresi declared: “In *Oliver*, seemingly Sixth Amendment public access was seen as a guarantor of fairness, accuracy, and correct procedure — as much

<sup>125</sup> See Brennan, *Meiklejohn Interpretation of the First Amendment*, *supra* note 120.

<sup>126</sup> ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 119 (1960); see also ELY, *supra* note 124, at 93–94 (“The expression-related provisions of the First Amendment . . . were centrally intended to help make our governmental processes work, to ensure the open and informed discussion of political issues, and to check our government when it gets out of bounds.”).

<sup>127</sup> *Richmond Newspapers*, 448 U.S. at 584 (Brennan, J., concurring in the judgment).

<sup>128</sup> 457 U.S. 596 (1982).

<sup>129</sup> *Id.* at 604 (internal quotation marks omitted).

<sup>130</sup> *In re Oliver*, 333 U.S. 257, 270 (1948); see also *id.* at 270 n.24.

because these further democratic values and help adjudicators reach correct results as because they protect defendants.”<sup>131</sup>

### C. *An Audience of Locals*

In the Supreme Court’s approach to these rights, it is an audience made up of local citizens, physically present in the courtroom, that can best support the constitutional functions of the audience. For example, *Oliver*’s conception of the “public” in the “right to a public trial” is one of the local community rather than one of the press. The Court focused on the ability of members of the community to view proceedings, stating explicitly that the right protects the ability of supporters of the defendant — “at the very least . . . [a defendant’s] friends, relatives and counsel” — to attend the trial.<sup>132</sup> Rather than explicitly including the press as an important player to be admitted into a trial courtroom, the opinion relegated to a footnote an acknowledgment that past commentators have advocated for a special position for the press.<sup>133</sup> The Court reinforced this idea more recently, in *Presley*, when it overturned a conviction because the only courtroom observer — the defendant’s uncle — was excluded from the courtroom during voir dire.<sup>134</sup>

This focus on the local audience, in contrast to the institutional press, is reflected in the Court’s First Amendment jurisprudence as well. Although the plaintiffs in both *Richmond Newspapers* and *Globe Newspaper* were newspapers, the decisions do not stress any special right of the press to access proceedings and publicize what happens there, and instead explicitly rely on the combined rights of free speech, press, and assembly. In this way, *Richmond Newspapers* reveals a counterintuitive feature of the Court’s First Amendment jurisprudence in that the opinions focus not on the function of the institutional press but on the function of the general public.<sup>135</sup> The result is an arm of

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<sup>131</sup> *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 296 (2d Cir. 2012) (citing *Oliver*, 333 U.S. at 270).

<sup>132</sup> *Oliver*, 333 U.S. at 272.

<sup>133</sup> See *id.* at 272 n.29; see also HERMAN, *supra* note 20, at 34 (“A footnote to this sentence . . . made clear who was omitted from the Court’s initial list of who ‘at the very least’ must be permitted to attend: the press.”).

<sup>134</sup> *Presley v. Georgia*, 130 S. Ct. 721, 722, 725 (2010) (per curiam).

<sup>135</sup> See C. Edwin Baker, *The Media that Citizens Need*, 147 U. PA. L. REV. 317, 401 (1998); Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards a Realistic Right to Gather Information in the Information Age*, 65 OHIO ST. L.J. 249, 290–96 (2004) (critiquing the *Richmond Newspapers* approach for locating the right of access under free speech principles rather than freedom of the press). Another indication that *Richmond Newspapers* was not about special press rights was a series of then-recent cases that had rejected claims that the press was independently privileged to access or receive information. See *Houchins v. KQED, Inc.*, 438 U.S. 1, 14–16 (1978) (plurality opinion); *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 849–50 (1974); *Pell v. Procunier*, 417 U.S. 817, 834–35 (1974); see also Eugene Cerruti, “*Dancing in the Courthouse*”: *The First Amendment Right of Access Opens a New Round*, 29 U. RICH. L. REV. 237, 248 (1995).

First Amendment doctrine that treats the press no differently from the individual members of the public at large who wish to observe courtroom proceedings. Just as in *Oliver* thirty years earlier, the Court's focus, as stated in *Globe Newspaper*, was on local community members sitting in courtrooms watching the criminal justice system in action: "[T]he First Amendment serves to ensure that *the individual citizen* can effectively participate in and contribute to our republican system of self-government."<sup>136</sup> This is not to say that the press plays no role in the constitutional function of the audience; the institutional press can certainly enhance the ability of the public at large to understand the workings of the criminal justice system and hold that system accountable. But the Court's jurisprudence displays an unmistakable focus on the physical presence of locals inside the courtroom.

The longstanding debate over whether the press has a right to bring cameras into courtrooms highlights the distinction that the Court has drawn between the physical presence of local community members and the inclusion of the institutional press at large. Even as the Sixth Amendment right to a public trial developed in the mid-twentieth century, the Court considered a series of cases in which it addressed the constitutional balance between allowing the press inside criminal courtrooms and a defendant's right to a fair trial.<sup>137</sup> In *Estes v. Texas*,<sup>138</sup> for example, the Court overturned a defendant's conviction because the presence of television crews and news photographers undermined the dignity and fairness of the trial, threatening to prejudice the jury and affect witness testimony.<sup>139</sup> Some Justices were concerned with the harms of "commercializ[ing]" the criminal trial;<sup>140</sup> the majori-

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Even Professor Laurence Tribe, arguing for Richmond Newspapers, stated during oral argument that his client did not want to be treated any differently than the public at large. See Transcript of Oral Argument, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (No. 79-243), 1980 U.S. Trans. LEXIS 102, at \*18-19; see also Anthony Lewis, *A Public Right to Know About Public Institutions: The First Amendment as Sword*, 1980 SUP. CT. REV. 1, 19 ("One lingering constitutional argument is surely put to rest by *Richmond Newspapers*: the claim that the Press Clause of the First Amendment gives journalists a distinct and preferred status.").

<sup>136</sup> *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) (emphasis added); see also *Press-Enterprise I*, 464 U.S. 501, 508 (1984) (emphasizing "the right of everyone in the community to attend" the proceeding, rather than the right of the press to report on it).

<sup>137</sup> *Chandler v. Florida*, 449 U.S. 560, 581 (1981) (holding that television coverage of trials is permissible absent a showing that the coverage affected the judgment of the jury or had an "adverse impact on the trial participants"); *Sheppard v. Maxwell*, 384 U.S. 333, 362-63 (1966) (reversing conviction after trial because the court failed to control excessive press coverage, and stressing that "trial courts must take strong measures to ensure that the balance is never weighed against the accused," *id.* at 362); *Estes v. Texas*, 381 U.S. 532, 535-37, 540 (1965) (holding that the televising of a defendant's pretrial hearings and parts of his trial interfered with "the atmosphere essential to the preservation of a fair trial," *id.* at 540, and violated due process).

<sup>138</sup> 381 U.S. 532.

<sup>139</sup> See *id.* at 540-41, 544-48.

<sup>140</sup> *Id.* at 574 (Warren, C.J., concurring).



ty decision contrasted the physical presence of individuals with the videotaping and broadcasting of those trials to a larger public.<sup>141</sup> This concern with the potential of the institutional press to prejudice proceedings helps explain how, in the same Term as it held that the exclusion of one observer during voir dire violates the Sixth Amendment in *Presley*, the Supreme Court went out of its way to overturn a civil trial judge's ruling allowing cameras in the courtroom for a highly publicized civil case.<sup>142</sup>

While I do not take a position in this Article with respect to the Supreme Court's distrust of cameras,<sup>143</sup> my point is that the First and Sixth Amendment rights to a public trial protect first and foremost the *physical* presence of the *local* audience and only secondarily reach issues of technology and press access.<sup>144</sup> Today, the institutional press seldom attempts to gain entrance to routine criminal courtrooms.<sup>145</sup> When it does, there are rarely jurors to prejudice or witnesses to intimidate. Instead, state criminal courtrooms are full of local residents who are drawn to the courthouse not for entertainment but rather to observe specific cases as defendants, victims, or their friends, family, and neighbors. They may describe their experiences on social media or other substitutes for the institutional press. But as local residents, they often share with defendants an interest in open proceedings that elucidate underlying prosecutorial policies and police practices. Of course, this observation is not always true — a defendant charged with a serious crime, for instance, may not want the details of the charges read publicly in front of a courtroom of his neighbors. But ascertaining whether the interests of the defendant conflict or merge with those of the public attempting to enter a courtroom can help a court determine whether an open courtroom serves the normative purposes of the rights to a public trial in a particular case.

When the interests of the defendant and the public align, the rights are strongest. A defendant's due process rights protect against any

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<sup>141</sup> *Id.* at 540 (majority opinion); see also *id.* at 588 (Harlan, J., concurring) (“Essentially, the public-trial guarantee embodies a view of human nature, true as a general rule, that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings.”).

<sup>142</sup> See *Hollingsworth v. Perry*, 130 S. Ct. 705, 707 (2010) (per curiam). But note that, in *Hollingsworth*, the Court took pains to stress that it did not “express any views on the propriety of broadcasting court proceedings generally.” *Id.* at 709.

<sup>143</sup> See generally Sonja R. West, *The Monster in the Courtroom*, 2012 B.Y.U. L. REV. 1953 (discussing and critiquing the Supreme Court's stated reasons for its distrust of cameras in the courtroom).

<sup>144</sup> Indeed, a live broadcast of a routine criminal courtroom has the potential to legitimate the physical exclusion from that courtroom of populations whose presence can have a real-time effect on the actors inside.

<sup>145</sup> Cf. GOLDFARB, *supra* note 71, at 155 (“Less than 1 percent of the hundreds of thousands of criminal cases each year get even a line of press notice.”).

public presence in the courtroom that prejudices the case *against the defendant*, but the prosecutor and the judge enjoy no such protection. The confluence of the defendant's and the public's interest in open proceedings is most likely to happen in routine, nontrial appearances, where concerns about prejudicing factfinding proceedings give way to a "common concern [in] the assurance of fairness."<sup>146</sup> In the absence of juries, it becomes *appropriate* for actors in the courtroom — especially prosecutors and judges — to adjust their conduct in reaction to the presence of the local public. Indeed, the effect of the audience on courtroom players becomes one of the central justifications for extending the defendant's Sixth Amendment protection beyond the trial.<sup>147</sup> As litigation surrounding the freedom to listen shifts from the trial courtroom to the nontrial courtroom, and from championing the interests of the institutional press to the interests of the local audience, the allowable reasons that a court can give for closing the courtroom doors diminish, and the constitutional demands for access therefore grow stronger. In the next Part, I sketch out the parameters of the First and Sixth Amendment rights to a public trial in these routine, nontrial courtrooms; in doing so, I argue that the normative thrust of the Supreme Court precedents identified above authorizes robust protection of the local criminal court audience today.

### III. THE AUDIENCE AND THE RIGHT TO A PUBLIC ADJUDICATION

In order for local community members to be able to understand, discuss, react to, and hold accountable the behavior of local criminal justice institutions — in order for the Constitution to uphold the values articulated in the Supreme Court's jurisprudence — the protection of the audience must extend into the world of plea bargaining, into today's routine, nontrial courtroom. As the Fifth Circuit recently emphasized, "the fact that there is no jury at . . . [a] proceeding . . . heightens the need for public access."<sup>148</sup> The Supreme Court has never explicitly weighed in on the application of the right to a public trial in relation to plea bargaining — that is, in the context of a criminal case that will likely end in a guilty plea and accompanying sentencing rather than a trial. The Court has expanded both the First and Sixth Amendment rights beyond the literal trial, however, opening the door for lower courts to do so in the world of plea bargaining.

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<sup>146</sup> *Press-Enterprise II*, 478 U.S. 1, 7 (1986).

<sup>147</sup> See *Waller v. Georgia*, 467 U.S. 39, 46 (1984); *United States v. Rivera*, 682 F.3d 1223, 1230 (9th Cir. 2012).

<sup>148</sup> *In re Hearst Newspapers, L.L.C.*, 641 F.3d 168, 179 (5th Cir. 2011) (finding First Amendment right of access to sentencing proceedings).

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And they have. The First Amendment right expanded first, beginning in the 1980s, as lower courts began to encounter requests for public access to nontrial proceedings. The Sixth Amendment right, in contrast, has spread to pleas and sentencings only in the past few years, thanks in large part to the little-noticed 2010 Supreme Court decision in *Presley*.

This Part will parse the rights of the audience and the defendant to public and open courtrooms in nontrial proceedings. By nontrial proceedings, I do not mean voir dire, suppression hearings, or other formal hearings in which testimony is given and weighed for its truthfulness, but rather the day-to-day, usually short, “routine” proceedings that comprise the vast majority of court appearances. These include, most importantly, bail hearings, arraignments, plea allocutions, and sentencings, but can also include status conferences in which courtroom players discuss the status of the charges, discovery, or plea negotiations.

I begin by detailing the recent expansion of the First and Sixth Amendment rights into this nontrial world, identifying a nascent jurisprudential trend that recognizes the function of the audience as protecting the democratic accountability of local criminal justice in a world without juries. I spend time telling the story of this recent expansion for two reasons. First, it demonstrates lower courts’ embrace of the importance of the constitutional values described above in the nontrial courtroom. Second, it reveals that as the case law has developed, courts have increasingly conflated the scope of the First and Sixth Amendment rights; while the First Amendment right at first seems broader than the Sixth, there is a growing sense that an individual defendant’s right to a public trial must be greater than or equal to the public’s right to access a courtroom. The result of this conflation is complex, but important: as the First Amendment right of access has extended beyond the literal “trial,” the defendant’s Sixth Amendment right has followed.

After describing these phenomena, I then look beyond this smattering of cases to address a number of concrete questions that arise when assessing the scope of the First and Sixth Amendment rights in the nontrial courtroom, including: (1) to which criminal proceedings do the rights apply?; (2) how do we know when a remedy is necessary?; and (3) what would that remedy be? I take each question in turn, ultimately arguing that the revitalized rights to a public trial extend to every routine, nontrial criminal court appearance, implicating nationwide patterns of audience overcrowding and exclusion.

#### A. *First Amendment Expansion in Lower Courts*

The extension of the First Amendment freedom to listen into the world of plea bargaining — bail hearings, plea proceedings, and sen-

tencing hearings — followed closely behind the Supreme Court’s decisions in *Richmond Newspapers* and the *Press-Enterprise* cases. This expansion focused on the role of public observation in the absence of jury trials; even in the 1980s, the vast majority of criminal cases ended in guilty pleas rather than trials.<sup>149</sup> The continued dominance of the plea bargaining regime heightened the importance of including the local public in the courtroom, where their observation could provide a check on the government, including with regard to criminal justice policies that extend beyond one individual case.<sup>150</sup>

The expansion was set up by a 1986 case, *Press-Enterprise II*, in which the Court found that the First Amendment right of access to criminal courtrooms extends to a California preliminary hearing, the purpose of which is to determine if there is probable cause to charge a defendant with a felony.<sup>151</sup> The Court for the first time set aside the requirement that the freedom to listen concern a criminal *trial*: “[T]he First Amendment question cannot be resolved solely on the label we give the event, *i.e.*, ‘trial’ or otherwise.”<sup>152</sup> Instead, to determine if the First Amendment right applies, a court should look to the proceeding in question and ask (i) if there is a tradition or history of openness and (ii) whether public observation “plays a significant positive role in the functioning of the particular process in question.”<sup>153</sup> In applying this “experience and logic” test<sup>154</sup> to the preliminary hearing in question, the Court focused on the role of the public in a proceeding without a jury: “[T]he absence of a jury, long recognized as ‘an inestimable safeguard against the corrupt or overzealous prosecutor and . . . biased[] or eccentric judge,’ makes the importance of public access to a preliminary hearing even more significant.”<sup>155</sup> In addition, the Court recognized that not all cases go to trial, acknowledging that for many de-

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<sup>149</sup> See *In re N.Y. Times Co.*, 828 F.2d 110, 114 (2d Cir. 1987) (“It makes little sense to recognize a right of public access to criminal courts and then limit that right to the trial phase of a criminal proceeding, something that occurs in only a small fraction of criminal cases.” (quoting *In re Herald Co.*, 734 F.2d 93, 98 (2d Cir. 1984)) (internal quotation marks omitted)); Galanter, *supra* note 54, at 492–93.

<sup>150</sup> Indeed, one critique of the plea bargaining regime at the time was that it undermined the values articulated in *Richmond Newspapers*. See Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652, 719–20 (1981) (“[P]lea negotiation will provide an easy mechanism for circumventing all of the values that the Chief Justice articulated [in *Richmond Newspapers*].” *Id.* at 720.).

<sup>151</sup> *Press-Enterprise II*, 478 U.S. at 13; see CAL. PENAL CODE §§ 859–870 (West 2008).

<sup>152</sup> *Press-Enterprise II*, 478 U.S. at 7.

<sup>153</sup> *Id.* at 8.

<sup>154</sup> *Id.* at 9.

<sup>155</sup> *Id.* at 12–13 (citation omitted) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968)); see also *El Vocero de P.R. v. Puerto Rico*, 508 U.S. 147, 150 (1993) (finding that *Press-Enterprise II* applies to a different kind of preliminary hearing in Puerto Rico).

defendants, a preliminary hearing may be the only public airing of any evidence in their case.<sup>156</sup>

The First Amendment expansion into the world of nontrial appearances then continued with a series of cases around the country that challenged closed criminal courtrooms in pleas and sentencings. In 1986, the Fourth Circuit was one of the first courts to rule that the First Amendment right extends to both guilty pleas and sentencing proceedings.<sup>157</sup> The court followed the two-prong “experience and logic” test. Historically, sentencings and guilty pleas have been open proceedings — even if guilty pleas are a relatively new phenomenon — satisfying the experience prong.<sup>158</sup> And as for the “logic” or “function” of openness, the Fourth Circuit stated:

As to both [sentencings and guilty pleas], public access serves the important function of discouraging either the prosecutor or the court from engaging in arbitrary or wrongful conduct. The presence of the public operates to check any temptation that might be felt by either the prosecutor or the court to obtain a guilty plea by coercion or trick, or to seek or impose an arbitrary or disproportionate sentence.<sup>159</sup>

The Fourth Circuit emphasized checking any prosecutorial or judicial misconduct against the particular defendant whose case is on the record, so that the public is protecting both its own interests in observing public officials and the interests of defendants in fair proceedings.

Other circuits to address the issue have without exception followed this reasoning with respect to both pleas<sup>160</sup> and sentencings,<sup>161</sup> continually stressing the importance of public scrutiny in the absence of trials. Given that “most criminal prosecutions consist solely of pre-

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<sup>156</sup> *Press-Enterprise II*, 478 U.S. at 12. (“[T]he preliminary hearing is often the final and most important step in the criminal proceeding.”).

<sup>157</sup> See *In re Wash. Post Co.*, 807 F.2d 383, 389 (4th Cir. 1986).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> See, e.g., *Oregonian Publ'g Co. v. U.S. Dist. Court*, 920 F.2d 1462, 1465–66 (9th Cir. 1990) (“In many respects, the plea agreement takes the place of the criminal trial. Just as there exists a first amendment right of access in the context of criminal trials, it should exist in the context of the means by which most criminal prosecutions are resolved, the plea agreement.” *Id.* at 1465 (citations omitted).); *United States v. Danovaro*, 877 F.2d 583, 589 (7th Cir. 1989) (“Public access to [guilty pleas] reveals the basis on which society imposes punishment, especially valuable when the defendant pleads guilty while protesting innocence.”); *United States v. Haller*, 837 F.2d 84, 86–87 (2d Cir. 1988).

<sup>161</sup> See, e.g., *In re Hearst Newspapers, L.L.C.*, 641 F.3d 168, 175–81 (5th Cir. 2011); *United States v. Alcantara*, 396 F.3d 189, 196–99 (2d Cir. 2005); *United States v. Eppinger*, 49 F.3d 1244, 1252–53 (7th Cir. 1995); *CBS, Inc. v. U.S. Dist. Court*, 765 F.2d 823, 825 (9th Cir. 1985) (“The primary justifications for access to criminal proceedings . . . apply with as much force to post-conviction proceedings as to the trial itself.”); see also *United States v. Santarelli*, 729 F.2d 1388, 1390 (11th Cir. 1984) (finding a First Amendment right of access to documents submitted at a sentencing hearing).

trial procedures,”<sup>162</sup> a community presence in the nontrial courtroom may be the only opportunity for the community to learn about — and later react to — not just prosecutorial and judicial practices, but also those of the police.<sup>163</sup> Lower courts soon extended the freedom to listen to bail proceedings as well.<sup>164</sup> Although a bail hearing is not a substitute for a trial, courts began to acknowledge that the decision regarding whether to set bail can be one of the most critical in a criminal case and has important implications for both defendants and communities.<sup>165</sup>

The emphasis of these decisions on the right of the public to see, understand, and hold accountable the decisions made by officials involved in the criminal justice system clearly reflects Justice Brennan’s structural focus on the First Amendment’s protection of the audience as community members and citizens.<sup>166</sup> At the same time, while courts decided these cases under the First Amendment, they often invoked the benefits to defendants of having a public presence in the nontrial courtroom — once again, the history and function of the Sixth Amendment contributed to the strength of the First Amendment right.<sup>167</sup> Because the public’s and the defendant’s interests overlap in the nontrial courtroom — the vast majority of cases involve not a famous defendant or salacious accusation to attract the press, but a rou-

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<sup>162</sup> *United States v. Criden*, 675 F.2d 550, 557 (3d Cir. 1982).

<sup>163</sup> *See id.* at 556–57.

<sup>164</sup> *See, e.g., In re Globe Newspaper Co.*, 729 F.2d 47, 52 (1st Cir. 1984) (extending right to bail proceedings based on “the need for a public educated in the workings of the justice system and for a justice system subjected to the scrutiny of the public”); *United States v. Chagra*, 701 F.2d 354, 363–64 (5th Cir. 1983) (finding bail proceedings covered by First Amendment based on “societal interests in public awareness of, and its understanding and confidence in, the judicial system,” *id.* at 363, and despite lack of history of openness).

<sup>165</sup> *See, e.g., In re Globe Newspaper*, 729 F.2d at 52 (“[T]he bail decision is one of major importance to the administration of justice . . . .”); *see also United States v. Abuhadra*, 389 F.3d 309, 323–24 (2d Cir. 2004) (discussing the importance of bail hearings in the context of both First Amendment and Sixth Amendment jurisprudence).

<sup>166</sup> *See supra* notes 124–26 and accompanying text.

<sup>167</sup> In contrast, while a few courts in the 1980s recognized the First Amendment right’s application to civil trials as well, *see, e.g., Westmoreland v. CBS, Inc.*, 752 F.2d 16, 23 (2d Cir. 1984); *Publinter Indus., Inc. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984), the expansion of the freedom to listen has run into problems outside of the criminal context in the absence of a civil complement to the history and text of the Sixth Amendment public trial right. *See Heidi Kitrosser, Secrecy in the Immigration Courts and Beyond: Considering the Right to Know in the Administrative State*, 39 HARV. C.R.-C.L. L. REV. 95, 98–99 (2004) (describing the uneven application of *Richmond Newspapers* and its progeny in the modern administrative state, including in immigration hearings); Raleigh Hannah Levine, *Toward a New Public Access Doctrine*, 27 CARDOZO L. REV. 1739, 1741 (2006) (critiquing the Supreme Court’s silence on the extension of the freedom to listen beyond the criminal context); *cf. Ctr. for Nat’l Sec. Studies v. U.S. Dep’t of Justice*, 331 F.3d 918, 935 (D.C. Cir. 2003) (“[N]either this Court nor the Supreme Court has ever indicated that it would apply the *Richmond Newspapers* test to anything other than criminal judicial proceedings . . . .”). That said, a number of federal circuit courts have extended the First Amendment right to civil proceedings.

tine prosecution that attracts local community members — the constitutional rights behind those interests began to overlap as well; rather than separate rights, courts increasingly treated the First and Sixth Amendment rights to open proceedings hand in hand.

The 2005 Second Circuit case *United States v. Alcantara*<sup>168</sup> highlights the extent of the conflation of the two rights. *Alcantara* addressed two cases, one a guilty plea and one a sentencing proceeding after a guilty plea, both of which took place in a district court judge's chambers without notice to the public.<sup>169</sup> One defendant sought relief under the Sixth Amendment, arguing that the closed proceedings violated her right to a public trial.<sup>170</sup> The Second Circuit vacated both convictions in a consolidated opinion, ordering that new proceedings must take place in open courtrooms.<sup>171</sup> However, rather than rely on the Sixth Amendment in overturning both the plea and the sentence, the court based its decision on a violation of the First Amendment.<sup>172</sup>

In *Alcantara*, the court overturned the sentence and the plea *at the request of the defendants* — there was no intervenor from the public or the press — by invoking the First Amendment and the importance of the audience. The court was able to decide the case under the First rather than the Sixth Amendment because it treated the interests of the local community, or the “public,” as coextensive with the interests of the defendant.<sup>173</sup> The court wrote:

Sentencing proceedings are of paramount importance to friends and family members of the defendant being sentenced. The proceedings are also extremely significant to victims of crimes, to family members of victims, and to members of the community in which the crime occurred. . . . A sentencing proceeding is a solemn occasion at which the judge has the weighty duty of determining the fate of another human being. A transcript of the proceeding does not convey the impact that the judge's words and actions have on the defendant and any friends or family members present. Furthermore, the ability to see the application of sentencing laws in person is important to an informed public debate over these laws.<sup>174</sup>

In this dense explanation of the Second Circuit's expansive ruling, there are three important strands of reasoning at play together. First, the court highlighted the constitutional importance of including a defendant's family and community in a guilty plea or sentencing, under-

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<sup>168</sup> 396 F.3d 189 (2d Cir. 2005).

<sup>169</sup> *Id.* at 191.

<sup>170</sup> *Id.* at 193.

<sup>171</sup> *Id.* at 203.

<sup>172</sup> *Id.* at 202.

<sup>173</sup> Procedurally, this action was taken under the circuit's supervisory powers. *Id.* at 192.

<sup>174</sup> *Id.* at 198–99.

scoring the value of the local audience.<sup>175</sup> Second, the court viewed the interests of defendants and the public in securing open proceedings as in unison in the world of plea bargaining, stating that “the interests of the defendants are squarely aligned with protecting the rights of the public and press.”<sup>176</sup> Finally, the decision stressed the furtherance of public debate that comes not from reading about a proceeding or publishing a story on it, but from *attending* the proceeding.<sup>177</sup> By invoking these three intertwined justifications for open proceedings in pleas and sentencing in two cases brought by defendants, the Second Circuit deliberately highlighted the ways in which the purposes and protections of the First and Sixth Amendment rights to public proceedings come together in the absence of trials.

### B. Presley and the Sixth Amendment Expansion

As of 2010, while courts around the country had acknowledged the relevance of the Sixth Amendment to the reach of the First Amendment freedom to listen, for the most part they had still not ruled on the reach of the Sixth Amendment right to a public trial beyond the suppression hearing at issue in *Waller v. Georgia*.<sup>178</sup> Moreover, in the trial context, lower courts applied the Sixth Amendment right unevenly, with some courts declining to overturn convictions even when trial courts had partially closed courtrooms without making appropriate findings.<sup>179</sup> Then, in 2010, the Supreme Court addressed the Sixth Amendment right to a public trial for the first time in twenty-four years in *Presley v. Georgia*, reversing a conviction after a Georgia trial court excluded the lone courtroom observer — the defendant’s uncle — from voir dire proceedings.<sup>180</sup> Although the decision was issued per curiam, the Court actually made a number of significant jur-

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<sup>175</sup> *Id.* at 198; see also *In re Oliver*, 333 U.S. 257, 271–72 (1948) (stressing the protection of “at the very least . . . [a defendant’s] friends, relatives and counsel,” *id.* at 272).

<sup>176</sup> *Alcantara*, 396 F.3d at 203.

<sup>177</sup> See *id.* at 199 (“There is no doubt that witnessing a sentencing in person is a more powerful experience than reading a transcript of the proceeding.”).

<sup>178</sup> One exception is an appellate decision in Ohio applying the Sixth Amendment right to a closed sentencing hearing. See *State v. Morris*, 811 N.E.2d 577, 579 (Ohio Ct. App. 2004) (“Because the sentencing hearing is an essential part of the criminal trial itself, we hold that the right to a public trial extends to the sentencing hearing.”).

<sup>179</sup> See Daniel Levitas, Comment, *Scaling Waller: How Courts Have Eroded the Sixth Amendment Public Trial Right*, 59 EMORY L.J. 493 (2009) (describing the ways in which courts had “eroded” the Sixth Amendment right in the trial context by applying harmless error analysis and allowing partial closures of courtrooms).

<sup>180</sup> 130 S. Ct. 721, 722 (2010) (per curiam). Before *Presley*, the Court last discussed the Sixth Amendment right to a public trial in 1986, in *Press-Enterprise II*, 478 U.S. 1, 7 (1986), which examined the First Amendment public trial right. The last direct holding regarding the Sixth Amendment public trial right was in *Waller v. Georgia*, 467 U.S. 39 (1984).



isprudential moves that reinvigorated the relevance of the Sixth Amendment's right to a public trial in a post-trial world.<sup>181</sup>

*Presley's* first important move was that, in officially extending the Sixth Amendment right into voir dire proceedings, it did so not by arguing that voir dire is a functional part of a "trial," but instead by reference to the prior extension of the First Amendment freedom to listen to nontrial proceedings.<sup>182</sup> Specifically, the Court described *Press-Enterprise I's* holding that the First Amendment freedom to listen applies to voir dire, and then decided that "there is no legitimate reason, at least in the context of juror proceedings, to give one who asserts a First Amendment privilege greater rights to insist on public proceedings than the accused has."<sup>183</sup> While the Court explicitly declined to hold that the scope of the First and Sixth Amendments are coterminous beyond voir dire, the implication of the decision's language, one picked up on by lower courts,<sup>184</sup> is that because extensions of the First Amendment freedom to listen are indebted to the existence of a defendant's rights to fair and public proceedings, where the First Amendment right reaches, the Sixth Amendment right to a public trial must apply as well.<sup>185</sup>

The Court's second significant move in *Presley* was to hold that neither a defendant nor the public need assert its right to attend a criminal proceeding in order to uphold or preserve that right. Instead, the Court wrote that a trial court has an affirmative obligation "to take every reasonable measure to accommodate public attendance," whether or not such accommodation is requested.<sup>186</sup> In so holding, the Court again referred to its First Amendment jurisprudence. The Court reasoned that because, under *Press-Enterprise I* and its progeny, "the public has a right to be present whether or not any party has asserted the right," a court's obligation naturally extends to the defendant, removing any requirement that he object or request public access

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<sup>181</sup> Justice Thomas recognized as much, writing: "Today the Court summarily disposes of two important questions it left unanswered 25 years ago . . . . Besides departing from the standards that should govern summary dispositions, today's decision belittles the efforts of our judicial colleagues who have struggled with these issues . . . ." *Presley*, 130 S. Ct. at 725–27 (Thomas, J., dissenting).

<sup>182</sup> *Id.* at 723–24 (per curiam).

<sup>183</sup> *Id.* at 724.

<sup>184</sup> For example, in extending the Sixth Amendment right to sentencing hearings, the Eighth Circuit took the quotation above and replaced "juror proceedings" with "sentencing hearings." *United States v. Thompson*, 713 F.3d 388, 394 (8th Cir. 2013).

<sup>185</sup> In this way, the Court engaged in the same kind of bootstrapping argument as found in *Waller*. See *Waller*, 467 U.S. at 46 ("[T]here can be little doubt that the *explicit* Sixth Amendment right of the accused is no less protective of a public trial than the *implicit* First Amendment right of the press and public." (emphasis added)).

<sup>186</sup> *Presley*, 130 S. Ct. at 725.

in order to preserve the issue.<sup>187</sup> The *Presley* Court thus underscored the responsibility of courts to assure public courtrooms, taking the onus away from defendants to assert their Sixth Amendment right.<sup>188</sup> The Court reiterated that a violation of this responsibility constitutes a structural error, requiring reversal of a conviction whether or not there is harm shown.

Third, and equally important, the Court in *Presley* ordered a new trial based on the exclusion of one lone spectator, the defendant's uncle, during only one part of the trial proceedings.<sup>189</sup> Moreover, it did so without a discussion of whether excluding one family member of the defendant is a substantial enough exclusion to rise to a violation of the right to a public trial. The assumption in the Court's reasoning is that to exclude just one spectator does not excuse a court from its obligation to make explicit findings and explore all possible alternatives before closure.<sup>190</sup> This assumption contradicted the approach of some circuit courts, which had found that when a small number of people are excluded or the exclusion is for only a part of a proceeding, that exclusion requires a lower level of scrutiny.<sup>191</sup>

Lower courts have taken these cues from *Presley*, and a renewed expansion of the Sixth Amendment right has begun. Over the past few years, a smattering of lower courts addressing Sixth Amendment claims has stressed both the importance of the right in nontrial proceedings<sup>192</sup> and the responsibility of courts to ensure the right to

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<sup>187</sup> *Id.*; see also *id.* (“In *Press-Enterprise I*, for instance, neither the defendant nor the prosecution requested an open courtroom during juror voir dire proceedings; in fact, both specifically argued in favor of keeping the transcript of the proceedings confidential. The Court, nonetheless, found it was error to close the courtroom.” (citation omitted)).

<sup>188</sup> The Supreme Court so held despite circuit precedent to the contrary. See, e.g., *Ayala v. Speckard*, 131 F.3d 62, 65–68 (2d Cir. 1997) (en banc) (holding, among other things, that a trial judge need not consider alternatives to closure sua sponte). Notably, the dissent in *Ayala* underscored the overlapping interests of the public and the defendant in an open courtroom. *Id.* at 76–77 (Parker, J., dissenting) (“With regard to the constitutional guarantee of the public right to trial, the First and Sixth Amendments are inextricably linked, serving the same ends within our political system. The whole notion of trial being ‘public’ implies that people other than the defendant must have a stake in this right in order to give it any meaning.”).

<sup>189</sup> 130 S. Ct. at 722.

<sup>190</sup> The Sixth Circuit has a similar interpretation of *Presley*. See *Drummond v. Houk*, 728 F.3d 520, 527 (6th Cir. 2013) (“*Presley* . . . held that *Waller* applies equally to full and partial courtroom closures.”).

<sup>191</sup> See *Angiano v. Scribner*, 366 F. App'x 726, 727 (9th Cir. 2010) (“The Circuits are split as to the applicability of the . . . test in *Waller* to ‘partial closures,’ where only one person is excluded from a trial.”).

<sup>192</sup> See, e.g., *United States v. Thompson*, 713 F.3d 388 (8th Cir. 2013) (extending right to sentencings); *United States v. Rivera*, 682 F.3d 1223, 1229 (9th Cir. 2012) (extending right to pleas and sentencings); *United States v. Waters*, 627 F.3d 345, 360 (9th Cir. 2010) (extending right to pretrial hearing because “although the Sixth Amendment refers to a ‘public trial,’ the right encompasses more than the trial itself”); *Lilly v. State*, 365 S.W.3d 321, 326 (Tex. Crim. App. 2012) (extending right to pretrial appearances in chapel courtroom).

a public trial even in the absence of objections or requests for access.<sup>193</sup>

A case from Texas's highest criminal court illustrates both of these phenomena. In *Lilly v. State*,<sup>194</sup> the Texas Court of Criminal Appeals reversed a plea proceeding conducted inside of a prison chapel courtroom which, although not closed to the public, required that people wishing to attend pass through a series of searches and security barriers to get inside.<sup>195</sup> The Texas court found without much discussion or difficulty that the Sixth Amendment right to a public trial extended to plea proceedings, holding that a guilty plea in front of a judge is itself a form of criminal "trial" because a judge presides over the outcome of a criminal case.<sup>196</sup> Moreover, even though there was no evidence that anyone had tried to gain access to the courtroom to observe the defendant's case, the court found that the "cumulative effect" of the courtroom's location inside a guarded prison and the searches required to get inside created an overly restrictive courtroom environment.<sup>197</sup> The plea was vacated, and the case remanded for a new plea or trial.<sup>198</sup> Citing *Presley*, the court faulted the courtroom administrators for not "tak[ing] every reasonable measure to accommodate public attendance."<sup>199</sup> In Texas, all criminal courts must now take affirmative steps to guarantee open courtrooms whether or not a member of the public has requested access.

Although brought by defendants, recent successful Sixth Amendment claims invariably concern the importance of community access to routine criminal justice. For example, the Ninth Circuit case *United States v. Rivera*<sup>200</sup> found a Sixth Amendment violation when a defendant's seven-year-old son was excluded from a sentencing proceeding because "[t]he presence of the public at sentencing reminds the partici-

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<sup>193</sup> See, e.g., *Drummond*, 728 F.3d at 523; *Littlejohn v. United States*, 73 A.3d 1034, 1040–42 (D.C. 2013); *United States v. Gupta*, 699 F.3d 682, 686 (2d Cir. 2012); *United States v. Withers*, 638 F.3d 1055, 1064 (9th Cir. 2011); *Purvis v. State*, 708 S.E.2d 283, 283 (Ga. 2011); *Commonwealth v. Alebord*, 953 N.E.2d 744, 749 (Mass. App. Ct. 2011); *People v. Martin*, 16 N.Y.3d 607, 613 (N.Y. 2011). The Second Circuit's decision in *Gupta* displayed a notable shift in the circuit's approach to reviewing Sixth Amendment decisions, for the panel issued a decision reversing itself after the full court had met en banc to review the initial decision upholding the conviction. See *United States v. Gupta*, 650 F.3d 863 (2d Cir. 2011), *vacated and remanded*, 699 F.3d 682 (2d Cir. 2012).

<sup>194</sup> 365 S.W.3d 321.

<sup>195</sup> *Id.* at 330.

<sup>196</sup> *Id.* at 328 ("[P]lea-bargained bench trials in a correctional facility . . . are trials within the meaning of the Sixth Amendment, and the need for the public to have a meaningful opportunity to attend a criminal defendant's bench trial in a prison is no less important than in a jury trial at the public county courthouse.").

<sup>197</sup> *Id.* at 330–32.

<sup>198</sup> *Id.* at 333.

<sup>199</sup> *Id.* at 331 (citing *Presley v. Georgia*, 130 S. Ct. 721, 725 (2010) (per curiam)).

<sup>200</sup> 682 F.3d 1223 (9th Cir. 2012).

pants, especially the judge, that the consequences of their actions extend to the broader community.”<sup>201</sup> In *Rivera*, the district court judge had deemed attendance of family members as “manipulative” simply through their presence; the Ninth Circuit stressed, in overturning the sentencing proceeding, that such a complaint is “directly at odds with one of the purposes of the public trial protection — namely, to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions.”<sup>202</sup> When audience members quietly sit in a courtroom with the intent to influence proceedings and remind prosecutors and judges about how their decisions affect the local community, they are not being disruptive, but rather are exercising a constitutional right.

As the Sixth Amendment right has begun to extend into the realm of routine criminal justice, the First Amendment has begun to display some of these changes as well. Reflecting the shared interests of defendants and communities in open courtrooms, First Amendment claims are now brought by local nonprofit organizations or community groups seeking access to courtrooms.<sup>203</sup> The New York Civil Liberties Union, for example, brought a lawsuit on behalf of communities affected by the New York City Transit Police’s practice of issuing “tickets” with consequences parallel to low-level criminal charges, but the adjudication of which took place behind closed doors.<sup>204</sup> And in Georgia, the Southern Center for Human Rights brought a class action challenging the practice of excluding community members — the named plaintiffs in *Fuqua v. Pridgen*<sup>205</sup> were local clergy, family members, and friends of defendants — from courtrooms in which arraignments, bail decisions, pleas, and routine calendar calls take place.<sup>206</sup> In *Fuqua*, the federal district court found that the First Amendment applies to these routine criminal proceedings because “[p]rohibiting the majority of the public from these proceedings often bars them from observing the entire justice system.”<sup>207</sup> These lawsuits demonstrate both the harm that comes to local communities when they

<sup>201</sup> *Id.* at 1230.

<sup>202</sup> *Id.* at 1236 (internal citation omitted).

<sup>203</sup> See, e.g., *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286 (2d Cir. 2012); *State ex rel. Law Office of Montgomery Cnty. Pub. Defender v. Rosencrans*, 856 N.E.2d 250, 253 (Ohio 2006); *Heckman v. Williamson Cnty.*, 369 S.W.3d 137, 143 (Tex. 2012); *Fuqua* Complaint, *supra* note 77.

<sup>204</sup> See *N.Y. Civil Liberties Union*, 684 F.3d at 300.

<sup>205</sup> No. 1:12-CV-93 (WLS) (M.D. Ga. 2012).

<sup>206</sup> *Fuqua* Complaint, *supra* note 77, at 6–8. This challenge recently survived a motion to dismiss for failure to state a claim. *Fuqua* Order of Feb. 20, 2013, *supra* note 93. The district court ruled, in part, that the First Amendment applies in the arraignment courtroom, citing *Presley* when doing so. *Id.* at 9–14; see also *Fuqua v. Pridgen*, No. 1:12-CV-93 (WLS), 2013 WL 3938517, at \*6–8 (M.D. Ga. July 30, 2013).

<sup>207</sup> *Fuqua* Order of Feb. 20, 2013, *supra* note 93, at 16.

are excluded from routine criminal justice and the renewed viability of challenges to such exclusion in light of Sixth Amendment developments.<sup>208</sup>

### C. *The Scope of the Rights Today*

Taken together, then, these trends in First and Sixth Amendment jurisprudence provide renewed protections for the constitutional function of the local audience: to promote fairness and accountability in everyday criminal justice. Although the expansion of the Sixth Amendment right in the nontrial courtroom is still a new one, the tide is turning toward a recognition that both the First and Sixth Amendment rights to a public trial apply — and apply forcefully — in the nontrial world. This section parses out the specifics of the scope of those rights.

1. *Which Proceedings?* — The result of *Presley* and the recent case law it has spawned is that both the First and Sixth Amendment rights are at play in every criminal proceeding that traditionally takes place in open court — beginning with bail hearings and arraignments, and all the way through the entering of a judgment at sentencing. The district court in *Fuqua* explained why this is the case in the First Amendment context: ordinary criminal court appearances, even when they do not involve truthseeking or the taking of testimony, are “integral to the judicial process regardless of whether the defendant pleads guilty.”<sup>209</sup> Routine criminal court appearances satisfy the “experience and logic” test<sup>210</sup> — they have traditionally been open to the public and, functionally, they facilitate the ability of audience members to hold the criminal justice system and its actors accountable for how they respond to crime and treat defendants in the post-trial world. The fact that the majority of state constitutions speak of the right to “open” courts generally, rather than just public trials, supports both the historical and functional aspects of the test as well.<sup>211</sup> In order for the public to hold its officials accountable and participate as citizens, it needs to be able to see the routine appearances that make up criminal justice in its neighborhoods. This access does not extend, of course, to pre-arrest investigations,<sup>212</sup> grand jury proceedings, or most off-the-

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<sup>208</sup> Indeed, in *Fuqua*, the district court repeatedly referred to the opinion in *Presley* when determining the scope of the First Amendment right. See, e.g., *id.* at 12–14.

<sup>209</sup> *Id.* at 18.

<sup>210</sup> See *supra* notes 151–56 and accompanying text.

<sup>211</sup> See Resnik, *supra* note 10, at 923. Moreover, these state constitutional provisions support the extension of the First Amendment right into civil and appellate courtrooms.

<sup>212</sup> Cf. *Wilson v. Layne*, 526 U.S. 603, 612–13 (1999) (finding that First Amendment does not necessarily extend to media “ride-alongs” in police cars).

record plea discussions.<sup>213</sup> But when a judge is presiding over a criminal courtroom proceeding at which the defendant is present, there is an initial presumption of openness and any closure must be justified.

The Constitution's reach into routine criminal court proceedings is no less robust in the Sixth Amendment context. As the *Waller* Court stated, and the *Presley* Court reemphasized, "there can be little doubt that the *explicit* Sixth Amendment right of the accused is no less protective of a public trial than the *implicit* First Amendment right of the press and public."<sup>214</sup> In *Presley*, the Court was careful to limit this idea to voir dire, but its logic is no less persuasive in the nontrial context: if the central concerns of the First Amendment right are fairness and democratic accountability,<sup>215</sup> in part based on the Sixth Amendment's concern for fairness with respect to the defendant,<sup>216</sup> then the constitutional protection in those courtrooms surely belongs to the defendant as well. It is this equivalence that lower courts have used when recognizing that the Sixth Amendment extends to nontrial appearances. Indeed, the doctrinal "experience and logic" is the same. The Eighth Circuit recently put it this way:

To [determine whether the Sixth Amendment applies], as informed by the Court's First Amendment public access jurisprudence, we must determine whether [the proceeding is] traditionally conducted in an open fashion, and whether public access operates to curb prosecutorial or judicial misconduct and furthers the public interest in understanding the criminal justice system.<sup>217</sup>

Nontrial courtroom appearances — not backroom plea bargaining deals<sup>218</sup> or grand jury proceedings, but arraignments, bail hearings, and

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<sup>213</sup> I say "most" because there may be times when the First and Sixth Amendment rights come to bear on the ability of a defendant to publicize or make use of documents handed over by the government but not made part of the record during the course of plea negotiations. For example, if the documents lead to an official adjudicatory decision or plea allocution, they are subject to a right of access. See *United States v. El-Sayegh*, 131 F.3d 158, 161–62 (D.C. Cir. 1997). But even if the documents do not lead to an official adjudicatory act, they may arguably serve an important function in governmental accountability and therefore public access may be subject to constitutional protection. For example, Kevin Ring — a lobbyist convicted in conjunction with the Abramoff bribing scandal — recently moved for a federal district court to allow him to make public use of materials handed over to him by the government pursuant to a protective order in order to "educate the public about how pleas and charging decisions can work and how prosecutors' actions can affect the criminal justice process." See Defendant's Motion to Unseal at 1, *United States v. Ring*, 628 F. Supp. 2d 195 (D.D.C. 2013) (No. 08-CR-274), archived at <http://perma.cc/WF9L-TBZA>.

<sup>214</sup> *Presley v. Georgia*, 130 S. Ct. 721, 723 (2010) (per curiam) (emphasis added) (quoting *Waller v. Georgia*, 467 U.S. 39, 46 (1984)).

<sup>215</sup> See *supra* Part II, pp. 2195–205.

<sup>216</sup> See *supra* pp. 2201–02 (discussing the Sixth Amendment's relationship to the structural conception of the First Amendment right).

<sup>217</sup> *United States v. Thompson*, 713 F.3d 388, 393 (8th Cir. 2013).

<sup>218</sup> But see *supra* note 213 and accompanying text.

other routine appearances that usually happen in the courtroom — are traditionally open proceedings.<sup>219</sup> For most defendants, allowing their neighbors, friends, and family into the courtroom facilitates the unearthing of police conduct and prosecutorial decisions that have led to their prosecution, and reminds the courtroom players that the setting of bail, determination of a sentence, and even how the parties discuss the case on the record, affects more than just one person.<sup>220</sup>

The Supreme Court's 2012 rulings in *Lafler v. Cooper*<sup>221</sup> and *Missouri v. Frye*<sup>222</sup> provide further support for the extension of the Sixth Amendment into routine nontrial proceedings, as the Court indicated its willingness to regulate the constitutionality of everyday plea bargaining procedures in light of the rarity of trials today.<sup>223</sup> Indeed, the district court in *Fuqua* made this argument, writing that “[i]n acknowledging the modern realities of the criminal-justice system, [*Lafler* and *Frye*] cast doubt on [the] position that a hearing must be trial-like, or a trial substitute, to receive constitutional protection.”<sup>224</sup>

The text of the Sixth Amendment — in particular, the word “trial” — need not be an impediment to its reach into the routine, nontrial courtroom. While the majority of courts that have recognized the extension of the Sixth Amendment right to a public trial into the nontrial courtroom have largely ignored this textual puzzle, some have taken it on. The Texas Court of Criminal Appeals, for example, has held that the definition of the word “trial” in the Sixth Amendment necessarily includes guilty pleas, sentencing, and similar pretrial proceedings because the heart of their function is not the taking of testimony, but rather the adjudication of the criminal case.<sup>225</sup> This reading makes sense: at the

<sup>219</sup> See *Fuqua* Order of Feb. 20, 2013, *supra* note 93, at 16–17.

<sup>220</sup> Cf. *United States v. Alcantara*, 396 F.3d 189, 203 (2d Cir. 2005) (“[T]he interests of the defendants are squarely aligned with protecting the rights of the public and press.”).

<sup>221</sup> 132 S. Ct. 1376 (2012).

<sup>222</sup> 132 S. Ct. 1399 (2012).

<sup>223</sup> *Id.* at 1407 (“Because ours ‘is for the most part a system of pleas, not a system of trials,’ it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process.” (quoting *Lafler*, 132 S. Ct. at 1388) (citation omitted)); *Lafler*, 132 S. Ct. at 1388 (“[T]he right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences.”); see also *Lafler*, 132 S. Ct. at 1391 (Scalia, J., dissenting) (“[T]he Court today opens a whole new field of constitutionalized criminal procedure: plea-bargaining law.”); Donald A. Dripps, *Plea Bargaining and the Supreme Court: The End of the Beginning?*, 25 FED. SENT’G REP. 141, 141 (2012) (“*Frye* and *Lafler* arguably confirm the willingness of a majority of the justices to regularize and perhaps regulate the guilty plea process.”).

<sup>224</sup> *Fuqua* Order of Feb. 20, 2013, *supra* note 93, at 16 n.1.

<sup>225</sup> See *Lilly v. State*, 365 S.W.3d 321, 328 (Tex. Crim. App. 2012) (citing *Murray v. State*, 302 S.W.3d 874, 880 (Tex. Crim. App. 2009)) (“[A] plea-bargain proceeding in which no issues are contested is still a trial.”); cf. *United States v. El-Sayegh*, 131 F.3d 158, 161 (D.C. Cir. 1997) (“A new procedure that substituted for an older one would presumably be evaluated by the tradition of access to the older procedure.”).

founding of the Republic, a defendant's case usually consisted of just one court appearance — a “trial” — so that the right encompassed the entire public adjudication of the case.<sup>226</sup>

In a separate approach, some judges and scholars have argued that the Due Process Clauses of the Fifth and Fourteenth Amendment combine with the Sixth Amendment to extend a defendant's right to open proceedings beyond the traditional definition of a trial.<sup>227</sup> Indeed, in his *Richmond Newspapers* concurrence, Justice Brennan explained in a footnote that “*Oliver* did not rest upon the simple incorporation of the Sixth Amendment into the Fourteenth, but upon notions intrinsic to due process, because the criminal contempt proceedings at issue in the case were ‘not within “all criminal prosecutions” to which [the Sixth] Amendment applies.’”<sup>228</sup> Under either approach — one that sticks to defining a “trial” as an entire public adjudication or one that seeks assistance from the Due Process Clause — the “experience and logic” test mandates that a defendant has a right to have his entire courtroom adjudication held in front of the public, including his friends, family, and neighbors, when his interests so dictate.

2. *What Must a Court Do to Ensure the Rights?* — The extension of the First and Sixth Amendment rights into the nontrial courtroom means that, in every public criminal courtroom, the responsibility falls upon the court and the courthouse administrators to make sure that no member of the public is excluded from the courtroom without a constitutionally sufficient reason. Not only must a court balance potential exclusion against other legitimate interests, it must also consider “all reasonable alternatives to closure”<sup>229</sup> and it must do so on the record.<sup>230</sup> This obligation holds whether or not someone has requested access; after *Presley*, courts are “obligated to take every reasonable measure to accommodate public attendance at criminal trials.”<sup>231</sup> Ex-

<sup>226</sup> See LAWRENCE FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 24–26 (1993).

<sup>227</sup> See, e.g., *United States v. Thompson*, 713 F.3d 388, 396–400 (8th Cir. 2013) (Gruender, J., concurring); Chhablani, *supra* note 114, at 530–33 (arguing that *Waller* should have been decided under the Due Process Clause rather than the Sixth Amendment public trial right).

<sup>228</sup> *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 591 n.16 (1980) (Brennan, J., concurring) (alteration in original) (quoting *Levine v. United States*, 362 U.S. 610, 616 (1960)).

<sup>229</sup> *Presley v. Georgia*, 130 S. Ct. 721, 725 (2010) (per curiam).

<sup>230</sup> See, e.g., *Littlejohn v. United States*, 73 A.3d 1034, 1041 (D.C. 2013) (asking whether a judge had considered all reasonable alternatives before excluding a defendant's supporters from part of a trial based on legitimate safety concerns); *Garcia v. State*, 401 S.W.3d 300, 303 (Tex. App. 2013) (“[T]he trial court had to consider *all* reasonable alternatives to closure, sensibly reject each one, and issue specific findings that justified the closure in light of controlling law.”).

<sup>231</sup> *Presley*, 130 S. Ct. at 725. While it is clear that no one need *request* access in order to trigger a court's responsibility to make a courtroom accessible, courts are split over whether a defendant can waive his Sixth Amendment right by failing to object to a known closure, leading to plain error review. Compare *United States v. Espinal-Almeida*, 699 F.3d 588, 599–600 (1st Cir.



clusion can occur only “based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.”<sup>232</sup> Under the Sixth Amendment, any “closure must be no broader than necessary . . . [and] the trial court must consider reasonable alternatives to closing the proceeding.”<sup>233</sup> Similarly, a court must address any potential First Amendment claim in detail on record prior to closure.<sup>234</sup> In the context of routine criminal courtrooms, this requirement might mean one announcement at the start of a busy day with respect to audience inclusion and crowded courtrooms. But the record must nevertheless be explicit and detailed — the onus is on the court, not the rightsholders.

In trial cases, overcrowding is not, on its own, an adequate excuse for exclusion of members of the public from a courtroom.<sup>235</sup> There is no reason that this duty should not remain in the routine, nontrial courtroom as well; if a courtroom is going to be too crowded to accommodate the cases that day, judges and court administrators must consider alternative methods — “every reasonable measure” — of including audiences in the adjudication of cases. As I discuss in Part IV, the responsibility for considering issues of overcrowding falls not just on individual judges, but also on court administrators.

To be clear, enforcing the right to a public criminal adjudication does not mean that every criminal courtroom must always be open, or that no audience member can ever be excluded. There can certainly be good reasons for audience exclusion. An individual judge may very well confront circumstances in which spectators are disrupting pro-

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2012) (holding that when a defendant does not object to closure, a court must conduct a review for plain error, including looking to the harm that closure caused), *with* *Walton v. Briley*, 361 F.3d 431, 434 (7th Cir. 2004) (holding that a defendant need not object to preserve a Sixth Amendment public trial violation), *and* *State v. Wise*, 288 P.3d 1113, 1115 (Wash. 2012) (noting that an “absence of an objection is not a waiver of the public trial right” because the right is a structural one). Recognizing the issue as unsettled, some courts have sought guidance from higher courts. *See, e.g., State v. Pinno*, 2011AP2424-CR, 2012 WL 6050552, at \*4 (Wis. Ct. App. Dec. 5, 2012).

<sup>232</sup> *Waller v. Georgia*, 467 U.S. 39, 45 (1984) (quoting *Press-Enterprise I*, 464 U.S. 501, 510 (1984)).

<sup>233</sup> *Id.* at 48; *see also id.* at 45 (establishing the steps a court must take before overcoming the presumption of openness).

<sup>234</sup> *Press-Enterprise II*, 478 U.S. 1, 13–14 (1986) (requiring “specific, on the record findings . . . demonstrating that ‘closure is essential to preserve higher values and is narrowly tailored to serve that interest’” (quoting *Press-Enterprise I*, 464 U.S. at 510)).

<sup>235</sup> *See, e.g., United States v. Agosto-Vega*, 617 F.3d 541, 545–48 (1st Cir. 2010) (crowded courtroom not an excuse for excluding a defendant’s family from witnessing voir dire); *People v. Floyd*, 988 N.E.2d 505, 506–07 (N.Y. 2013) (“Mere courtroom overcrowding is not an overriding interest justifying courtroom closure.” *Id.* at 507.); *Garcia v. State*, 401 S.W.3d 300, 303–04 (Tex. App. 2013); *Benson v. State*, 04-12-00159-CR, 2013 WL 1149028 at \*3 (Tex. Ct. App. Mar. 20, 2013).

ceedings<sup>236</sup> or are prejudicing them just by being there in visible support of a particular interest.<sup>237</sup> And there may still be times when the public's First Amendment freedom to listen conflicts with a defendant's right to a fair trial or otherwise adversely affects a proceeding; at that point, the traditional balancing test applies.<sup>238</sup> The principle is the same as it is in the context of the jury trial: when the possible prejudice to a defendant of audience observation outweighs the public's interest in openness, the courtroom must be closed. But in the nontrial courtroom, acceptable reasons for excluding the public from the courtroom are fewer than they are in the trial courtroom, where the public's potential to prejudice a factfinding mission or to intimidate a witness is enhanced.<sup>239</sup> Openness is the presumption; maintaining this presumption is the clear responsibility of courts and judges.

3. *What Are the Remedies?* — The remedial scheme for the Sixth Amendment right seems simple at first: because the right to a public trial is a structural right, a defendant need not prove prejudice and the remedy is a new trial or proceeding.<sup>240</sup> This scheme extends to the nontrial context.<sup>241</sup> In the case of a sentencing, a court must conduct a new sentencing proceeding;<sup>242</sup> when the proceeding at issue is a guilty plea, the court must vacate the entire plea.<sup>243</sup> In other words, the defendant gets a “do over” with the public, including his supporters, in attendance. This “do over” can be limited to the specific proceeding that was affected by the closure. In *Waller*, for example, the Court held that if the result of an improperly closed suppression hearing is the same after it is redone, then the guilty verdict that followed the initial suppression hearing stands.<sup>244</sup>

There is some disagreement among courts, however, regarding how serious the Sixth Amendment violation must be in order to trigger this remedy. In the trial context, there is a circuit split over whether a

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<sup>236</sup> See, e.g., *Drummond v. Houk*, 728 F.3d 520, 530–31 (6th Cir. 2013) (implying that fights in the audience that disrupted court proceedings could potentially justify partial closure on the day the fights occurred).

<sup>237</sup> See, e.g., *Bucy*, *supra* note 41, at 587–91 (asserting that visible courtroom support for a defendant may have influenced the jury in a criminal trial).

<sup>238</sup> See, e.g., *United States v. Loughner*, 807 F. Supp. 2d 828, 835–36 (D. Ariz. 2011) (balancing news organizations' First Amendment right to access criminal proceedings against defendant Jared Loughner's Sixth Amendment right to a fair trial).

<sup>239</sup> See *supra* notes 145–47 and accompanying text.

<sup>240</sup> See *Waller v. Georgia*, 467 U.S. 39, 49 & n.9 (1984).

<sup>241</sup> See *id.* at 49–50.

<sup>242</sup> See, e.g., *United States v. Rivera*, 682 F.3d 1223, 1236–37 (9th Cir. 2012) (remanding for a new sentencing proceeding in the presence of the defendant's family).

<sup>243</sup> See, e.g., *Lilly v. State*, 365 S.W.3d 321, 328, 333 (Tex. Crim. App. 2012) (vacating plea and remanding for new trial); *cf.* *United States v. Alcantara*, 396 F.3d 189, 201–07 (2d Cir. 2005) (vacating both a plea and a sentencing under the First Amendment and remanding for new public proceedings).

<sup>244</sup> *Waller*, 467 U.S. at 50.

Sixth Amendment violation is subject to de minimis review, under which a trivial closing — for example, closure of a courtroom for only a fraction of a trial — does not require a new proceeding.<sup>245</sup> *Presley*, however, implicitly called into question this form of de minimis review, as the Court ordered a new trial after the exclusion of just one courtroom observer from only voir dire.<sup>246</sup>

Using de minimis review in the nontrial context does not make sense. It is not an enormous burden on a court to redo a short, routine proceeding that does not involve taking testimony or picking a jury. As a result, courts should not succumb to the temptation to label the exclusion of the public from such proceedings as “trivial” simply because the proceedings themselves seem trivial — not only because triviality analysis is itself suspect, but also because these proceedings *are* the defendant’s criminal adjudication in the absence of a trial. If a guilty plea takes two minutes, it is as important that the public be able to observe that plea as it would be that the public be able to observe a trial that took place over the course of two weeks. Indeed, an exclusion during a plea would be *less* trivial than during a trial, for without a jury, there is no other representative of the public keeping the courtroom actors in check.

The First Amendment right does not have a similar structural hook to necessitate that completed proceedings be redone when the right is violated. Members of the public can certainly move to intervene in the course of a proceeding when they feel that they are being excluded. And when a court makes a finding that a First Amendment violation has occurred, courts in that jurisdiction are on notice that their future conduct must conform with the constitutional rights of the audience, even though no remedy may be available in the instant case.<sup>247</sup> More broadly, in both the First and Sixth Amendment contexts, relief can come in the form of injunctions that require courts to institute procedures that ensure a default of openness. Under the terms of settlement in *Fuqua*, for instance, judges are required to place signs outside of their courtrooms informing the public of its right to observe routine proceedings and must train bailiffs and sheriffs’ deputies to ensure that the public has access.<sup>248</sup> The right to a public criminal adjudication therefore has profound real-world implications for routine criminal courthouses around the country.

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<sup>245</sup> See *United States v. Gupta*, 699 F.3d 682, 688 (2d Cir. 2012) (collecting cases from circuits that apply a triviality standard to infringements of the right to a public trial).

<sup>246</sup> *Presley v. Georgia*, 130 S. Ct. 721, 722, 725 (2010) (per curiam).

<sup>247</sup> See *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 600 (1982).

<sup>248</sup> *Fuqua Settlement Agreement*, *supra* note 77.

#### IV. ENFORCING THE CONSTITUTIONAL PROTECTION OF THE AUDIENCE

What does strenuous enforcement of the First and Sixth Amendment rights to a public criminal adjudication look like in courtrooms in which bail hearings, pleas, sentencing, and other short appearances happen in quick succession? This Part provides some initial answers to that question. First, enforcing the constitutional protection of the audience means that courts must be vigilant in preventing the physical exclusion of local community members from courtrooms. Second, and less obviously, courts may be required to pay attention to the underlying practices that reinforce such exclusion in the first place. While First and Sixth Amendment decisions have dealt exclusively with the physical exclusion of local audiences from courtrooms, the values behind both rights implicate the nature of speedy, routine criminal justice itself. This Part considers these two forms of exclusion in turn.

##### A. *Physical Exclusion*

Enforcement of the right to a public criminal adjudication implicates widespread and well-entrenched practices of physical exclusion from courtrooms. A series of guiding principles for addressing such practices can help courts that wish to take seriously their constitutional responsibility to audiences — and wish to avoid the potential for frequent “do-overs.” First, and most clearly, the constitutional protection of the audience means that blanket policies of exclusion of the public from nontrial courtrooms are unconstitutional. Recall the Georgia counties that excluded all members of the public from arraignment courtrooms,<sup>249</sup> or the Texas arraignment courtroom that displayed a sign explicitly forbidding the entrance of “children, spouses, parents, or friends.”<sup>250</sup> Cases such as *Lilly*,<sup>251</sup> *Fuqua*,<sup>252</sup> and *Rivera*<sup>253</sup> make clear that these practices fly in the face of the constitutional protection of the audience in the nontrial courtroom. Indeed, the recent expansion of First and Sixth Amendment rights into the world of plea bargaining is aimed at precisely the population excluded by these blanket policies — the “children, spouses, parents, or friends” of defendants — because it is the supporters of defendants who represent the communities most affected by decisions made in local criminal justice systems.<sup>254</sup> Victims, when they exist, are of course affected by everyday

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<sup>249</sup> See *supra* note 77 and accompanying text.

<sup>250</sup> See *supra* note 78 and accompanying text.

<sup>251</sup> See *supra* notes 194–99 and accompanying text.

<sup>252</sup> See *supra* notes 205–08 and accompanying text.

<sup>253</sup> See *supra* notes 200–02 and accompanying text.

<sup>254</sup> See, e.g., *United States v. Rivera*, 682 F.3d 1223, 1230 (9th Cir. 2012) (finding that exclusion of defendant’s child from a sentencing violated the Sixth Amendment); *United States v. Alcanta-*

proceedings as well. If nothing else, the constitutional protection of the audience requires that the default position of all criminal courtrooms is one of openness.

Second, when courts do determine that an individual or group cannot enter a courtroom, they must do so by making explicit findings that justify the exclusion and demonstrate that they have considered “all reasonable alternatives” to closure.<sup>255</sup> A court would not have to place these findings on the record during every single one of many cases in succession, but rather could provide a considered record at the beginning of a long session, provided that there is adequate signage, notice, and training of court staff. Considering audience exclusion this way, in a deliberate and public manner, would itself be a significant step in promoting transparency and acknowledging the importance and power of the local audience. Moreover, this public deliberation might lead a court to realize that there *are* ways to foster audience inclusion in the nontrial courtroom.

Third, court administrators must consider the constitutional protection of the audience when thinking about issues of space and access. Many local community members cannot enter courtrooms, not because of blanket policies of exclusion, but rather because courtrooms are too small to accommodate growing misdemeanor caseloads.<sup>256</sup> Despite constraints on budgets and space, the affirmative obligation placed on courts by *Presley* requires careful, explicit consideration of ways to facilitate audience observation before any exclusion takes place. Judges and administrators must make public statements regarding the rights of both the defendants and the community as balanced against any capacity constraints.<sup>257</sup>

Beyond these clear mandates, the burden may fall on local governments to ensure that their courthouse facilities can accommodate the number of people they arrest and prosecute, as well as the community members who wish to observe that volume of cases.<sup>258</sup> Similar burdens fall on the state to ensure that prison overcrowding does not

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ra, 396 F.3d 189, 198–99 (2d Cir. 2005) (discussing protections for the defendant’s friends and family at both pleas and sentencings and the importance of what happens during a sentencing to local community members). *In re Oliver* also emphasized protections for “at the very least . . . [a defendant’s] friends, relatives and counsel.” 333 U.S. 257, 272 (1948).

<sup>255</sup> See *supra* notes 229–34 and accompanying text.

<sup>256</sup> See *supra* notes 79–81 and accompanying text.

<sup>257</sup> See, e.g., *Delgado v. Milgram*, No. 09-3728 (JLL), 2011 WL 1431904, at \*13 (D.N.J. Apr. 14, 2011) (approving of a state judge’s on-the-record ruling that “exclusion of spectators would be warranted if, and only if, the overcrowding would become so excessive as to prevent accommodation of the venire persons in the courtroom, and — until such situation actually occurs — every measure would be taken to preserve Petitioner’s right to public trial”).

<sup>258</sup> Cf. LINDA MULCAHY, LEGAL ARCHITECTURE 87 (2011) (“[T]he fundamental expectation that trials are public should allow us to assume that the public be allocated sufficient space to perform their role effectively and with dignity.”).

lead to Eighth Amendment violations, whether or not the system is strapped for money and cannot fund new facilities.<sup>259</sup> If state governments may need to release prisoners to remedy unconstitutional conditions, why must they not also reconsider their policing, prosecutorial, or court scheduling policies if those policies result in more defendants and audience members than their courtrooms can hold?<sup>260</sup> While these difficult questions remain open, for now it is clear that courts must at the very least explicitly balance the needs of their budgets and resources against the constitutional value of the audience.

Fourth, court systems must educate their judges, administrators, and court officers regarding the community's access rights. Recall that on a recent day in the Bronx, a court officer escorted out of a misdemeanor courtroom members of a community group attempting to support a young defendant and thereby protest police behavior; when doing so, the court officer told them: "[T]his is not a trial."<sup>261</sup> There, the observers intended to make a silent statement through their presence in the courtroom about the prosecution of a particular teenage defendant. Such explicit attempts by local community members to transfer power through observation may be especially likely to elicit negative responses from courtroom players. At the same time, such strategies could not be a clearer exercise of the people's right to "remind[] the participants, especially the judge, that the consequences of their actions extend to the broader community."<sup>262</sup> For this reason, challenges to and statements about individualized examples of exclu-

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<sup>259</sup> Cf. *Brown v. Plata*, 131 S. Ct. 1910, 1928, 1947 (2011) (affirming judicial order requiring the California state prison system to remedy Eighth Amendment violations by either building new facilities or releasing as many as 46,000 inmates).

<sup>260</sup> In a related vein, Tribe has described the ways in which a burden falls on government to make affirmative efforts to provide the opportunity for the public to exercise positive rights. For individual rights, including those rights protected under the Sixth Amendment, Tribe writes that "[g]overnment must facilitate the right's exercise by means within its constitutional power — so as to make its actual exercise *possible* notwithstanding any prior choices made by the right's holder — in order to ensure the continuing vitality of fundamental relational norms." Laurence H. Tribe, Commentary, *The Abortion Funding Comundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 335 (1985).

<sup>261</sup> See *supra* note 82 and accompanying text.

<sup>262</sup> *United States v. Rivera*, 682 F.3d 1223, 1230 (9th Cir. 2012); see also *id.* at 1236 ("That the district court characterized the[] implicit messages [sent by family members sitting in the audience] as 'manipulative' was a way of saying that it preferred to dispense with the important reminder of judicial responsibility to the community in the exercise of its functions, a reminder at the core of the public trial right."); *Press-Enterprise II*, 478 U.S. 1, 12–13 (1986) ("[T]he absence of a jury, long recognized as 'an inestimable safeguard against the corrupt or overzealous prosecutor and . . . judge,' makes the importance of public access . . . even more significant." (citation omitted) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968))); *Waller v. Georgia*, 467 U.S. 39, 46 (1984) (describing the role of the audience in "ensuring that judge and prosecutor carry out their duties responsibly").

sion are especially important reminders to courtroom players that the presence of the community in the courtroom carries constitutional implications. Contrary to the Bronx court officer's belief, such expressive signals are *especially* important when "this is not a trial." Such ad hoc exclusion is likely to continue, though, as long as courtroom players are not educated about the ways in which the constitutional protection of the audience extends beyond the trial.<sup>263</sup>

Finally, it is worth considering one objection to efforts to eliminate physical exclusion in nontrial courtrooms: if the content of what is said on the record in the routine nontrial courtroom is not meaningful, why does physical access to those courtrooms matter? The first answer is that because the constitutional rights of public access to nontrial courtrooms belong to defendants and to the public, it is up to members of the public and not to the court system to decide which courtrooms they would like to enter and what courtroom speech they would like to hear.<sup>264</sup> The second answer is that any words spoken on the record, no matter how brief, are meaningful because what happens during a routine court appearance *is* the public criminal justice system in a world without trials. Hearing those words can open up the space for audience members to question the other words and actions that may have happened behind closed doors or off the record. And that questioning, in turn, has the potential to lead to actual change of in-court procedures.

*B. Implicit Exclusion and the Quality  
of the Freedom to Listen*

Beyond physical exclusion, the normative values behind the First and Sixth Amendment protections of the audience implicate the constitutional validity of speedy, routine criminal justice itself. Even if an audience member gains access to a courtroom, the words spoken on the record during a routine criminal court appearance are often incomprehensible to an ordinary observer.<sup>265</sup> If the words spoken in front of the audience are not substantive or meaningful, then a court may not have fulfilled its obligation to "ensure that this constitutionally protected 'discussion of governmental affairs' is an *informed*

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<sup>263</sup> Cf. DUFF ET AL., *supra* note 34, at 277 ("[A]ccessibility is not only a matter of physical barriers to public access, but extends to all conditions which might prevent members of the public from attending a hearing."); William Glaberson, *New York Family Courts Say Keep Out, Despite Order*, N.Y. TIMES, Nov. 17, 2011, at A1, archived at <http://perma.cc/GM24-YJ85> (reporting that judges in New York City family courts mistakenly kept proceedings closed to the public due to "errors or misunderstandings of the open-courts policy").

<sup>264</sup> See MEIKLEJOHN, *supra* note 126, at 119 ("[T]he First Amendment is . . . concerned with the authority of the hearers to meet together, to discuss, and to hear discussed by speakers of their own choice, *whatever they may deem worthy of their consideration.*" (emphasis added)).

<sup>265</sup> See *supra* notes 72–75 and accompanying text.

one.”<sup>266</sup> A rushed twenty-second courtroom appearance diminishes not only the fairness of the procedures used to prosecute a defendant, but also the sovereignty of the people watching the procedures take place. Even Resnik and Curtis, champions of the ability of public adjudication to redistribute power from the court to the people, contend that the audience is stripped of its power when proceedings lack content. They write that “[t]he dense and tedious repetition of ordinary exchanges is where one finds the enormity of the power of both bureaucratic states and private sector actors.”<sup>267</sup> A “dense and tedious repetition of ordinary exchanges” in the criminal courtroom can thus represent the difference between the audience as a nuisance and the audience as an arm of democracy.

Similarly, the substance of the words spoken on the record affects the ability of the local audience to connect what they hear in the courtroom to local movements for social or political change. As Professor Lani Guinier has illustrated, speech inside a courtroom can reach an audience in such a way that “those previously excluded can enter, engage with, and destabilize dominant (or majority) legal discourse.”<sup>268</sup> The act of listening in the courtroom can inspire laypeople involved in social movements to have a voice in interpreting the Constitution — what Guinier and Professor Gerald Torres call “demosprudence.”<sup>269</sup> Viewed through the lens of demosprudence, the criminal courtroom is a unique opportunity for speakers in that courtroom to connect disempowered communities to movements for change and accountability in criminal justice. Because individuals in the audience have a direct stake in the outcomes of cases on the calendar, they have a unique ability to put a human face on the impact of those cases once they leave the courtroom.<sup>270</sup> As in the structural conception of the First Amendment, however, the criminal court audience cannot realize its potential to connect courtroom speech to larger movements for social change when that speech is not accessible or understandable.<sup>271</sup>

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<sup>266</sup> *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605 (1982) (emphasis added); see also STUNTZ, *supra* note 64, at 298 (“[D]emocracy is impossible when voters cannot tell why the system punishes when and whom it does.”).

<sup>267</sup> RESNIK & CURTIS, *supra* note 12, at 301; see also Cerruti, *supra* note 135, at 322 (“The focus of the [First Amendment] right must always be on the information, not the package, to which the public is entitled.”).

<sup>268</sup> Guinier, *supra* note 13, at 26.

<sup>269</sup> See, e.g., *id.* at 15–16; Gerald Torres, *Legal Change*, 55 CLEV. ST. L. REV. 135, 141 (2007).

<sup>270</sup> See Donald Braman, *Criminal Law and the Pursuit of Equality*, 84 TEX. L. REV. 2097, 2100 (2006) (“[E]ffective reform — reform that is likely to last — requires . . . both a partnership with and the empowerment of those our courts seek to protect.”).

<sup>271</sup> See Guinier, *supra* note 13, at 16 (explaining that a demosprudential statement in a courtroom requires three things: (1) that the speaker discuss an issue of democratic involvement; (2) that she speaks in an accessible style; and (3) that the speech inspire nonjudicial actors to act).



For an open courtroom to fulfill its constitutional and normative obligation to the local audience, then, perhaps defendants, victims, and institutional players must be given the space to voice their thoughts about the larger implications of what is happening in court. Indeed, nontrial appearances present an opportunity to speak outside of the bounds of evidentiary rules, making room for speech that implicates community or political concerns and that would otherwise be improper if spoken in front of a jury.<sup>272</sup> To give voice to the import of seemingly mundane procedures — and to acknowledge that what we say on the record has meaning, and can even be violent<sup>273</sup> — is to respect the presence of audience members whose lives and communities are affected by the cumulative impact of those procedures. While this may be a vague directive, I would like to sketch out a few ways in which courts can use the constitutional values behind the right to a public adjudication to infuse emotion and substance into routine criminal justice.

To begin with, audience members need to be able to hear what is happening once they are inside a courtroom. To protect the constitutional value of the audience members' roles as participatory citizens, courts must at least avoid deliberate attempts to thwart accessibility, such as that made by an Ohio courtroom that refused to turn on its fully functional microphones.<sup>274</sup> Surely such auditory exclusion undermines the First Amendment's guarantee that audience members observe court proceedings in order to "effectively participate in and contribute to our republican system of self-government."<sup>275</sup> If the audience cannot hear, it cannot be effective in this role.

Relatedly, the architecture of a courtroom can make the difference between the audience as participants and the audience as mere spectators, or even nuisances. Some courtrooms separate out the audience, relegating them to physically lower or darker spaces from which it may be difficult to hear or follow the proceedings. Scholars of courthouse architecture recommend that, to serve the purposes of public adjudication, courthouses combine the architecture of transparency (for example, glass walls and welcoming spaces) with proceedings that are

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<sup>272</sup> Cf. Christopher J. Peters, *Adjudicative Speech and the First Amendment*, 51 UCLA L. REV. 705, 709 (2004) (discussing a "First Amendment blind spot regarding evidentiary rules").

<sup>273</sup> See JAMES BOYD WHITE, *LIVING SPEECH: RESISTING THE EMPIRE OF FORCE* 11 (2008) (arguing that the First Amendment protects "living speech"); Robert M. Cover, *Essay, Violence and the Word*, 95 YALE L.J. 1601, 1609–12 (1986) (discussing the violence of judicial speech). Professor White writes that, for lawyers and judges, "in their effort to do justice it is crucial that they learn, as some indeed have done, to engage in living speech in their own performances." WHITE, *supra*.

<sup>274</sup> See *supra* notes 83–86 and accompanying text.

<sup>275</sup> *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982).

themselves transparent and understandable.<sup>276</sup> Designers of local community courts have similarly focused on creating welcoming and inclusive courthouse architecture.<sup>277</sup> Administrators and planners should design courthouses in a way that signals that the public is welcome to watch and listen to the ways in which justice plays out.

Beyond turning on microphones and redesigning courtrooms, courts can take a number of steps to demonstrate to local community members that their observation, understanding, and input have constitutional value. Some scholars have suggested ways in which lawyers and judges can make meaningful records during routine court appearances by giving voice to the manner in which individual cases impact the lives and situations of defendants, victims, and communities.<sup>278</sup> Professor Ian Weinstein, for example, has proposed that courtrooms adjudicating low-level offenses allow each side to “develop[] a factual record about what happened, including the conduct at issue, its impact on victims, and the community and the defendant’s background and situation.”<sup>279</sup> Professor Josh Bowers has suggested that the prosecution and the defense each give a “brief normative pitch” to a grand jury that is authorized to determine the normative worth of a prosecution<sup>280</sup> — a normative pitch that could perhaps occur in front of an audience as well. Proposals such as these — as well as efforts that are already being made by prosecutors, victims’ rights advocates,<sup>281</sup> defense attorneys, and defendants themselves<sup>282</sup> to voice their concerns

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<sup>276</sup> See, e.g., MULCAHY, *supra* note 258, at 151–59; Douglas P. Woodlock, *Communities and the Courthouses They Deserve. And Vice Versa.*, 24 YALE J.L. & HUMAN. 271, 278–80 (2012); cf. Norman W. Spaulding, *The Enclosure of Justice: Courthouse Architecture, Due Process, and the Dead Metaphor of Trial*, 24 YALE J.L. & HUMAN. 311, 343 (2012) (“[T]he space in which justice is done shapes what we think it means.”).

<sup>277</sup> See, e.g., Greg Berman & Aubrey Fox, *Justice in Red Hook*, 26 JUST. SYS. J. 77, 84 (2005) (describing how a community court “uses architecture to send a message of respect and decency rather than intimidation”).

<sup>278</sup> See, e.g., BIBAS, *supra* note 72, at 155 (describing ways to make plea hearings more meaningful and probative); Bowers, *supra* note 6, at 347–48; Michael E. Tigar, *The Supreme Court, 1969 Term — Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1, 23–25 (1970) (arguing that a guilty plea resulting from a plea bargain should involve an extended conversation on the record before a plea is accepted); Weinstein, *supra* note 74, at 1178; see also Albert W. Alschuler, *Implementing the Criminal Defendant’s Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 1049 (1983) (“[I]t is wrong to . . . say[] that we do not have the time and money to listen, . . . and that any effort to listen would merely drive our failure to listen underground.”).

<sup>279</sup> Weinstein, *supra* note 74, at 1178 (footnote omitted).

<sup>280</sup> Bowers, *supra* note 6, at 347–48.

<sup>281</sup> See, e.g., Jayne W. Barnard, *Allocation for Victims of Economic Crimes*, 77 NOTRE DAME L. REV. 39, 78 (2001); Richard A. Bierschbach, *Allocation and the Purposes of Victim Participation Under the CVRA*, 19 FED. SENT’G REP. 44, 46 (2006) (distinguishing the benefits of victim allocation in open court from those of out-of-court mediation).

<sup>282</sup> Cf. Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1475 (2005) (“Defendant speech also has democratic significance . . .”); Kimberly A.

on the record — would not only help achieve fairness and transparency, but also help further the constitutional function of the audience.

Judges should also consider the ways in which judicial speech and action underscore — or undermine — the democratic function of the audience.<sup>283</sup> While judges are bound by certain rules, including prohibitions on interfering with plea discussions, they may also have a responsibility while presiding over bail decisions, pleas, and sentencings to ensure that an audience member can know what behind-the-scenes decisions have been made and why. This suggestion is not to say that a judge must always tell the audience every piece of information that goes into a judicial decision,<sup>284</sup> but rather that an official record should be delivered out loud and in a way that is comprehensible to a lay audience without prior knowledge of the case before the court.

Even if the Constitution does not mandate that parties or judges give explanations or “normative pitches” in the adjudication of every misdemeanor case, it may require that judges presiding over nontrial courtrooms *allow* such pitches when speakers attempt to make them. Such an obligation would prohibit a judge from shutting down an attorney or defendant attempting to say something of substance in a routine court appearance that, by the usual norms of the courtroom, should last only seconds. It might also constitutionally require a judge to consider the request of a victim or community member who wished to speak and to hear any objections to such speech.<sup>285</sup> Judges, concerned with efficiency and heavy caseloads, often rush speakers along or dismiss statements about police conduct or a victim’s opinions as “irrelevant” to the particular nontrial proceeding.<sup>286</sup> The freedom to listen is based on the assumption that community members, defendants, and victims should hear about the ways in which prosecutions

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Thomas, *Beyond Mitigation: Towards a Theory of Allocution*, 75 *FORDHAM L. REV.* 2641, 2661–67 (2007).

<sup>283</sup> See, e.g., WHITE, *supra* note 273, at 210–13 (arguing that thoughtful and engaged speech by judges and lawyers supports the democratic value of free speech); Guinier, *supra* note 13, at 47–56 (describing how spoken dissents from judges connect their speech to the community); Terry A. Maroney, *Angry Judges*, 65 *VAND. L. REV.* 1207, 1249–61 (2012) (describing benefits of the “righteously angry judge”).

<sup>284</sup> Cf. Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 *HARV. L. REV.* 625, 669 (1984) (arguing that some “decision rules” that govern official behavior are best hidden from the public, in contrast to “conduct rules” for the public at large). Importantly, I am thinking here of judicial speech as aimed not just at the audience as potential lawbreakers subject to “conduct rules,” but also more broadly at the audience as citizens capable of fighting for fairness in the administration of criminal justice.

<sup>285</sup> Such speech might, of course, conflict with a defendant’s right to fair proceedings, and a judge would be required to balance those interests.

<sup>286</sup> See, e.g., *Focal Point: Trials and Tribulations*, *supra* note 75.

affect them as citizens.<sup>287</sup> Accordingly, to recognize the value of speech that sheds light on the effects of arrests and prosecutions on entire communities is to recognize the value of the experiences of audience members themselves.<sup>288</sup> If an individual is speaking within the bounds of procedural rules in a way that engages with such concerns, the right of the hearers may correspond with a right of the speakers to continue with their speech, even if only briefly.

I do not mean to suggest that open, accessible courtrooms are a standalone solution to problems with public participation or to inequalities that may exist within the criminal justice system. Community observation of a criminal adjudication does not render that adjudication a fair one; public words voicing a sense of injustice do not remedy that injustice.<sup>289</sup> An emphasis on open courtrooms might distract from the need for substantive reform or legitimate otherwise unfair proceedings. For example, building bigger courtrooms to house large audiences runs the risk of quieting debate about the underlying police practices that lead to so many arrests and prosecutions in the first place. At the same time, though, if officials treat those courtrooms as spaces of democratic engagement, then they open up the possibility of empowering audience members who are accustomed to being subject to, but not participants in, criminal justice policymaking.

Indeed, local movements for social change by low-income populations in urban areas can and do involve courtroom observation; in New York City, for example, current movements to change policing practices include the organizing of groups to observe nontrial court appearances related to instances of alleged police misconduct.<sup>290</sup> Through organized courtwatching campaigns, both 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.”<sup>291</sup> By protecting such attempts to promote accountability, the right to a public criminal adjudication can play a partial, but important, equalizing role in a system plagued by

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<sup>287</sup> See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575–80 (1980) (plurality opinion); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604–05 (1982).

<sup>288</sup> Cf. Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 56 (1990) (“Uncertain, Other-oriented speech might be revalued in legal rituals that seek to build community rather than punish the transgression of legal rules.”).

<sup>289</sup> Cf. DUFF ET AL., *supra* note 34, at 267 (“That trials are held in public can be as much an instrument of illegitimate public power as a disciplining mechanism to ensure fairness.”).

<sup>290</sup> See, e.g., *Police Violence Weekly Digest*, URB. REBUILDING INITIATIVE (Feb. 15, 2013, 4:18 PM), <http://www.uripeoplesinitiative.org/blog/2013/02/15/Police-Violence-Weekly-Digest>, archived at <http://perma.cc/E9TN-ZFBV> (listing courtroom observation opportunities for the coming month).

<sup>291</sup> *United States v. Rivera*, 682 F.3d 1223, 1230 (9th Cir. 2012).

profound power imbalances.<sup>292</sup> Large-scale change to the criminal justice system is not going to happen through courtroom processes alone, but we lose something — and something inherently constitutional — when we put aside the potential of *any* change or accountability inside the nontrial courtroom.

#### CONCLUSION

Ensuring the constitutionally protected function of the audience in plea bargaining is not easy. Both physical and substantive inclusion require pushing back against the systemic norms that relegate nontrial proceedings to the status of routine mechanics. But efforts to include the public in criminal justice too often skip over the local audience already sitting in our courtrooms and watching routine criminal justice at work. Taking the constitutional protection of the audience seriously is one way to begin to recapture the voices of precisely the people who scholars worry do not have a say in how criminal justice is administered: people who share streets, schools, and experiences with criminal defendants and victims alike.<sup>293</sup> Regardless of whether we devise new institutions or create new juries, the Constitution requires that we make the ones we have now accessible to the public by opening doors, turning on microphones, and speaking in ways that acknowledge the audience's presence.

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<sup>292</sup> See *supra* notes 59–65 and accompanying text (describing those power imbalances).

<sup>293</sup> See, e.g., Bibas, *supra* note 4, at 923–29; Braman, *supra* note 270, at 2100; see also *supra* notes 61–64 and accompanying text.

