

# WHAT'S IN A NAME? STRICT SCRUTINY AND THE RIGHT TO A PUBLIC TRIAL

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## I. INTRODUCTION

The apparent strict scrutiny<sup>1</sup> applied by appellate courts to review courtroom closures ordered by trial courts should be conceived as a more lenient form of review. The Sixth Amendment to the United States Constitution provides that the accused has a right to a public trial.<sup>2</sup> This ensures that proceedings are not infected with the unfairness that might be imposed in secret proceedings.<sup>3</sup> “Sunlight,” it is said, “is the best of disinfectants.”<sup>4</sup> The right to a public trial has only rarely been addressed by the Supreme Court, but in *Waller v. Georgia*,<sup>5</sup> the Court set forth a test for determining when it is appropriate to close a courtroom to the public, despite the general public trial command. The language of the *Waller* test suggests great rigor. Its requirements of an “overriding interest”<sup>6</sup> and a closure “no broader than necessary”<sup>7</sup> are the language of strict scrutiny, as it arises in other areas of constitutional law, including content-based regulations of speech, race-conscious classifications, and fundamental rights.<sup>8</sup> It is a truism that constitutional strict scrutiny is “strict in theory, fatal in fact,”<sup>9</sup> and, despite some protestations from the

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1. When it applies strict scrutiny, the Court requires the government to demonstrate that its law “furthers a compelling interest and is narrowly tailored to achieve that interest.” *Citizens United v. FEC*, 558 U.S. 310, 340 (2010) (internal quotation marks omitted).

2. U.S. CONST. amend. VI.

3. See *In re Oliver*, 333 U.S. 257, 270 (1948).

4. L. BRANDEIS, *OTHER PEOPLE’S MONEY* 62 (1933).

5. 467 U.S. 39, 48 (1984) (adopting test from a public access case arising under the First Amendment, *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 511–12 (1984)).

6. *Id.*

7. *Id.*

8. See generally Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 *UCLA L. REV.* 1267, 1269 (2007).

9. See *infra* Section III.A.

Court,<sup>10</sup> the truism is largely true.<sup>11</sup> But a canvass of the appellate cases applying *Waller* to the review of courtroom closures reveals a test that is rarely fatal.<sup>12</sup> Many closures are upheld as satisfying *Waller's* demands of a strong interest and a tight fit between that interest and the closure decision.<sup>13</sup>

There appear to be two reasons why strict scrutiny's verbal formulation, widely viewed as all-but-impossible to satisfy in other contexts, is commonly satisfied when applied under the Sixth Amendment. First, in other constitutional contexts, the interests asserted by the government to be "compelling" tend to be broad societal interests—"macro" interests.<sup>14</sup> In the context of the right to a public trial, however, the interests at issue are always "micro" interests—the interests of the individuals participating in the proceedings.<sup>15</sup> These micro interests are more easily agreed upon as justifying the government action under review.

Second, in terms of tailoring, courts reviewing courtroom closures do not place great demands on the trial court's choice of means. Of course, in many cases, a courtroom closure will be one of the only practical choices available to satisfy the interest presented to the court. Tailoring is about choosing between alternatives.<sup>16</sup> When a judge orders a courtroom closed, there are often few other sensible ways to achieve the closure's goals. But in many cases, there may be other less practical, but still possible, alternatives.<sup>17</sup> In other strict scrutiny contexts, practicality or ease of implementation is not considered an important value.<sup>18</sup> But in the public trial context, practicality wins the day. This deference to practical choices is familiar to criminal procedure tests—a doctrinal area in which strict scrutiny is largely unfamiliar.<sup>19</sup>

The *Waller* test should not be thought of as importing the fatal connotations of strict scrutiny and should instead be considered a sui generis test—a rough set of factors to guide a particular aspect of courtroom management. In practice, *Waller's* test is primarily an admonition against closing the courtroom as a matter of convenience. The test should be considered in its context, as one that acknowledges the trial court's leeway in addressing issues of courtroom management.

In the ordinary course of rulings on public trial issues, closures are often upheld. Accordingly, it is reasonable to ask, "what's the problem?" If courtroom

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10. See, e.g., *Johnson v. California*, 543 U.S. 499, 514 (2005) ("Strict scrutiny is not 'strict in theory, but fatal in fact.'") (citation omitted).

11. Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 296 (1992) ("If strict scrutiny is applied, the challenged law is never supposed to survive well, hardly ever, taking *Korematsu* into account."). But see Ozan O. Varol, *Strict in Theory, but Accommodating in Fact?*, 75 MO. L. REV. 1243, 1243, (2010) (suggesting that in recent cases strict scrutiny has been "a test that is strict in theory, but accommodating in fact").

12. See *infra* Section VI.

13. *Id.*

14. See *infra* Section IV.A.

15. *Id.*

16. Cf. *McCullen v. Coakley*, 573 U.S. 464, 495 (2014) (explaining, in intermediate scrutiny context, that "[t]o meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests.>").

17. See *infra* Section IV.B.

18. See, e.g., *Riley v. Nat'l Fed'n of the Blind of N.C. Inc.*, 487 U.S. 781, 795 (1988) ("[T]he First Amendment does not permit the State to sacrifice speech for efficiency.>").

19. See *infra* Section V.

closures are generally implemented in a responsible way, and not evaluated particularly harshly by reviewing courts, what is the harm of employing strict scrutiny methodology and rhetoric in the course of that review?

There is a danger that putting courts in a mindset that presumes “fatality” is more likely to lead to it.<sup>20</sup> Given the widely-held understanding that selection of a particularly stringent tier of scrutiny will almost necessarily result in finding a constitutional violation, the deck is stacked against the finality of trial proceedings in which a closure is invoked—reversal should be more likely when strict scrutiny is applied. Strict scrutiny creates an increased presumption of invalidity,<sup>21</sup> a greater presumption than should apply in the public trial context. Indeed, this may be the reason that some courts have tried to work their way around *Waller*, finding reasons that the test should not be applied in certain circumstances.<sup>22</sup> In this way, the descriptive nature of some of this essay has a prescriptive intent: showing how *Waller* scrutiny *does* work is a lesson in how it *should*. This essay proposes a reconsideration of the test for courtroom closures, rethinking whether traditional strict scrutiny thinking is appropriate in this constitutional and practical context. That said, this essay does not argue with *Waller*’s broad outlines. Courts making closure decisions *should* consider reasons and alternatives. But the strict language of *Waller*’s formula does not account for courtroom management needs.

## II. THE WALLER TEST

### A. The Origins of the *Waller* Test

The Sixth Amendment guarantees criminal defendants “the right to a speedy and public trial.”<sup>23</sup> The Sixth Amendment’s right to a public trial has been addressed in only a few Supreme Court cases. The first to address the right in detail was *In re Oliver*.<sup>24</sup> The facts of the case were quite dramatic, with a public trial violation being perhaps the least of the defendant’s problems. The Court reported that:

[T]he questioning was secret in accordance with the traditional grand jury method . . . . Under these circumstances of haste and secrecy, petitioner, of course, had no chance to enjoy the benefits of counsel, no chance to prepare his defense, and no opportunity either to cross-examine the other grand jury witness or to summon witnesses to refute the charge against him.<sup>25</sup>

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20. See *infra* notes 986–87 and accompanying text.

21. *Ysursa v. Pocatello Educ. Ass’n*, 555 U.S. 353, 358 (2009).

22. See *infra* note 230 and accompanying text.

23. U.S. CONST. amend. VI.

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

25. *Id.* at 259.

The case presented no niceties of whether and when a trial might be “public”: “the public was excluded.”<sup>26</sup> It was a complete blackout, without even counsel present.<sup>27</sup>

The *Oliver* court did not fashion a test to determine whether the right to a public trial had been violated, describing the right in only general terms:

the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. 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>28</sup>

Later courts seeking guidance on the parameters of the right were left with only *Oliver*'s dictum that “an accused is at the very least entitled to have his friends, relatives and counsel present.”<sup>29</sup>

The Court's next in-depth treatment of the right to a public trial came decades later, in 1984, when it decided *Waller v. Georgia*.<sup>30</sup> In *Waller*, the court first set forth its test to evaluate the legitimacy of a courtroom closure.<sup>31</sup> The Court first quoted *Press-Enterprise Co. v. Superior Court*,<sup>32</sup> a First Amendment case addressing the right of press access to court proceedings, asserting that the case “stated the applicable rules”<sup>33</sup>:

The presumption of openness may be overcome only by an *overriding interest* based on findings that closure is essential to preserve higher values and is *narrowly tailored* to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.<sup>34</sup>

Some three pages later, Justice Powell provided a slight rephrasing, asserting that “[u]nder *Press-Enterprise*,”<sup>35</sup> this showing was required to justify a courtroom closure:

[1] the party seeking to close the [proceeding] must advance an overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] the trial court must consider reasonable alternatives to closing the proceeding, and [4] it must make findings adequate to support the closure.<sup>36</sup>

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26. *Id.*

27. *Id.*

28. *Id.* at 270.

29. *Id.* at 272.

30. 467 U.S. 39 (1984).

31. *Id.* at 48.

32. 464 U.S. 501 (1984).

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

34. *Id.* (quoting *Press-Enterprise*, 464 U.S. at 510 (emphasis added)).

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

36. *Id.*

In this iteration, the closure must be “no broader than necessary,” rather than “narrowly tailored.”<sup>37</sup> It also incorporates another part of the *Press-Enterprise* holding, requiring consideration of alternatives.<sup>38</sup> As will be shown in a later section, this is an unusual test for an issue of criminal procedure.<sup>39</sup> Instead, this test is akin to the “strict scrutiny” used in doctrinal areas like the First Amendment, the Equal Protection Clause, and the protection of fundamental rights.<sup>40</sup>

Mechanically, the reason for this seemingly out of place use of an ends/means test is that it was born of First Amendment law. In the years preceding *Waller*, the Court had occasion to review the issue of open courtrooms in a First Amendment posture—the availability of access to the courts by the press.<sup>41</sup> This jurisprudence of press access predated and informed the *Waller* test.<sup>42</sup> As noted above, the *Waller* test was lifted verbatim from a press access case: *Press-Enterprise Co. v. Superior Court of California*.<sup>43</sup> *Press-Enterprise*, in turn, had rephrased yet another First Amendment access to the courts test, provided by *Globe Newspaper Co. v. Superior Court for City of Norfolk*.<sup>44</sup> Before setting forth its (and *Waller*'s) test, the *Press-Enterprise* Court quoted the following from *Globe Newspaper*: “[w]here . . . the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a *compelling governmental interest*, and is *narrowly tailored to serve that interest*.”<sup>45</sup> This is classic strict scrutiny language.

There is no descriptive or adaptive language placed between *Press-Enterprise*'s (and *Waller*'s) language of “overriding interest” and *Globe Newspapers*' “compelling governmental interest.” The change in wording seems to be designed to accomplish nothing more than restatement of the same strict ends/means requirement, with the addition of the procedural requirement that trial courts provide findings from which a reviewing court can evaluate the propriety of the closure.<sup>46</sup>

Although *Waller*'s test for the propriety of a courtroom closure under the Sixth Amendment's right to a public trial was appropriated from a related area of First Amendment law, there remain important structural differences between the public's access rights under the First Amendment and a defendant's right to an open courtroom under the Sixth. One distinction between a First Amendment access case

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37. See *supra* notes 34–36.

38. *Press-Enterprise*, 464 U.S. at 511 (“Absent consideration of alternatives to closure, the trial court could not constitutionally close the voir dire.”).

39. See *infra* Section V.

40. See *infra* Section II.B.

41. See, e.g., *Press-Enterprise*, 464 U.S. at 510.

42. *Waller* was issued in May of 1984. 467 U.S. at 39. *Press-Enterprise* was issued in January of that year. 464 U.S. at 50. *Globe Newspaper Co. v. Superior Court for City of Norfolk* was issued in 1982. 457 U.S. 596 (1982).

43. 464 U.S. 501 (1984); see also *Waller v. Georgia*, 467 U.S. 39 (1984).

44. 457 U.S. 596, 603 (1982).

45. *Press-Enterprise*, 464 U.S. at 510 (quoting *Globe Newspaper Co.*, 457 U.S. at 606-607) (emphasis added).

46. *Id.*

and a Sixth Amendment public trial case is that defendants have the power to waive their Sixth Amendment rights.<sup>47</sup> They may not waive the press's corresponding rights.<sup>48</sup>

The most dramatic difference between the two rights is the remedy available for a violation. In the First Amendment context, a member of the press may be able to obtain an order permitting access.<sup>49</sup> As well, the production of a transcript may be ordered, and considered sufficient to remedy a public access violation.<sup>50</sup> In the Sixth Amendment context, the remedy is much stronger. A violation of the right to a public trial can result in reversal of a conviction.<sup>51</sup> The finality of judicial proceedings is at stake in a way it is not when a First Amendment access case is brought—a newspaper cannot seek to void a conviction. This impact on finality is further exacerbated by public trial violations being denominated “structural errors.”<sup>52</sup>

Structural errors take a variety of forms but are immune from standard “harmlessness” analysis.<sup>53</sup> They are errors that implicate the fundamental fairness of criminal proceedings, or the proper administration of justice.<sup>54</sup> They are sometimes errors that are difficult to subject to the harmless error analysis common to most trial errors.<sup>55</sup> After all, how can a court determine that the absence of an individual from the courtroom had an actual effect on the outcome of a proceeding? Because some structural errors are not subject to harmlessness analysis—the right to a public trial among them—the finding that a right subject to structural error analysis has been violated results in a virtually “per se rule” of reversal.<sup>56</sup>

Because violations of the right to a public trial are subject to structural error analysis, a violation of the right that might seem minor or inadvertent may have outsized effect. *Presley v. Georgia*,<sup>57</sup> another seminal right to a public trial case, provides an example. In *Presley*, the defendant's uncle was excluded from jury selection in order to keep the courtroom free for prospective jurors.<sup>58</sup> It is almost impossible to conceive of any effect that exclusion had on the outcome of *Presley's* trial. Nonetheless, because the exclusion was considered a closure, and because the decision to close did not follow the *Waller* framework, it was considered a structural error, and *Presley's* conviction was reversed.<sup>59</sup> This is strong medicine for what some might consider an administrative oversight in the course of day-to-day

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47. *Levine v. United States*, 362 U.S. 610, 619–20 (1960).

48. *Presley v. Georgia*, 558 U.S. 209, 214–15 (2010).

49. *Publicker Indus. v. Cohen*, 733 F.2d 1059, 1061 (3rd Cir. 1984) (holding in a civil case that access should have been permitted).

50. *Gannett Co. v. DePasquale*, 443 U.S. 368, 393 (1979).

51. *See, e.g., Presley*, 558 U.S. at 216.

52. *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017).

53. *Id.*

54. *Id.*

55. *Id.* (describing harm from structural errors as “simply too hard to measure”).

56. *Peck v. United States*, 106 F.3d 450, 454 (2nd Cir. 1997) (“[A] per se rule of reversal applies when a structural error is present at trial . . .”).

57. *Presley v. Georgia*, 558 U.S. 209 (2010).

58. *Id.* at 210.

59. *Id.* at 215–16.

courtroom management.<sup>60</sup> A proper understanding of the *Waller* test's functioning is important given the stakes to judicial administration and economy.

#### B. The *Waller* Test is Nominally a Strict Scrutiny Test

In some areas of constitutional law, courts familiarly apply “tiered scrutiny”<sup>61</sup> to review government actions. These tiers include rational basis scrutiny, intermediate scrutiny, and strict scrutiny.<sup>62</sup> *Waller* nominally requires that strict scrutiny be applied to courtroom closures. This means that the common description of strict scrutiny—a test requiring a compelling interest and narrow tailoring of means to accomplish that interest<sup>63</sup>—is manifested in *Waller*. But strict scrutiny is more than just the words of the test. It is a judicial term of art that connotes an exceptionally difficult hurdle to overcome.<sup>64</sup> In practice, though, the *Waller* test is not terribly difficult to satisfy.<sup>65</sup> Thus, *Waller* is not just another iteration of strict scrutiny. Since it does not represent strict scrutiny as that term's entire “bundle of sticks” (to borrow a metaphor from property law) would indicate, it is more appropriate to see it as *sui generis*; an inquiry distinct from “strict scrutiny” as it is commonly known.

I have previously described *Waller* as setting forth a strict scrutiny requirement.<sup>66</sup> That description deserves a little more review. Very few sources have explicitly described the *Waller* test as embodying strict scrutiny. In fact, only one case says so,<sup>67</sup> along with one law review article,<sup>68</sup> besides my own. Many other

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60. See *United States v. Negrón-Sostre*, 790 F.3d 295, 299 (1st Cir. 2015) (stating, while reversing conviction for public trial violation, “[w]e are mindful that many days of testimony, weeks of diligent juror attention, and months of preparation” were undone).

61. See, e.g., Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945, 948–51 (2004).

62. *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (describing tiers of scrutiny in Equal Protection context).

63. *United States v. Windsor*, 570 U.S. 744, 812 (2013) (Alito, J., dissenting) (“[C]lassifications subject to strict scrutiny . . . must be ‘narrowly tailored’ to achieve a ‘compelling’ government interest . . . .”); Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 800 (2006) (explaining strict scrutiny as having two parts, the first requiring that “the governmental ends are compelling” and the second that “the law is a narrowly tailored means of furthering those governmental interests”).

64. See *infra* Section III.A.

65. See *infra* Section VI.

66. Stephen E. Smith, *The Right to a Public Trial and Closing the Courtroom to Disruptive Spectators*, 93 WASH. U.L. REV. 235, 237 (2015).

67. *Commonwealth v. Chism*, 65 N.E.3d 1171, 1178 (Mass. 2017) (referring to “the . . . strict scrutiny test articulated in *Waller*”).

68. Jennifer L. Greenblatt, *Putting the Government to the (Heightened, Intermediate, or Strict) Scrutiny Test: Disparate Application Shows Not All Rights and Powers Are Created Equal*, 10 FLA. COASTAL L. REV. 421, 470 (2009) (asserting that *Waller* “announced strict scrutiny applied to closure of a criminal hearing”).

cases have described *Waller's* requirements as “strict,” but have not used the entire term of art “strict scrutiny.”<sup>69</sup>

But these few references are not determinative. The provenance of the *Waller* test leaves no doubt that it imposes (again, at least nominally) strict scrutiny. Cases applying *Press-Enterprise*, the case from which *Waller* took its language, verbatim,<sup>70</sup> have regularly described its test as requiring strict scrutiny.<sup>71</sup> There is no reason to believe its “overriding interest” is meaningfully different from the familiar “compelling interest,” or that a closure “no broader than necessary” is not a narrowly tailored one. Accordingly, any judge investigating the possibility of closure will be on alert—her decision about courtroom closure will be put to strict scrutiny’s demanding test, should it be appealed.

It is true that the means requirement of a closure “no broader than necessary” or “narrowly tailored,” under *Waller* and *Press-Enterprise*, may be legally ambiguous. Doctrinally, there are different kinds of narrow tailoring. Under strict scrutiny, narrow tailoring requires that the government select the “least restrictive alternative” to accomplish its goal.<sup>72</sup> That is, the least restrictive of the constitutional right at issue.<sup>73</sup> There are areas of First Amendment law, however, where “narrow tailoring” is required, but a less demanding form of that tailoring is permitted. For instance, time, place and manner restrictions are described as requiring “narrow tailoring,” but the Court has been clear that a demanding “least restrictive alternative” analysis need not be undertaken to analyze those restrictions.<sup>74</sup> While there are multiple versions of “narrow tailoring” requirements, there is nothing in *Waller* or *Press-Enterprise* that indicates that a “watered down” version is meant to apply. And again, cases discussing *Press-Enterprise* consistently describe it as applying strict scrutiny, not a lesser, perhaps intermediate, form of scrutiny, employing a less demanding version of “narrow tailoring.”<sup>75</sup>

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69. *Owens v. United States*, 483 F.3d 48, 66 (1st Cir. 2007) (describing *Waller's* requirements as “strict,” though not using phrase “strict scrutiny”), *abrogated by* *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017); *Brown v. Kuhlmann*, No. 96 Civ. 7530 (HB), 1997 WL 104956, at \*4 (S.D.N.Y. Mar. 10, 1997) (same), *vacated*, 142 F.3d 529 (2nd Cir. 1998); *Concepcion v. United States*, 181 F. Supp. 2d 206, 233 (E.D.N.Y. 2002) (same); *Adams v. City of New York*, 993 F. Supp. 2d 306, 314 (E.D.N.Y. 2014) (same).

70. *See supra* notes 33–38 and accompanying text.

71. *N.Y. Civil Liberties Union v. N.Y. City Transit Auth.*, 684 F.3d 286, 293 (2nd Cir. 2012) (reporting district court’s assertion that “limits to access are subject to strict scrutiny” under First Amendment); *Doe v. Santa Fe Indep. Sch. Dist.*, 933 F. Supp. 647, 651 (S.D. Tex. 1996) (describing First Amendment access test as “strict scrutiny”); *Detroit Free Press v. Ashcroft*, 195 F. Supp. 2d 937, 945 (E.D. Mich. 2002) (“To determine the limitations of the right of access . . . courts traditionally apply a strict scrutiny analysis.”), *aff’d*, 303 F.3d 681 (6th Cir. 2002); *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1354 (D.C. Cir. 1985) (Skelly Wright, J., concurring in part) (“The Supreme Court has most recently spoken as if closure orders must meet the test of strict scrutiny.”). *See also* Winkler, *supra* note 63, at 849 (noting that “lower courts have read *Press-Enterprise* to hold that ‘strict scrutiny is the correct standard’”) (quoting *Kamasinski v. Judicial Review Council*, 44 F.3d 106, 109 (2nd Cir. 1994)).

72. *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004).

73. *Id.* (“The purpose of the test is to ensure that speech is restricted no further than necessary to achieve the goal . . .”).

74. *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989) (disclaiming least restrictive alternative analysis in time, place, and manner context); *Bd. of Trs. v. Fox*, 492 U.S. 469, 477 (1989) (disclaiming least restrictive means analysis in commercial speech case).

75. *See supra* note 71.

Finally, there is a less strict version of *Waller's* test applied to what are called "partial" closures.<sup>76</sup> A partial closure is one in which certain individuals are excluded,<sup>77</sup> or people are generally excluded, but only for a very specific portion of the proceedings.<sup>78</sup> The Supreme Court has never differentiated between, nor used the terms, partial and complete closures.<sup>79</sup> The terminology has taken hold in the lower courts, however, as a way of distinguishing between closures that require close attention and those that are perhaps subject to more cursory analysis.<sup>80</sup> Most courts have applied a slightly different version of the *Waller* test to partial closures.<sup>81</sup> When "partial" closures are at issue, they have diluted *Waller's* "overriding" interest to require only a "substantial" interest.<sup>82</sup> This implies that lower courts understand *Waller* to apply strict scrutiny, generally. These courts have fashioned a form of lesser intermediate<sup>83</sup> scrutiny at the government interest phase of the tiered scrutiny approach that they apply to closures that pose less of a risk to the values of a public trial.

Despite the different meanings of narrow tailoring, and despite the existence of a less-strict form of *Waller* review, it remains true that *Waller*, as phrased, represents a strict scrutiny approach. It demands a strong interest. It requires a close fit between that interest and the court's choice to close the courtroom.

### III. THE RHETORIC OF INVALIDITY IN OTHER STRICT SCRUTINY CONTEXTS

#### A. The Fatality of Strict Scrutiny

Strict scrutiny is familiar to every lawyer and judge. Its application suggests, though it does not require, that a law will be invalidated. It "has usually been understood to spell the death of any governmental action to which a court may apply it."<sup>84</sup> "Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law."<sup>85</sup> The application of strict scrutiny

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76. *E.g.*, *United States v. Simmons* 797 F.3d 409, 413–24 (6th Cir. 2015).

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

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

79. *Garcia v. Bertsch*, 470 F.3d 748, 754 (8th Cir. 2006) ("The Supreme Court has not spoken on the partial closure issue . . .").

80. *See Judd v. Haley*, 250 F.3d 1308, 1315 (11th Cir. 2001) (stating that partial closures are "not as deserving [as complete closures] of such a rigorous level of constitutional scrutiny.").

81. *See, e.g., Simmons*, 797 F.3d at 413–14 ("Nearly all federal courts of appeals . . . have distinguished between the total closure of proceedings and situations in which a courtroom is only partially closed to certain spectators.").

82. *See, e.g., Woods v. Kuhlmann*, 977 F.2d 74, 76 (2nd Cir. 1992) (applying "substantial reason" test). *But see Turrietta*, 308 P.3d at 967 (holding *Waller's* "overriding interest" factor applies in partial closures excluding only some courtroom spectators).

83. *See, e.g., Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2375 (2018) (describing intermediate scrutiny as requiring a "substantial" interest).

84. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 243 n.1 (1995) (Stevens, J., dissenting).

85. *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997); *Brown v. Entm't. Merchs. Ass'n*, 564 U.S. 786, 799 (2011) (strict scrutiny "is a demanding standard").

has been said to place a “thumb on the scales” in favor of the right at issue, and against the law under review.<sup>86</sup> It imposes a “heavy burden” on a state actor required to justify its law.<sup>87</sup>

Strict scrutiny has been famously described as “‘strict’ in theory and fatal in fact.”<sup>88</sup> The Supreme Court has tried to distance itself from the suggestion that the application of strict scrutiny necessarily determines the outcome and results in fatality.<sup>89</sup> And in 2006, Prof. Adam Winkler described this “fatality” as a myth. After reviewing cases in which strict scrutiny had been applied, he determined that the “survival rate” for cases reviewed under strict scrutiny was about 30 percent.<sup>90</sup> He noted that it was even greater for First Amendment access to the courts cases, *Waller’s* ancestors. In fifty percent of the 26 cases analyzed, the court let survive a law reviewed under strict scrutiny.<sup>91</sup>

Nonetheless, the rhetoric of strict scrutiny’s likely results persists. It is still said, by the Supreme Court itself, that “strict scrutiny readily, and almost always, results in invalidation.”<sup>92</sup> Justice Breyer, in 2009, wrote that strict scrutiny is “a categorization that almost always proves fatal to the law in question.”<sup>93</sup> And as Prof. Winkler notes, this remains empirically true at the Supreme Court level: “between 1990 and 2003, the Supreme Court only applied strict scrutiny 12 times, upholding only a single law prior to 2002.”<sup>94</sup> The characterization of strict scrutiny as the death knell for the regulation under review has not been lost on lower courts, which again and again note that strict scrutiny is “almost always fatal.”<sup>95</sup>

This common understanding of the effect of strict scrutiny, and of the burden it places on government actions within its purview, cannot help but inform the choices and actions of judges making closure decisions. In the context of affirmative action, Justice Stevens wrote that “there is a danger that the fatal language of ‘strict

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86. *Vieth v. Jubelirer*, 541 U.S. 267, 294 (2004) (plurality opinion) (strict scrutiny imposes “a strong presumption of invalidity” with a “thumb on the scales” in favor of the individual right).

87. *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972) (under strict scrutiny, “a heavy burden of justification is on the State”).

88. Gerald Gunther, *The Supreme Court, 1971 Term - Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

89. *Adarand Constructors, Inc.*, 515 U.S. at 237 (“[W]e wish to dispel the notion that strict scrutiny is ‘strict in theory, but fatal in fact.’”).

90. Winkler, *supra* note 63, at 796 (“Overall, 30 percent of all applications of strict scrutiny—nearly one in three—result in the challenged law being upheld. Rather than ‘fatal in fact,’ strict scrutiny is survivable in fact.”).

91. *Id.* at 845.

92. *Vieth v. Jubelirer*, 541 U.S. 267, 294 (2004).

93. *Ysursa v. Pocatello Educ. Ass’n*, 555 U.S. 353, 366 (2009) (Breyer, J., concurring in part and dissenting in part); see also *United States v. Alvarez*, 567 U.S. 709, 731 (2012) (Breyer, J., concurring) (writing that strict scrutiny implies “near-automatic condemnation”).

94. Winkler, *supra* note 63, at 796.

95. *Villanueva v. Carere*, 85 F.3d 481, 488 (10th Cir. 1996) (strict scrutiny “is almost always fatal to a classification”); *Stiles v. Blunt*, 912 F.2d 260, 263 n.5 (8th Cir. 1990) (“when a classification is subjected to strict scrutiny, it is almost always found unconstitutional”); *DISH Network Corp. v. FCC*, 653 F.3d 771, 778 (9th Cir. 2011) (regulations subject to strict scrutiny “almost always violate the First Amendment”); *Old Bridge Chems., Inc. v. New Jersey Dep’t of Env’t Prot.*, 965 F.2d 1287, 1291 (3rd Cir. 1992) (“[R]egulations subject to heightened scrutiny . . . will almost always be invalidated . . . .”); *North Dakota v. Heydinger*, 825 F.3d 912, 923 (8th Cir. 2016) (Murphy, J., concurring) (“Under the dormant Commerce Clause, a statute faces strict scrutiny and is almost always invalid if it ‘discriminates against interstate commerce.’”) (quoting *Dep’t of Revenue of Kentucky v. Davis*, 553 U.S. 328, 338 (2008)).

scrutiny' will skew the analysis and place well-crafted benign programs at unnecessary risk."<sup>96</sup> Professor Eugene Volokh has expressed a similar concern about strict scrutiny's language in the First Amendment context, writing that it "risks leading courts and legislators to the wrong conclusions, it causes courts to apply the test disingenuously, and it distracts us from looking for a better approach."<sup>97</sup> There is substance to the standard. Judges and litigants both should be expected to be aware of and responsive to it.

### B. The Purposes of Strict Scrutiny

Every personal right enshrined in the Constitution is an important one. There is, nonetheless, a hierarchy in terms of the protections extended to those differing rights. Strict scrutiny, the "most exacting scrutiny," the "most demanding" form of review, is extended to few.<sup>98</sup> As explained below, it is not employed to review other criminal procedure rights.<sup>99</sup>

Strict scrutiny is employed in an Equal Protection context to "flush out" unconstitutional motivations.<sup>100</sup> Laws are subject to heightened scrutiny when the court suspects that the classification they are based on does not reflect "sensible grounds"<sup>101</sup> or "meaningful considerations."<sup>102</sup> Heightened scrutiny applies only after the court presumes an illicit motive, which is presumed when, for instance, race is the instant classification in an Equal Protection case.<sup>103</sup> "[A]ll governmental action based on race—a group classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry . . . ."<sup>104</sup>

In the Equal Protection context, courts apply a more lenient form of scrutiny to gender classifications than to race classifications precisely because they are *less*

96. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 243 n.1 (1995) (Stevens, J., dissenting).

97. Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2418 (1996).

98. *See, e.g., Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994); *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997).

99. *See discussion infra* Section V.

100. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 146 (1980); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion) ("[T]he purpose of strict scrutiny is to 'smoke out' illegitimate uses of race . . . [and to determine] that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype."). *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938), also famously raised the possibility that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."

101. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

102. *Id.* at 441; *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 228 (1995) ("By requiring strict scrutiny of racial classifications, we require courts to make sure that a governmental classification based on race, which 'so seldom provide[s] a relevant basis for disparate treatment,' is legitimate, before permitting unequal treatment based on race to proceed.") (internal citations omitted).

103. ELY, *supra* note 100, at 154 ("[L]abeling a classification 'suspect' means functionally . . . that a prima facie case has been made out and that the inquiry into its suspiciousness should continue.>").

104. *Adarand*, 515 U.S. at 227 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)).

suspicious of the motives behind them.<sup>105</sup> We believe it is more likely (though still unlikely) that there is a legitimate purpose behind a gender classification than a racial one.<sup>106</sup> We know that there may be acceptable bases for those classifications.<sup>107</sup> That level of suspicion dictates the level of scrutiny, a reduction from strict to intermediate.<sup>108</sup>

Similarly, in the First Amendment context, courts apply strict scrutiny to content-based laws because they presume there are so few legitimate reasons for a government entity to restrict expression based on its content.<sup>109</sup> Because government has, generally, no power to regulate content,<sup>110</sup> when it does, it is regarded with the suspicion that strict scrutiny imposes.<sup>111</sup> Content-based laws run the risk that they will be “used for invidious, thought-control purposes.”<sup>112</sup>

These are not the only constitutional contexts in which strict scrutiny appears, but the Equal Protection and First Amendment contexts evidence the purpose of strict scrutiny, generally. It is applied when the courts have reason to believe that the very nature of the government action under review leads to a probability of invalidity.<sup>113</sup> When strict scrutiny is applied, it is because it is easy for the court to imagine an improper purpose at play, one that may well be “flushed out” and rightfully condemned by strict scrutiny’s procedure.<sup>114</sup> The presumption of invalidity indicates that the court *expects* the law to stem from an improper motivation.<sup>115</sup>

This is an ill-fitting justification for applying strict scrutiny to courtroom closure decisions. One of the purposes of the public trial right is to provide the sunlight that will prevent the judge and prosecutor from imposing unfair procedures on a defendant.<sup>116</sup> It seems improbable, however, that a trial court’s

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105. Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297, 303 (1997) (“Actions that look particularly suspicious are subject to ‘strict scrutiny,’ those that are somewhat suspicious are subject to ‘intermediate scrutiny,’ and the most innocuous receive ‘rational basis’ review.”).

106. *Id.* at 359 (“With gender . . . biological differences between the sexes will remain in existence, and therefore true ‘equality’ might well require differing treatment.”); *United States v. Virginia*, 518 U.S. 515, 533 (1996) (“Supposed ‘inherent differences’ are no longer accepted as a ground for race or national origin classifications. Physical differences between men and women, however, are enduring . . .”) (internal citation omitted).

107. *Id.*

108. See Bhagwat, *supra* note 105, at 303.

109. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (“Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional.”).

110. *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972).

111. See *BellSouth Corp. v. FCC*, 144 F.3d 58, 69 (D.C. Cir. 1998).

112. *Madsen v. Women’s Health Ctr.*, 512 U.S. 753, 794 (1994) (Scalia, J., concurring in part). In contrast, lesser scrutiny applies to laws that “do not pose such inherent dangers to free expression, or present such potential for censorship or manipulation, as to justify application of the most exacting level of First Amendment scrutiny.” *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 661 (1994).

113. See *Shaw v. Reno*, 509 U.S. 630, 643 (1993) (presuming invalidity of racial classification); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (presuming invalidity of content-based speech restriction).

114. See, e.g., Stephen E. Gottlieb, *Tears for Tiers on the Rehnquist Court*, 4 U. PA. J. CONST. L. 350, 362 (2002) (“It has long been noted that strict scrutiny flushes out bad motives.”).

115. Cass R. Sunstein, *The Supreme Court 1995 Term, Foreword, Leaving Things Undecided*, 110 HARV. L. REV. 4, 78 (1996) (strict scrutiny “ensure[s] that courts are most skeptical in cases in which it is highly predictable that illegitimate motives are at work.”).

116. *Peterson v. Williams*, 85 F.3d 39, 43 (2nd Cir. 1996) (citing *Waller*, 467 U.S. at 46).

desire to engage in nefarious rights-denying behavior is its motivation for a closure. Less probable still is that the court, colluding with the prosecutor, intends to shield the prosecutor's behavior from the public. These are *possibilities* of course, possibilities that provide the very reason for the public trial right, but they should hardly be presumed. Instead, it is easier to imagine proper purposes for closing a courtroom: protecting a witness's identity, protecting a child witness from public scrutiny, maintaining order in the courtroom, or perhaps preventing illness.<sup>117</sup> There is little reason for a reviewing court to begin from a position of great suspicion of the trial court's motives in ordering a closure. Instead, a proper motivation is a far more likely explanation for a closure decision. Courtrooms may be closed for inadequate reasons, and are accordingly due some scrutiny, but they are rarely closed for wrongful ones.

#### IV. COMPARING SCRUTINY IN OTHER CONSTITUTIONAL CONTEXTS TO THE RIGHT TO A PUBLIC TRIAL

##### A. Government Interests

The first inquiry a reviewing court must make when it applies strict scrutiny is whether the government interest pursued is strong enough to justify the government's action.<sup>118</sup> One of the reasons that courtroom closures regularly survive the crucible of *Waller* scrutiny is that the interests proposed by the trial court as "overriding" are typically what could be called "micro" interests—interests in protecting the particular players in the particular scene of the trial. They are interests that relate to safety, to the emotional well-being of individuals, and to order in the courtroom. They tend not to be highly debatable as either a category of protectable interest or in degree of importance. In that way, they differ from the interests presented in many other strict scrutiny scenarios. In those cases, the asserted compelling interests tend to be "macro" interests. These macro interests are typically abstract, generalized interests, inuring to the benefit of society broadly. They are the polity's interests, and they may be debatable. This affects how they are viewed by the courts.

Great judicial debates have taken place over the significance of asserted justifications for government actions, especially in the context of Equal Protection. The justices have debated whether maintaining a diverse student body in a university is "compelling"; a majority concluded yes.<sup>119</sup> They have argued over whether providing role models to minority students is "compelling"; that majority

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

118. See, e.g., *Wersal v. Sexton*, 674 F.3d 1010, 1020 (8th Cir. 2012) ("Under strict scrutiny, [the government must show its laws] (1) advance a compelling state interest and (2) are narrowly tailored to serve that interest.").

119. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (concluding school had compelling interest in student diversity); *Id.* at 355 (Thomas, J., concurring in part and dissenting in part) (concluding otherwise).

concluded no.<sup>120</sup> And so on. The Court has also rejected debatable interests such as “leveling the playing field”<sup>121</sup> and avoiding political favoritism or influence<sup>122</sup> in campaign finance contexts.

*Richmond v. J.A. Croson Co.*<sup>123</sup> provides an example of the sort of “macro” interest that the Court is suspicious of. In *Croson*, the City of Richmond imposed a set-aside requiring that thirty percent of the dollar amount of any city construction contract be awarded to minority businesses.<sup>124</sup> This quota requirement was justified by the city as a remedial measure to address a history of discrimination in the city’s construction industry.<sup>125</sup> The Court rejected this as a “compelling interest.”<sup>126</sup> It criticized the justification, saying, “a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy.”<sup>127</sup> It further described the government interest as “amorphous” and speculative.<sup>128</sup>

An asserted interest may also be rejected as compelling if there is insufficient certainty that the problem, which may sound compelling in the abstract, is concretely at issue. For example, in *Brown v. Entertainment Merchants Association*, the government wished to regulate violent video games, asserting an interest in preventing the development of violent tendencies in teens.<sup>129</sup> The Court rejected this speech restriction, analyzed under strict scrutiny, because there was inadequate evidence of “a direct causal link between violent video games and harm to minors.”<sup>130</sup> This sort of empirical inadequacy will rarely be at issue in a public trial case, where the needs for courtroom closure are immediately apparent. *Brown* presents an inadequately documented social concern, a macro concern, rather than an easily documented micro courtroom concern.

Less debatable interests, in the First Amendment context, have included “preserving public confidence in the integrity of the judiciary,”<sup>131</sup> “ensuring that an individual’s right to vote is not undermined by fraud in the election process,”<sup>132</sup> and “protecting the physical and psychological well-being of minors” who view certain material.<sup>133</sup> These may be broad societal, “macro” interests, but they are ones more easily agreed upon.

Thankfully, there is no need to catalog the Court’s treatment of particular interests asserted to satisfy the ends requirement of strict scrutiny. Instead, it is

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120. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (plurality opinion) (concluding that providing minority role models for minority students is not a compelling interest); *id.* at 316–17 (Stevens, J., dissenting) (concluding otherwise).

121. *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 749 (2011) (holding that matching funds rules cannot survive strict scrutiny).

122. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 359 (2010) (holding campaign finance law does not survive strict scrutiny).

123. *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

124. *Id.* at 477.

125. *Id.* at 498.

126. *Id.* at 486.

127. *Id.* at 498.

128. *Id.* at 499.

129. *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 799 (2011).

130. *Id.*

131. *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 444 (2015).

132. *Burson v. Freeman*, 504 U.S. 191, 199 (1992).

133. *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

sufficient to contrast those kinds of broad, debated macro interests with the kinds of interests that arise in courtroom closure decision making. The micro interests presented in public trial cases pertain not to the polity at large, but to the individual participants in the proceeding—the defendant, the judge, or a witness. A micro interest is more easily appreciated by a reviewing court and is less subject to political dispute as to its importance.

For instance, an overriding interest required to justify a courtroom closure was found when a closure was ordered to protect a 12-year-old victim-witness “from embarrassment and shame.”<sup>134</sup> This is not a question about a broad social issue, but about how one person, in one environment, can be protected.

Besides the prevention of emotional harm, physical harm may be at issue. It seems indisputable that the physical well-being of specified individuals may justify a courtroom closure, and indeed, it has been so held: “[t]he safety of law enforcement officers ‘unquestionably’ may constitute an overriding interest.”<sup>135</sup> A non-exhaustive list of overriding interests also includes the need to maintain order in the courtroom,<sup>136</sup> and prevention of witness intimidation and tampering.<sup>137</sup>

This is not to suggest that asserted interests are always accepted in courtroom closure analyses. For instance, a court found no overriding interest in encouraging a reluctant witness to testify, at least when “the district court made clear its belief that closure would not protect the witness or his identity.”<sup>138</sup> Moreover, “a vague assertion that ‘disparaging things’ were said by unidentified individuals cannot suffice to close a courtroom to members of the public during a criminal trial.”<sup>139</sup> And insufficient space because of the size of the venire, along with an undifferentiated risk of tainting the jury pool have been rejected as “overriding reasons” for closure.<sup>140</sup>

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134. *Bowers v. Michigan*, No. 16-2325, 2017 U.S. App. WL 1531958, at \*1 (6th Cir. Apr. 28, 2017) (citing *People v. Bowers*, No. 301811, 2012 WL 1560357, at \*1 (Mich. Ct. App. May 3, 2012)); *Globe Newspaper Co. v. Super. Ct. for Cty. of Norfolk*, 457 U.S. 596 at 607–08 (1982) (stating, in First Amendment context, that “the physical and psychological well-being of a minor” is a compelling justification for closure); *Bell v. Jarvis*, 236 F.3d 149, 168 (4th Cir. 2000) (concluding that the “state demonstrated an over-riding, compelling interest in protecting a child victim from the embarrassment and trauma associated with relating the details of multiple rapes and sexual molestation by a family member”); *United States v. Yazzie*, 743 F.3d 1278, 1287 (9th Cir. 2014) (“ensuring a child victim’s ability to effectively communicate is . . . a compelling higher value that can justify a closure.”). The government interest in protecting child witnesses and victims is also manifested in a federal statute, 18 U.S.C. § 3509 (2018), that specifically provides for courtroom closures in child cases. Of course, constitutional mandates would trump the statute.

135. *Moss v. Colvin*, 845 F.3d 516, 520 (2nd Cir. 2017) (quoting *People v. Ramos*, 685 N.E.2d 492, 496 (N.Y. 1997)); *Rodriguez v. Miller*, 537 F.3d 102, 110 (2nd Cir. 2008) (“It is clear that the State has an ‘overriding interest’ in protecting the identity of its undercover officers.”).

136. *Tucker v. Superintendent Graterford SCI*, 677 F. App’x 768, 777 (3rd Cir. Feb. 3, 2017).

137. *Id.*

138. *United States v. Candelario-Santana*, 834 F.3d 8, 23–24 (1st Cir. 2016).

139. *United States v. Simmons*, 797 F.3d 409, 415 (6th Cir. 2015).

140. *Presley v. Georgia*, 558 U.S. 209, 216 (2010); *Gibbons v. Savage*, 555 F.3d 112, 117 (2nd Cir. 2009); *United States v. Gupta*, 699 F.3d 682, 687–88 (2nd Cir. 2012).

The types of interests at play in courtroom closure cases, whether accepted as overriding or not, all share the common feature of being about courtroom actors. They do not ask whether a broad social policy should be honored. They ask whether a witness's shame is great enough. They ask whether the danger to an informant is real enough. They ask what kind of disorder the judge should expect to arise. These are deeply factual questions, and ones made in the moment by an individual: the judge. In contrast, governmental classifications based on race are generally (though not always<sup>141</sup>) made by a legislative body and are broadly applicable. The effects of a discriminatory statute are felt widely.

*Waller* scrutiny arises in a circumscribed realm—the context of a courtroom proceeding. The closure of the court is attributable to a judge and is applicable to a particular defendant (or group of defendants) in a discrete case. The societal stakes are necessarily lower. This takes the “counter-majoritarian difficulty”<sup>142</sup> with judicial review off the table. Courtroom closures do not implicate the democratic process or take rule-making responsibility from the people. Unlike true “strict scrutiny,” as it is typically applied to laws concerned with broad social goals, *Waller's* species is concerned with the nitty gritty purposes of courtroom management.

#### B. Narrowly Tailored Means

The second step of strict scrutiny requires that the means chosen to effect the government interest is narrowly tailored to accomplish it.<sup>143</sup> *Waller* phrases its means requirement as one requiring a choice of means “no broader than necessary.”<sup>144</sup> This is an unusual phrase to use in lieu of “narrow tailoring,”<sup>145</sup> but appears interchangeable with it.<sup>146</sup> In a mine-run strict scrutiny matter, a failure of tailoring is the expected reason for a law to be invalidated.<sup>147</sup> Narrow tailoring is said to require a necessary means, the least restrictive alternative.<sup>148</sup> But it turns out that there are almost always other things a government can do to serve its goal either without infringing, or infringing to a lesser degree, a constitutional right.<sup>149</sup> Accordingly, few government choices pass this gauntlet.

Strict scrutiny typically requires that when “a less restrictive alternative would serve the Government's purpose, the [government] must use that alternative.”<sup>150</sup>

141. See, e.g., *Palmore v. Sidoti*, 466 U.S. 429 (1984) (reviewing judicial order for compliance with Equal Protection Clause).

142. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16 (1962) (coining term “counter-majoritarian difficulty”).

143. See, e.g., *United States v. Paradise*, 480 U.S. 149, 167 (1987).

144. *Waller v. Georgia*, 467 U.S. 39, 48 (1984).

145. A search for the phrase brings up only 17 Supreme Court uses.

146. See *Burson v. Freeman*, 504 U.S. 191, 228 (1992) (Stevens, J., dissenting) (describing strict scrutiny as requiring a means “no broader than necessary”); *California Med. Ass'n v. Fed. Elec. Comm'n*, 453 U.S. 182, 202 (1981) (Blackmun, J., concurring) (stating that “full First Amendment protection” includes a choice of means “no broader than necessary”).

147. See Bhagwat, *supra* note 105, at 308 n.32.

148. *Sable Commc'ns of California, Inc. v. FCC*, 492 U.S. 115, 128 (1989); see Varol, *supra* note 11, at 1256 (noting that traditional narrow tailoring “requires the exhaustion of less restrictive alternatives”).

149. See, e.g., *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 808 (2000).

150. *Id.* at 813.

There are, of course, innumerable examples; *United States v. Playboy Entertainment Group, Inc.*<sup>151</sup> provides one. There, Congress passed a law that required cable operators either to scramble sexually explicit channels in full or to limit programming on the channels to limited hours.<sup>152</sup> The Court determined that, beyond these two choices, there were *other ways* the government could achieve its purpose of protecting children: there was evidence that cable channels could block content, on request, on a household by household basis.<sup>153</sup> Assessing the question of less restrictive alternatives, the Court concluded that “targeted blocking is less restrictive than banning, and the Government cannot ban speech if targeted blocking is a feasible and effective means of furthering its compelling interests.”<sup>154</sup>

Evidence of the alternatives, as was available in the *Playboy* case, need not be provided, however. Adequacy of tailoring may be determined by the court simply hypothesizing alternatives. The Supreme Court’s opinion in *Presley v. Georgia*, a public trial case, provides an example.<sup>155</sup> In *Presley*, the trial judge had closed the courtroom to the public because there “just wasn’t space,” and because he worried that the defendant’s uncle, the lone spectator attending the trial, might make prejudicial remarks that the close-quarters jurors might hear.<sup>156</sup> The Court indicated that it could easily conjure alternatives to closure: “some possibilities include reserving one or more rows for the public; dividing the jury venire panel to reduce courtroom congestion; or instructing prospective jurors not to engage or interact with audience members.”<sup>157</sup> If there are other choices the government can make that are less restrictive of the constitutional right at issue, strict scrutiny—as it usually presents—requires that the right-preserving choice be made.<sup>158</sup>

But *Presley* is an unusual public trial case. *Waller* review, as it is actually practiced, is unlike traditional strict scrutiny in its means analysis. The means analysis performed in public trial cases—the inquiry into narrow tailoring—reflects an inquiry into reasonableness.<sup>159</sup> It does not reflect the sort of demands that strict scrutiny usually entails. Under *Waller* review, time and again, some sort of alternative is either presented to courts, or is imaginable, in lieu of closure.<sup>160</sup> Nonetheless, time and again, reviewing courts are not so demanding and accept the closure.<sup>161</sup> This result seems appropriate to the task of courtroom management.

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151. *Id.*

152. *Id.* at 806.

153. *Id.* at 808.

154. *Id.* at 815. *Sable Commc'ns of California, Inc. v. FCC*, 492 U.S. 115, 128 (1989) (suggesting that, instead of a ban on “dial-a-porn,” “credit card, access code, and scrambling rules [might be] a satisfactory solution to the problem of keeping indecent dial-a-porn messages out of the reach of minor.”).

155. *See generally* 558 U.S. 209 (2010).

156. *Id.* at 210-11.

157. *Id.* at 215; *see also* *People v. Evans*, 69 N.E.3d 322, 326 (Ill. App. Ct. 2016) (“[W]e can conceive reasonable alternatives—many of which are based in common sense.”).

158. *E.g.*, *McCullen v. Coakley*, 573 U.S. 464, 478 (2014).

159. *See infra* Part VI.

160. *See infra* notes 212–229 and accompanying text.

161. *Id.*

A judge should not be burdened with determining the best possible approach—the narrowly tailored one—but should instead need only act reasonably.

If *Waller* manifested true strict scrutiny, there would always be some alternative to closing the courtroom. If an informant's identity is at risk, hide the informant behind a screen.<sup>162</sup> If there is a nervous child witness, let the child spend however long it takes with a child psychologist. But these measures are not required, because they would inhibit the normal course of proceedings. It turns out, the normal course of proceedings is more important to courts than the ability of some small portion of the public to be able to sit in the courtroom's pews.<sup>163</sup>

It may be argued that this adjusted, more flexible, scrutiny is textually required by the *Waller* test. After all, *Waller* not only requires that the means chosen be “no broader than necessary,” it also says in its third prong, that the trial court “must consider reasonable alternatives” to closure.<sup>164</sup> It may be that this is an explicit release from the responsibility to choose the “least restrictive alternatives” under strict scrutiny. Indeed, this may be the “hook” courts could use to conceive of *Waller* as a flexible test. The third factor's use of the word “reasonable” should suffuse the entire inquiry.

But this third factor, along with the fourth factor's requirement that the court “must make findings,”<sup>165</sup> seems to be more of a procedural demand than a substantive one. It makes explicit what is implicit in standard narrow tailoring evaluation—that alternatives must be considered. And again, the *Waller* Court purported to be applying the strict scrutiny test handed down from *Press-Enterprise* and *Globe Newspapers* before it, without indicating it intended to create a new, divergent doctrine.<sup>166</sup>

## V. TESTS APPLIED IN OTHER CRIMINAL PROCEDURE CONTEXTS

Strict scrutiny, as used in other constitutional contexts, is foreign to criminal procedure decision-making.<sup>167</sup> Fourth, Fifth, and Sixth Amendment procedural rights—besides the right to a public trial—are not analyzed using the tiered scrutiny approach. Without too exhaustive a canvass of criminal procedure's tools of scrutiny, it is worth some review of the types of tests commonly used in constitutional criminal procedure. It may be that practical *Waller* scrutiny derives some of its features from them.

Some criminal procedure tests are phrased in terms of categorical rights of defendants—

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162. *Compare* Hargett v. Giamb Bruno, 291 F. App'x 402, 404 (2nd Cir. 2008) (undercover officer placed behind screen), with Bowden v. Keane, 237 F.3d 125, 130 (2nd Cir. 2001) (courtroom closed to protect undercover officer).

163. *See, e.g.*, United States v. Yazzie, 743 F.3d 1278, 1290 (9th Cir. 2014) (“Here, a two-way closed circuit television or videotaped depositions, such as George now recommends, would materially change the nature of the proceedings.”).

164. *Waller v. Georgia*, 467 U.S. 39, 48 (1984).

165. *Id.*

166. *See supra* notes 33–46 and accompanying text.

167. *See* Bhagwat, *supra* note 105 at 303 (“[T]he Supreme Court's constitutional jurisprudence where individual rights are concerned—with the exception of criminal procedure—has come to be dominated by a three-tiered system under which governmental action is categorized according to some predetermined criteria, and then subjected to an appropriate level of scrutiny.”) (emphasis added).

whether their rights are violated or not. For instance, under the Sixth Amendment's Confrontation Clause, past testimonial statements by witnesses who are not subject to cross-examination at trial may not be admitted—period—unless the witness is unavailable and there has been a prior opportunity for cross-examination.<sup>168</sup> But the public trial right has never been considered absolute.<sup>169</sup>

Many other constitutional procedural rights consider the circumstances to assess the reasonableness of the government action. A determination of whether law enforcement has “probable cause” to search,<sup>170</sup> for instance, is a “common-sense, practical question” that is evaluated by looking at the totality of circumstances.<sup>171</sup> It is a “nontechnical conception that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.”<sup>172</sup> Of course, a reasonableness inquiry is built into search and seizure law. The Fourth Amendment prohibits only “unreasonable searches and seizures.”<sup>173</sup>

Similarly, the determination of whether a defendant is “in custody” for purposes of the Fifth Amendment's right against self-incrimination<sup>174</sup> is made from the perspective of how a reasonable person, under the circumstances, would perceive their situation.<sup>175</sup>

The Sixth Amendment provides the right to counsel of the defendant's choosing.<sup>176</sup> However, when a defendant chooses to be represented by a particular attorney whose selection may lead to conflicted representation (for instance, among multiple defendants in one case), the Supreme Court has indicated that a trial court's rejection of that choice is subject only to review for abuse of discretion.<sup>177</sup> The abuse of discretion standard, permitting the court to choose between many possible responses, is about as far from strict scrutiny as may be imagined.<sup>178</sup>

The Sixth Amendment's right to counsel also includes the right to the effective assistance of counsel.<sup>179</sup> Here, too, a generous standard is applied. All that is required is “reasonably effective assistance.”<sup>180</sup> The right is violated when counsel's representation falls “below an objective standard of reasonableness.”<sup>181</sup>

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168. *Crawford v. Washington*, 541 U.S. 36, 68-69 (2004).

169. *See, e.g., United States v. Eisner*, 533 F.2d 987, 993 (6th Cir. 1976).

170. U.S. CONST. amend. IV.

171. *Illinois v. Gates*, 462 U.S. 213, 230-31 (1983).

172. *Maryland v. Pringle*, 540 U.S. 366, 370 (2003) (internal quotation marks omitted).

173. U.S. CONST. amend. IV.

174. U.S. CONST. amend. V.

175. *J.D.B. v. North Carolina*, 564 U.S. 261, 270 (2011).

176. *Wheat v. United States*, 486 U.S. 153, 157 (1988).

177. *Id.* at 164.

178. *Interpharm, Inc. v. Wells Fargo Bank*, 655 F.3d 136, 146 (2nd Cir. 2011) (“[D]iscretion is commonly understood to allow a decision maker to choose from a broad range of choices not conflicting with law or reason.”); *see also Kode v. Carlson*, 596 F.3d 608, 612 (9th Cir. 2010).

179. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

180. *Id.*

181. *Hill v. Lockhart*, 474 U.S. 52, 57 (1985).

Another example of fact-based, reasonableness determinations in constitutional criminal procedure cases is that provided by the right to a public trial's clause-mate: the right to a speedy trial.<sup>182</sup> An objection may be made that the comparison is inapt. A trial's "speed" is necessarily assessed by degree. Was one day required? Were 10,000 days? The space between is not black and white, but a shade of grey. The public trial right is more amenable to a black and white approach—the trial was open, or it was not?<sup>183</sup> Nonetheless, both are constitutional guarantees of particular treatment in the course of court proceedings.

In *Barker v. Wingo*, the Court acknowledged that it was creating "a balancing test [that] necessarily compels courts to approach speedy trial cases on an ad hoc basis."<sup>184</sup> It provided a non-exclusive list of factors to determine whether the Speedy Trial right was violated.<sup>185</sup> These included the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant."<sup>186</sup> The Court did not create a categorical strength-of-justification rule with language requiring compelling, overriding, substantial, or other particular interests.<sup>187</sup> Instead, it noted that "different weights should be assigned to different reasons":<sup>188</sup>

A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.<sup>189</sup>

This passage does not discuss government interests in the same way as a tiered-scrutiny approach does. Instead, it acknowledges the practical features of government actions and needs. Bad faith, of course, is a bad reason for a trial delay—it is a bad reason for anything. A showing of governmental bad faith will weigh against the government as it attempts to justify its delay. Negligence by the government is not to be favored, but it will not necessarily lead to a finding that a speedy trial has been denied. But in any balancing, a "valid reason" should favor the government.

In other words, the reason must be reasonable. If this approach is comparable to any of the tiered scrutiny categories, it is like rational basis scrutiny. Though perhaps with a twist. Under typical rational basis review, the Court will accept any *conceivable* government interest.<sup>190</sup> The ad hoc review contemplated by the Court

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182. U.S. CONST. amend. VI.

183. Though not completely, given the existence of "partial" closures. *See supra* notes 77–82 and accompanying text.

184. *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

185. *Id.* ("We can do little more than identify some of the factors . . .").

186. *Id.*

187. *See Wingo*, 407 U.S. 514.

188. *Id.* at 531.

189. *Id.*

190. *See* Dana Berliner, *The Federal Rational Basis Test—Fact and Fiction*, 14 GEO. J.L. & PUB. POL'Y 373, 375 (2016).

in *Barker* naturally requires an *actual* interest. The government cannot say it *could have* had a missing witness; it must have one. A valid reason must be a true one.

The Sixth Amendment right to a speedy trial considers the government interest—phrased as the “reason” for the delay under review—but does so not in a strict scrutiny manner, requiring a compelling or overriding interest. Instead, it simply reviews the justification for its reasonableness. It requires sensible solutions.

Without getting into the detail of these varied criminal procedure standards, it is clear that they are all fact specific, and they all try to establish whether the facts presented are of a sufficient weight to “flip the switch” of the right invoked. They are tests steeped in concepts of reasonableness; what do we expect of our fellow humans under circumstances like these?

The mechanics of a typical court decision applying strict scrutiny to *legislative* actions are very different from those applying it to courtroom mechanics.<sup>191</sup> In an Equal Protection Clause case, for instance, the law at issue typically arises from a lengthy, deliberative process at a legislative level, and subsequent litigation that may proceed for years, through discovery, motion practice, and trial.<sup>192</sup> The court has a great deal of time to evaluate and consider the strength of the government’s interest, or the fine points of available, less restrictive alternatives. In the course of a trial, the luxury of time is not available. The need for the court to close the courtroom in the face of exigencies like disruption, or a witness’s sudden recalcitrance, does not lend itself to the same reflection. The realities of courtroom management require flexibility that strict scrutiny cannot provide.

## VI. THE RIGHT TO A PUBLIC TRIAL IN RECENT PRACTICE

A review of federal court of appeals cases addressing the right to a public trial over the past ten years reveals a test that is not strict in application.<sup>193</sup> Instead, it is more like the other criminal procedure tests just examined. A search on this issue revealed fifty-eight cases.<sup>194</sup> A somewhat subjective winnowing of those followed. Some of the cases were not directly relevant.<sup>195</sup> Others were habeas cases decided

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191. See *Huminski v. Corsones*, 386 F.3d 116, 150 (2nd Cir. 2004), as amended on reh'g, 396 F.3d 53 (2nd Cir. 2005) (noting that courtroom closure decisions may be made under “the imminence of . . . threat”).

192. See, e.g., *Sullivan-Knoff v. City of Chicago*, 348 F. Supp. 3d 787, 793–94 (N.D. Ill. 2018) (describing justifications and criticisms of local ordinance alleged to violate Equal Protection Clause and explaining need for discovery before determination may be made).

193. The search in Westlaw’s federal appeals court database was worded as [advanced: (waller & overriding) & “public trial” & DA (aft 01-01-2010)]. This may not capture all the right to a public trial cases decided by federal courts of appeal in the past ten years, but I suspect it was close. The date was chosen, in part, to capture all the cases that have been issued since the Court’s watershed right to a public trial case, *Presley v. Georgia*, 558 U.S. 209 (2010). State courts, of course, must also apply *Waller*, but are not included in this sample.

194. *Id.*

195. See, e.g., *N.Y. Civ. Liberties Union v. N.Y. City Transit Auth.*, 684 F.3d 286, 296 (2nd Cir. 2012) (First Amendment case).

on procedural grounds, or in an otherwise summary manner.<sup>196</sup> Twenty-one cases addressed the right to a public trial issue presented in at least a somewhat thorough manner. Many of these cases, in turn, involved only “partial” closures, applying a “substantial reason” factor in lieu of requiring *Waller’s* “overriding reason.”<sup>197</sup> Partial closure cases reduce the demand the courts place on the weight of the government interest, the first prong of tiered scrutiny, from “overriding” to “substantial.”<sup>198</sup> But regardless of the nomenclature of a partial or complete closure, eleven of these cases applied *Waller* as-is, without modulating its “overriding” standard down to one requiring only a “substantial” reason to justify the closure. In other words, they employed strict scrutiny’s language demanding a strong government interest. Of these eleven cases applying “pure” *Waller*, the split between the closure being upheld and invalidated was about even. Six cases upheld the closure.<sup>199</sup> Only five invalidated the closure.<sup>200</sup> The fact of the split indicates that, in the public trial context, this is not the “fatal” test strict scrutiny is expected to be. But more interesting than raw numbers is the reason for these results.

The five cases invalidating closures all did so because the court’s interest justifying the closure was inadequate.<sup>201</sup> This is unusual, given Professor Bhagwat’s conclusion that the Supreme Court “has strongly tended to prefer means scrutiny over ends scrutiny across doctrinal areas.”<sup>202</sup> All five of these were easy cases. The interests justifying the closures in four were interests in nothing more than administrative convenience. For instance, three of the closures were simply for space reasons.<sup>203</sup> Another courtroom was closed by the judge “because that’s the type of hearing it is.”<sup>204</sup> In one case, a witness fear justification was asserted, which will often qualify as an “overriding” interest, but the court concluded there was no indication that the witness was really afraid.<sup>205</sup> These sorts of justifications are easily evaluated interests, impacting individuals in a courtroom setting. They demonstrate practical concerns, and evaluations of reasonableness. In the light of the Sixth Amendment’s commitment to a public trial, the need for space or following a “standard operating procedure” is insufficient to close a courtroom.

The cases upholding courtroom closures, and concluding that an interest was overriding, also did so easily. The interests asserted include the safety of

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196. See, e.g., *United States v. Withers*, 638 F.3d 1055, 1064 (9th Cir. 2011) (determining, in habeas context, that claim was not “patently frivolous”).

197. See, e.g., *United States v. Laureano-Pérez*, 797 F.3d 45, 77 (1st Cir. 2015).

198. See notes 77–82 and accompanying text for an explanation of the partial and complete closure distinction.

199. *Johnson v. Sherry*, 465 F. App’x 477, 479 (6th Cir. 2012); *United States v. Yazzie*, 743 F.3d 1278, 1290 (9th Cir. 2014); *United States v. Fernandez*, 590 F. App’x 117, 119 (2nd Cir. 2015); *Moss v. Colvin*, 845 F.3d 516, 521 (2nd Cir. 2017); *Tucker v. Superintendent Graterford SCI*, 677 F. App’x 768, 778 (3rd Cir. 2017); *Bowers v. Michigan*, No. 16-2325, 2017 WL 1531958, at \*1 (6th Cir. Apr. 28, 2017).

200. *United States v. Agosto-Vega*, 617 F.3d 541, 548 (1st Cir. 2010); *United States v. Waters*, 627 F.3d 345, 361 (9th Cir. 2010); *United States v. Gupta*, 699 F.3d 682, 688 (2nd Cir. 2012); *United States v. Negron-Sostre*, 790 F.3d 295, 305 (1st Cir. 2015); *United States v. Candelario-Santana*, 834 F.3d 8, 23 (1st Cir. 2016).

201. See *infra* notes 203–05.

202. Bhagwat, *supra* note 105, at 308 n.32.

203. *Gupta*, 699 F.3d at 688; *Agosto-Vega*, 617 F.3d at 548; *Negron-Sostre*, 790 F.3d at 305.

204. *Waters*, 627 F.3d at 361.

205. *Candelario-Santana*, 834 F.3d at 23.

undercover officers,<sup>206</sup> protecting the well-being of child witnesses,<sup>207</sup> protecting fearful witnesses,<sup>208</sup> and preventing courtroom disruption.<sup>209</sup> These are the sorts of difficult to dispute micro interests typically at issue when a courtroom closure is being considered. To the extent the concerns are not trumped up, it is hard to argue they are not interests worth protecting.

The public trial interest analysis, in practice, follows a framework similar to those used in other criminal procedure contexts. The needs of individuals, responding to specific circumstances, are at stake. The reasonableness of providing protection to those individual interests—while keeping in mind that a constitutional right is at stake—is the real focus of the court’s inquiry. Even considering that a right is at stake, protection of witnesses is reasonable. Closing a courtroom as an automatic matter, “because that’s the kind of hearing it is,” is not.<sup>210</sup>

Recent cases also demonstrate the flexibility of *Waller’s* requirement that a closure be no broader than necessary—strict scrutiny’s tailoring prong. On this topic, a review of the cases since *Presley* may include both “complete” closure cases, under *Waller’s* strict scrutiny formula, and “partial” closure cases, in which federal courts of appeal have reduced *Waller’s* interest requirement from “overriding” to “substantial,”<sup>211</sup> creating, in essence, an intermediate scrutiny regime. In either circumstance, *Waller’s* requirement of narrow tailoring, or a means selected that is “no broader than necessary,” remains nominally the same. In *none* of the twenty-one cases reviewed applying this means scrutiny was a closure invalidated for failure to satisfy the tailoring requirement. To an observer expecting a “least restrictive alternative” analysis, this should be a surprise. And looking at the cases, it is clear that a such an analysis is not applied.

For instance, in *United States v. Ledee*,<sup>212</sup> the courtroom was closed to protect the emotional well-being of a child witness.<sup>213</sup> The defendant wanted his parents to be in the courtroom for the child’s testimony, but they were excluded.<sup>214</sup> One alternative to closure offered that would have permitted the defendant’s parents to observe was setting up closed circuit television that would allow them to view from another room.<sup>215</sup> This seems obviously “less restrictive” of the public trial right, and relatively easy, technologically. Nonetheless, the alternative was rejected.<sup>216</sup> The reviewing court, using language that sounds nothing like a demand for a least restrictive alternative, wrote they were not reasonable alternatives and

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206. *Moss*, 845 F.3d at 521; *Fernandez*, 590 F. App’x at 119.

207. *Yazzie*, 743 F.3d at 1290; *Bowers*, 2017 WL 1531958, at \*1.

208. *Johnson*, 465 F. App’x at 479.

209. *Tucker v. Superintendent Graterford SCI*, 677 F. App’x 768, 778 (3rd Cir. 2017).

210. *United States v. Waters*, 627 F.3d 345, 361 (9th Cir. 2010).

211. See *supra* notes 77–82 and accompanying text.

212. *United States v. Ledee*, 762 F.3d 224 (2nd Cir. 2014).

213. *Id.* at 229.

214. *Id.* at 230.

215. *Id.*

216. *Id.*

that “[a] certain amount of line drawing is inherent in any closure decision.”<sup>217</sup> This is true, but it is not strict scrutiny.

In *United States v. Fernandez*,<sup>218</sup> the court assumed that hiding an undercover witness behind a screen constituted closure, and that the right to a public trial applies to a hearing on revoking supervised release.<sup>219</sup> These may be debatable conclusions, but in any event, the court, making those assumptions, applied *Waller*.<sup>220</sup> One obvious less restrictive alternative to the “closure” at issue would have been to keep the proceeding open, and rely on hearsay testimony of the undercover witness, instead of live testimony.<sup>221</sup> This is permitted under Federal Rules of Criminal Procedure 32.1 and, in any event, was proposed by defendant, which would waive an objection.<sup>222</sup> Nevertheless, the trial court concluded “that live testimony from [the witness] was preferable,”<sup>223</sup> and the court of appeals accepted the determination.<sup>224</sup> Again, if a demand of the least restriction on the right to a public trial were taken seriously, this choice would not have satisfied it.

Finally, for purposes of these illustrations, is *Tucker v. Superintendent Graterford SCI*.<sup>225</sup> In *Tucker*, the trial judge completely closed the courtroom to protect the overriding interest in avoiding disruptions and witness intimidation arising from the presence of members of rival gangs in the courtroom.<sup>226</sup> The complete closure was entered despite the possibility of excluding only specific disruptive persons,<sup>227</sup> or “allowing certain non-disruptive persons back into the courtroom.”<sup>228</sup> The trial court considered these choices, but rejected them for logistical reasons.<sup>229</sup> In terms of courtroom management needs, the court’s choices appear reasonable. They do not, however, appear to be concerned with choosing the least right-restricting alternative.

## VII. CONCLUSION - THE TRUE WALLER TEST

*Waller* should not be read to require strict scrutiny of courtroom closures. Ultimately, there is nothing especially objectionable about the language of *Waller*’s test. The reasons that justify a closure order, and possible alternatives to closure, *should* be considered by a court before it orders a closure. But those considerations should not be viewed through a strict scrutiny lens. Because the formulation of the strict scrutiny test is familiar to lower courts as something akin to a prohibition, that reading of the test may be misleading. The particular circumstances and demands of courtroom management do not lend themselves to review by traditional tiered

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217. *Id.*

218. *United States v. Fernandez*, 590 F. App’x 117 (2nd Cir. 2015).

219. *Id.* at 119.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Fernandez*, 590 F. App’x at 119.

225. *Tucker v. Superintendent Graterford SCI*, 677 F. App’x 768 (3rd Cir. 2017).

226. *Id.* at 777.

227. *Id.* at 778.

228. *Id.*

229. *Id.*

scrutiny approaches and are better guided by the reasonableness inquiries conducted in other areas of constitutional criminal procedure.

Some courts have puzzlingly declined to apply *Waller* to courtroom closures at all.<sup>230</sup> There is a danger that they did so because they believed a closure that might otherwise be eminently reasonable might nevertheless fail when reviewed under a strict scrutiny regime. But those closures would not likely be invalidated if subjected to the *Waller* test as it does and should exist. There is no need for courts to fashion themselves an “out” that relieves them from *Waller*’s demands.<sup>231</sup>

When considering the reason for a courtroom closure—whether there is an overriding interest—a court should consider the seriousness of the harm asserted by the courtroom actor whose needs justify the closure. Is the undercover agent still at work? In this vicinity? Affirmative answers lead to an easy decision, the safety of the witness justifies a complete closure. Easy decisions to the contrary are also made possible by justifications of mere administrative ease. Is there a serious harm to the judge or the judge’s staff if extra chairs need to be moved into the room? No. These sorts of administrative justifications will never suffice, because there is no meaningful harm suffered by a courtroom actor.

Somewhat more difficult questions of justification may be presented by things like child witnesses. It may be unclear whether a particular child needs protection from the trauma of spectators. But reviewing courts can only presume good faith efforts by trial judges. There should be leeway in evaluating the seriousness of the witness’s needs. This is a question of fact, typically left to trial court discretion.<sup>232</sup> To make a distinction between an interest being overriding or something somewhat less than is a great demand. Purpose scrutiny should not be strict in the public trial context, it should be practical.

In terms of tailoring, courts should ask if the means chosen to protect the interest—closure—was reasonable, or if obvious alternatives could have been employed. There are both practical concerns and fairness concerns. Many alternatives to closure might work to the detriment of the defendant in some way. To the extent possible, those should be avoided. For instance, putting a witness behind a screen may protect her identity while preserving the public nature of the trial, but it might also make the jury suspicious of a defendant in a way that simply

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228 *Id.* See, e.g., *Cosentino v. Kelly*, 102 F.3d 71 (2nd Cir. 1996) (per curiam); *Shepard v. Artuz*, No. 99 CIV.1912 (DC), 2000 WL 423519, at \*5 (S.D.N.Y. Apr. 19, 2000); *State v. Sowell*, No. 06AP-443, 2008 WL 2600222, at \*10 (Ohio Ct. App. June 30, 2008). These cases all declined to apply *Waller* when courtrooms were closed in response to disruptive spectators. Similarly, Pennsylvania courts appear to apply a mere abuse of discretion standard to review at least some courtroom closure decisions. See, e.g., *Commonwealth v. Copper*, No. 1926 EDA 2017, 2018 WL 4233127, at \*4 (Pa. Super. Ct. Sept. 6, 2018). This has led the Third Circuit to assert that it is “deeply concerned that Pennsylvania courts, including the Superior Court in Tucker’s case, are not applying *Waller* when analyzing defendants’ Sixth Amendment public-trial claims.” *Tucker*, 677 F. App’x at 776.

231. See generally Daniel Levitas, *Scaling Waller: How Courts Have Eroded the Sixth Amendment Public Trial Right*, 59 *Emory L. J.* 493 (2009).

232. Robert Anderson IV, *Law, Fact, and Discretion in the Federal Courts: An Empirical Study*, 2012 *UTAH L. REV.* 1, 44 (2012) (“[T]he idea that by their situation or their experience[,] the trial judges find facts better than appellate judges” is a reason for deferential review.).

clearing the courtroom would not. The screen might be a less restrictive alternative for openness purposes but might impact the defendant's interest in not having the jury predisposed against him. In short, judges may be put to the choice of competing demands. This is a fine, difficult, and maybe impossible assessment. Trial judges should be given the latitude to make it. A least restrictive alternative command is too much to ask in the context of managing a courtroom, where the closure decision is only one of many the judge must make on short notice. Court choices in this respect are necessarily imperfect. The choice that the trial judge makes with a good faith intent of protecting the fairness of the trial should be honored—despite a reviewing court being able to imagine a more open alternative.