

THE NEWEST SPECTATOR SPORT: WHY EXTENDING VICTIMS' RIGHTS TO THE SPECTATORS' GALLERY ERODES THE PRESUMPTION OF INNOCENCE

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ABSTRACT

A criminal defendant in the United States is innocent until proven guilty and has a Sixth Amendment right to a fair trial and an impartial jury. Although the American criminal justice system generally goes to great lengths to afford defendants these constitutional rights, competing interests may, if not carefully monitored, undermine these bedrock principles. This Note argues that a new practice, stemming from the victims' rights movement and developing in criminal courtrooms across the country, is one such competing interest. This new practice—spectator demonstrations—allows crime victims' family members and supporters to display ribbons, buttons, T-shirts, signs, family urns, or any other written or symbolic message to the jury while sitting in the audience section of the courtroom, also known as the spectators' gallery. Although the cathartic nature of the demonstration may provide benefits to the victims, this Note argues that the prejudicial effects on the jury and resulting contravention of the defendant's constitutional rights far outweigh any such justification. Consequently, this Note proposes that courts limit victims' rights in this area and ban spectator demonstrations completely to eliminate the per se unacceptable risk that they create.

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INTRODUCTION

At least 217 defendants have taken their seat in a courtroom and listened to the deafening sounds of injustice¹: the underlying reverberations of poverty, the vigorous drum of coercion and deceit, the exploding bombshells of misidentification and faulty evidence, and the babbling echo of bad lawyering.² Fortunately, all 217 of these defendants, subjected to the failings of the criminal justice system, have been exonerated by DNA evidence.³ Accordingly, these DNA exoneration statistics, as well as the fear that this group may only constitute a fraction of those convicted of crimes they did not commit,⁴ stimulate interest in identifying “the fundamental flaws in the criminal justice system that lead to wrongful convictions.”⁵

One source of identifiable concern is the victims’ rights movement,⁶ responsible for increasing victim involvement and allowing victims the right to be present and heard at various critical stages of judicial proceedings. Although victims’ rights are often revered as positive additions to the system,⁷ every additional victims’

1. As of June 1, 2008, 217 people in the United States have been wrongfully convicted of a crime and exonerated through DNA evidence. Innocence Project, <http://www.innocenceproject.org> (last visited Oct. 10, 2008).

2. This recasts the Innocence Project’s seven most common causes of wrongful convictions: (1) eyewitness misidentification, (2) unreliable or limited science, (3) false confessions, (4) forensic science fraud or misconduct, (5) government misconduct, (6) informants or snitches, and (7) bad lawyering. Innocence Project, *Understand the Causes*, <http://www.innocenceproject.org/understand> (last visited Oct. 10, 2008).

3. Innocence Project, *supra* note 1.

4. *See* Innocence Project, *supra* note 2 (“Those exonerated by DNA testing aren’t the only people who have been wrongfully convicted in recent decades. For every case that involves DNA, there are thousands that do not.”).

5. *See id.* (describing how the number of DNA exonerations has brought attention to the problems inherent in the criminal justice system and the necessity of fixing the system).

6. *See infra* Part I.B.

7. *See, e.g.,* Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims’ Rights Act*, 2005 BYU L. REV. 835, 837 (“[O]nly by integrating victims into the federal rules will Congress’s goal of making victims participants in the process be fully realized.”); Karyn Ellen Polito, Note, *The Rights of Crime Victims in the Criminal Justice System: Is Justice Blind to the Victims of Crime?*, 16 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 241, 241 (1990) (“Victims of crime should have recognized roles in the judicial system.”); Note, *Victims’ Roles in the Criminal Justice System: A Fallacy of Victim Empowerment?*, 8 ST. JOHN’S J. LEGAL COMMENT. 225, 236–37 (1992) (discussing several advantages of victim participation). *But see* Robert C. Black, *Forgotten Penological Purposes: A Critique of Victim Participation in Sentencing*, 39 AM. J. JURIS. 225, 227 (1994) (“It is a source of outrage to some that defendants enjoy more rights than victims. It ought not to be. . . . Victims’ rights bestowed by statute are necessarily subordinate to defendants’ constitutional rights in case of conflict.” (citation omitted)).

right raises the question: is the right eroding the defendant's presumption of innocence and constitutional right to a fair trial?⁸ Much of the existing research on victims' rights has concerned victim impact statements at sentencing hearings,⁹ victim involvement in plea bargaining,¹⁰ mandated victim involvement in domestic violence cases,¹¹ and the potential effects of victim involvement on a prosecutor's ability to remain a neutral and impartial "minister of justice."¹² Creating arguably one of the most divisive debates about victims' rights, however, are victim or spectator demonstrations in the courtroom during trial, which have further entangled the victim in the criminal justice system. To put the issue into context, consider the following scenario:

Everyday, juror number five sits in a wooden jury box. He and eleven other jurors have sworn, under oath, to be impartial fact finders despite the highly publicized nature of the criminal murder trial in which they sit. Juror number five attempts to focus on the expert witness of the day, but notices that a little girl in the spectators' gallery is holding a brass urn. In fact, he notices this little girl every

8. See, e.g., Rachel King, *Why a Victims' Rights Constitutional Amendment Is a Bad Idea: Practical Experiences from Crime Victims*, 68 U. CIN. L. REV. 357, 362 (2000) ("By endowing constitutional rights on a 'victim' after a person has been accused of a crime, but before conviction, there is a presumption made that the accused is in fact guilty. This erodes the presumption of innocence—a cornerstone of our criminal justice system."); see also Erin Ann O'Hara, *Victim Participation in the Criminal Process*, 13 J.L. & POL'Y 229, 233–34 (2005) ("[V]ictim involvement in the criminal process is becoming and will continue to be a reality of our criminal justice process. . . . As a consequence, advocates must think creatively about how to provide victims with participation at a minimal cost to existing procedural protections for defendants.").

9. See *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) ("A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed.").

10. See Sarah N. Welling, *Victim Participation in Plea Bargains*, 65 WASH. U. L.Q. 301, 303–04 (1987) (examining whether victims should be afforded a right to participate in the plea bargain); David A. Starkweather, Note, *The Retributive Theory of "Just Deserts" and Victim Participation in Plea Bargaining*, 67 IND. L.J. 853, 854 (1992) (discussing how victim participation can be a positive addition to the plea bargaining process).

11. See Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1856 (1996) (discussing the tension behind requiring a victim to testify in a domestic violence case).

12. Bennett L. Gershman, *Prosecutorial Ethics and Victims' Rights: The Prosecutor's Duty of Neutrality*, 9 LEWIS & CLARK L. REV. 559, 561 (2005) (discussing potential ethical conflicts that may develop as a result of victim involvement); see also Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 132 (2004) (discussing the barriers that impede prosecutorial neutrality).

day. She belongs to the select group of people who sit in the front row, across from the bailiffs' post, and watch the trial.

During the first week, the group passed out T-shirts. Although juror number five hardly gave them a second glance because the T-shirt graphics were too small to read, last week he definitely noticed the bright-orange buttons they all wore showing the face of the murder victim. It was only then that he realized this group was the family of the murder victim, and their involvement began to make him a little uneasy.

Today, there are one, two, three . . . six of them. As juror number five drudges through what he hopes to be the last expert witness, he cannot help but stare at the brass urn that sits on the little girl's lap. He studies its detail and wonders whether it contains the remains of the little girl's father. He wonders what the family members are thinking, why they feel so strongly about the defendant's guilt, and whether they will be able to go on after this tragedy. And suddenly he feels an immense pressure as he realizes that the defendant's fate—and the family's fate—is solely in his and the other juror's hands.

This example illustrates various forms of spectator demonstrations—courtroom displays, worn, held, or otherwise touted by a crime victim's family member or supporter during the proceedings at trial. Although the example is only speculative of a juror's actual thoughts, the example is well within the realm of possibilities. Spectators have already donned large colorful buttons or badges depicting their loved ones,¹³ buttons advocating for a certain cause,¹⁴ ribbons,¹⁵ T-shirts with written or symbolic messages on them,¹⁶ and urns containing their loved ones' ashes.¹⁷ Furthermore, to

13. *E.g.*, *Nguyen v. State*, 977 S.W.2d 450, 457 (Tex. Ct. App. 1998) (describing how defendant asked that spectators be “ordered to remove large buttons portraying a color photograph of the deceased”).

14. *E.g.*, *Norris v. Risley*, 918 F.2d 828, 830 (9th Cir. 1990) (describing how defendant “contended that jurors were in the presence of a large number of women wearing ‘Women Against Rape’ buttons”).

15. *E.g.*, *In re Woods*, 114 P.3d 607, 616 (Wash. 2005) (en banc) (describing how victims' family members wore “black and orange remembrance ribbons while in the courtroom”).

16. *E.g.*, *State v. Speed*, 961 P.2d 13, 29 (Kan. 1998) (“[T]he family members were wearing t-shirts with a picture of [the victim] on them.”).

17. There are no cases that discuss urns. While conducting interviews in preparation for this Note, however, one prosecutor who overheard the interview added that one of her victim's family members brought an urn with the victim's remains into the courtroom, apparently for others to see, and the judge was going to have to rule on it. For an explanation of the prosecutor interviews conducted for this Note, see *infra* note 23.

bring attention to their displays, some have cradled sleeping babies,¹⁸ walked in and out of the courtroom,¹⁹ or served refreshments.²⁰ Consequently, the question posed here is twofold: why are spectator demonstrations allowed, and are they potentially biasing the jury and trial outcomes?

In answering these questions, this Note suggests that the phenomenon of allowing spectator demonstrations is the result of the victims' rights movement, which has influenced courts to adopt legal balancing tests that award rights to both spectators and defendants. These legal balancing tests, however, only create confusion in the courts and qualify guaranteed constitutional protections. This Note argues that this technique, especially in light of the possible prejudicial effects that spectator demonstrations may have on the jury—including diverting jurors' attention, creating biased priming manipulations, and altering courtroom availability heuristics—is fundamentally flawed. Fortunately, in 2006, the U.S. Supreme Court stated that it had not previously applied a legal balancing test to spectator conduct and that it was “an open question in our jurisprudence,”²¹ creating an opportunity to implement a new, uniform standard in the law. By illuminating the inherent inconsistencies and inadequacies that stem from legal balancing tests applied in this context, which allow courts to unevenly apply the law, this Note contends that courts should ban spectator demonstrations completely, arguing that in and of themselves spectator demonstrations create a *per se* unacceptable risk.

This Note consists of three parts. Part I tracks the evolution of the case law regarding spectator conduct in and around the courtroom. Part II introduces the Supreme Court's pivotal 2006 decision, *Carey v. Musladin*,²² and illustrates the competing views on spectator demonstrations through prosecutorial anecdotes.²³ Part III

18. See *State v. Franklin*, 327 S.E.2d 449, 454 (W. Va. 1985) (“Some cradled sleeping infants in their laps and all prominently displayed their MADD buttons.”).

19. See *State v. Nelson*, 705 So. 2d 758, 763 (La. Ct. App. 1997) (“The court further requested that the spectators not wander in and out of the courtroom, but rather remain seated, so as to minimize the effect of the t-shirts.”).

20. *Norris v. Risley*, 918 F.2d 828, 829 (9th Cir. 1990) (contending that the button wearers “served refreshments outside the courtroom on behalf of the state”).

21. *Carey v. Musladin*, 127 S. Ct. 649, 653–54 (2006).

22. *Carey v. Musladin*, 127 S. Ct. 649 (2006).

23. In preparation for this Note, prosecutors were interviewed about their experiences, relationships, and views about victim and spectator conduct in the courtroom. The interviews were conducted in 2007 and 2008 with current and former state prosecutors across the country.

rebutts the pro-spectator rights arguments set forth in Part II and argues for a total ban on spectator demonstrations. First, it dispels the myth that a victim or spectator has a First Amendment right to free speech in the courtroom that deserves heightened protection. Second, it discusses the ways in which spectator demonstrations may prejudice the jury. This Note concludes that courts ought to completely ban spectator demonstrations because “the risk of prejudice [is] profound, [and] the burden of alleviating that risk [is] minimal.”²⁴

I. THE EVOLUTION: FROM DEFENDANTS’ RIGHTS TO SPECTATORS’ RIGHTS

Spectator conduct in the courtroom has evolved from unruly spectators who scream, laugh, and point to “well-behaved” spectators who flaunt their signs, buttons, and T-shirts. Surprisingly, however, not only has the conduct itself evolved but also, and more importantly, the ideologies of the judges have evolved. Whereas judges were once willing and maybe even anxious to prevent prejudicial convictions, the evolving case law suggests a willingness to disregard potential prejudicial effects of spectator demonstrations. Why is this happening? Is the explicit message of an outburst more detrimental than the implicit message of a silent demonstration? Has the image of the weak and susceptible juror been replaced by that of the impervious mental giant unaffected by extraneous influences? Or, are twenty and twenty-first-century courts simply willing to give spectators, the majority of whom are victims, a little more freedom? This Part tracks the evolution of the law, suggesting that the advent of victims’ rights and the fact that many demonstrators are victims or victims’ family members has contributed to the judiciary’s response to spectator demonstrations.

A. *Historical Treatment of Spectators*

Historically, courts have been quick to shield juries from the potentially biasing influence of third parties in the courtroom. In pre-victims’ rights cases, interruptions to court proceedings primarily

All prosecutors were guaranteed anonymity. Therefore, their responses throughout the Note are only identifiable by number.

24. *Norris*, 918 F.2d at 834.

involved spectator outbursts.²⁵ Spectator outbursts occur when courtroom audience members engage in behavior that is typically spontaneous, such as “applause, laughter, yells and shrieks, or statements,” during court proceedings.²⁶ After such an outburst, it was not uncommon for judges to grant a new trial.²⁷ Because judges had difficulty preventing outbursts completely, however, when evaluating an outburst’s prejudicial effect, reviewing courts evaluated the judge’s actions.²⁸ When a judge promptly and effectively terminated the possibility of a reoccurrence, the verdict stood.²⁹ On the other hand, when the judge failed to immediately restore order in the court, appellate courts often reversed the verdict for fear that the failure to quell the outburst contributed to an unfair trial.³⁰ Furthermore, many courts held that individual jurors’ opinions about whether they could disregard the demonstration and render an unbiased verdict were

25. See generally Jay M. Zitter, Annotation, *Disruptive Conduct of Spectators in Presence of Jury During Criminal Trial as Basis for Reversal, New Trial, or Mistrial*, 29 A.L.R. 4TH 659 (1984) (detailing spectator demonstrations in a variety of cases).

26. *Id.* § 2.

27. See *id.* (describing a number of situations in which courts granted new trials when “prejudice in fact resulted or might have occurred”).

28. See *id.* (leaving “[t]he decision of whether the jury was or possibly could have been influenced [by a spectator demonstration] . . . [primarily] up to the discretion of the trial court”).

29. See, e.g., *Hallman v. United States*, 410 A.2d 215, 217 (D.C. 1979) (affirming a denial of a request for a mistrial when a woman in the public seating area of the courtroom began to cry during the prosecutor’s opening statement, because the individual was taken out of the courtroom and the judge immediately admonished the jury to decide the case only on the facts); *Stevens v. State*, 20 S.E. 331, 331 (Ga. 1893) (syllabus by the court) (finding no cause for a new trial when “the presiding judge promptly rebuked the offender, and had him removed from the court room”); *State v. Wheelock*, 254 N.W. 313, 316 (Iowa 1934) (“The outburst was promptly suppressed . . . [and] the trial court had the entire situation well in hand.”); *Shimniok v. State*, 19 So. 2d 760, 766 (Miss. 1944) (en banc) (finding no grounds for reversal when the judge restored order to the courtroom after an outburst and “instructed the sheriff that all persons must be seated; that there was to be no talking, or comments, or show of pleasure or displeasure, and that quiet must prevail in the courtroom”); *Floyd v. State*, 148 So. 226, 232 (Miss. 1933) (finding a fair trial when the audience “applauded because they thought the jury selection had been completed and that the trial on its merits would proceed [and] [t]he judge stated that there should be no more applause”).

30. See, e.g., *Stumph v. Commonwealth*, 408 S.W.2d 618, 619 (Ky. 1966) (noting that it is “the duty of the court to maintain order in the courtroom. . . [and] the trial court should take appropriate action” when there is a spectator outburst); *Hickox v. State*, 253 S.W. 823, 830 (Tex. Crim. App. 1923) (“The court should have sharply reprimanded the audience . . . [and] if this did not have the desired effect [the judge] should have promptly cleared the courtroom of spectators . . . [and] if this could not be accomplished, then the defendant should have been promptly granted a new trial.”); *Manning v. State*, 39 S.W. 118, 119 (Tex. Crim. App. 1897) (reversing a conviction for slander because the trial judge, after one demonstration, should have curtailed any subsequent actions).

irrelevant, and to ask them for such opinions midtrial was unnecessary.³¹ Although judges understood that not all spectator outbursts could be remedied by overturning convictions,³² curative steps taken to quell those acts were important when evaluating prejudice³³ and determining whether to grant a new trial.³⁴ Overall, this behavior by reviewing courts shows that spectator outbursts were seen as *per se* unacceptable risks in pre-victims' rights cases.

In addition to this historical procedural protocol, U.S. Supreme Court decisions reveal a consistent, historical concern for preventing third parties from prejudicing juries. For instance, in *Turner v. Louisiana*,³⁵ the Supreme Court focused on the importance of an "impartial" and "indifferent" jury.³⁶ In *Turner*, two sheriffs were in charge of the jury.³⁷ Specifically, these sheriffs "drove the jurors to a restaurant for each meal," took them to their "lodgings each night," and were otherwise closely associated with them.³⁸ Therefore, the judge reversed the defendant's conviction³⁹ when the same sheriffs

31. See, e.g., *Woolfolk v. State*, 8 S.E. 724, 727 (Ga. 1889) (holding that the combination of applause and screams of "hang him" warranted a new trial because "[t]he question here is not what effect these things did have upon the minds of the jury, but what effect they were calculated to produce"); *State v. Henry*, 198 So. 910, 923 (La. 1940) ("It was, therefore, error for the trial judge to substitute for his own opinion the conclusions of the jurors as to the effect and influence that the extraneous misconduct of bystanders and spectators had on them.").

32. See, e.g., *Parker v. State*, 25 S.W. 967, 967-68 (Tex. Crim. App. 1894) ("[T]o make a rule that a judgment will be reversed because of such applauding, in all cases, though promptly suppressed and reprimanded, would be very dangerous indeed. A person . . . would not hesitate to have his friends ready and willing to applaud counsel for the state . . .").

33. See, e.g., *Hendry v. State*, 112 So. 212, 214 (Ala. 1927) ("Misconduct of bystanders . . . is highly reprehensible, and should not be tolerated. When it occurs, it should be promptly and vigorously suppressed in such manner that the jury is made to see the ugliness and injustice of such demonstration."). Another state court held that immediate remedial action by the trial court could prevent a mistrial:

[W]here, as here, improper audience behaviour is purely fortuitous and where the court takes immediate steps to quell it and to admonish the jury and the spectators to assure no prejudice to the accused, a mistrial may not be required if the audience misbehaviour may be reasonably viewed as not having unduly influenced the jury.

State v. Allen, 276 So. 2d 868, 871 (La. 1973).

34. See, e.g., Zitter, *supra* note 25, § 3(a) ("[D]isruptive conduct of spectators in the presence of the jury during the selection of the jury or during the opening arguments constituted a basis for a reversal, or the granting of motions for a new trial or mistrial.").

35. *Turner v. Louisiana*, 379 U.S. 466 (1965).

36. *Id.* at 471 (quoting *Irvin v. Dowd*, 366 U.S. 717, 722 (1961)).

37. *Id.* at 467.

38. *Id.* at 468.

39. *Id.* at 474.

subsequently testified as witnesses for the prosecution.⁴⁰ The Court specified that the jury's verdict "must be based upon the evidence developed at the trial"⁴¹ and that "in spite of forms [juries] are extremely likely to be impregnated by the environing atmosphere."⁴² The Court also noted that "even if it could be assumed that the [sheriffs] never did discuss the case directly with any members of the jury," the continual interaction between those witnesses and the jury suggested extreme prejudice.⁴³ In ruling for the defendant, the Court recognized that a "trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the *witness stand* in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel."⁴⁴

Similarly, when confronting the disruptive nature of the media the following year in *Estes v. Texas*⁴⁵ and *Sheppard v. Maxwell*,⁴⁶ the Court scrutinized other outside influences in the courtroom. Concluding that the media prevented a fair trial in *Estes*, the Court noted that the "mass of wires, television cameras, microphones and photographers"⁴⁷ may have distracted the jurors.⁴⁸ Furthermore, the Court stated, "distractions are not caused solely by the physical presence of the camera Human nature being what it is, not only will a juror's eyes be fixed on the camera, but also his mind will be preoccupied with the telecasting rather than with the testimony."⁴⁹ In *Sheppard*, quoting Justice Holmes, the Court declared, "[t]he theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any

40. *Id.* at 468.

41. *Id.* at 472 (quoting *Irvin*, 366 U.S. at 722).

42. *Id.* (quoting *Frank v. Mangum*, 237 U.S. 309, 349 (1915) (Holmes, J., dissenting)).

43. *Id.* at 473.

44. *Id.* at 472–73 (emphasis added) (quoting *Irvin*, 366 U.S. at 722). In *Cox v. Louisiana*, 379 U.S. 559 (1965), the Court also upheld a Louisiana statute prohibiting picketing or parading near a court, *id.* at 564. "A State may adopt safeguards necessary and appropriate to assure that the administration of justice at all stages is free from outside control and influence." *Id.* at 562. Furthermore, "the legislature has the right to recognize the danger that some judges, jurors, and other court officials, will be consciously or unconsciously influenced by demonstrations in or near their courtrooms both prior to and at the time of the trial." *Id.* at 565.

45. *Estes v. Texas*, 381 U.S. 532 (1965).

46. *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

47. *Estes*, 381 U.S. at 550.

48. *Id.* at 546.

49. *Id.*

outside influence, whether of private talk or public print.”⁵⁰ Concluding that the jury’s subjective assessment of prejudice was not dispositive⁵¹ and that the judge “did not fulfill his duty . . . to control [the] disruptive influences in the courtroom,”⁵² the Supreme Court remanded the case.⁵³

For the sake of preventing jury prejudice, the Court has also administered control over the clothing and appearance of criminal defendants. In *Estelle v. Williams*,⁵⁴ for example, the “accused [was] compelled to wear identifiable prison clothing at his trial by a jury.”⁵⁵ Noting that “jail clothing furthers no essential state policy,” the Court determined that the “constant reminder of the accused’s condition implicit in such distinctive, identifiable attire may affect a juror’s judgment. . . . [and] an unacceptable risk is presented of impermissible factors coming into play.”⁵⁶ Even though the verdict was ultimately upheld because the defense did not properly make an objection to the court,⁵⁷ *Williams* established that the State could no longer compel a defendant to stand trial wearing identifiable prison clothing.

In another case, *Holbrook v. Flynn*,⁵⁸ “four uniformed state troopers [sat] in the first row of the spectators’ [gallery]” behind the six defendants.⁵⁹ Upholding the conviction, the Court stated that “maintaining custody during the proceedings”⁶⁰ was extremely important.⁶¹ Therefore, when the four uniformed officers were only there to provide security and did not overwhelm the room, an unacceptable risk of prejudice was simply not present.⁶² Nevertheless, the Court qualified its holding by stating, “[w]e do not minimize the threat that a roomful of uniformed and armed policemen might pose”⁶³ and “we might express a preference that officers providing

50. *Sheppard*, 384 U.S. at 351 (quoting *Patterson v. Colorado*, 205 U.S. 454, 462 (1907)).

51. *Id.*

52. *Id.* at 363.

53. *Id.*

54. *Estelle v. Williams*, 425 U.S. 501 (1976).

55. *Id.* at 502.

56. *Id.* at 504–05.

57. *Id.* at 512.

58. *Holbrook v. Flynn*, 475 U.S. 560 (1986).

59. *Id.* at 562.

60. *Id.* at 572.

61. *Id.* at 571–72.

62. *Id.* at 570–72.

63. *Id.* at 570.

courtroom security in federal courts not be easily identifiable by jurors as guards.”⁶⁴ The Court thus seemed to retain its protective principles related to potential jury prejudice in the courtroom even though the State had a “legitimate interest in maintaining custody” of the defendant in the case.⁶⁵

All of these cases suggest that historically, assuring an impartial jury took precedence over other competing interests, including the rights of third parties. Thus, the distortion of these established principles by select lower courts, allowing increased third-party presence in spectator demonstrations, seems unwarranted. Upon second glance, however, this shift in the balance between concern for jury prejudice and third-party rights came at the heels of a movement that brought third-party rights to the forefront of the criminal justice system and may have contributed to the abrupt shift in judicial philosophy.

B. *Enter Victims’ Rights*

In colonial America, individual victims of crime were the ones in charge of “law enforcement and the administration of justice.”⁶⁶ In the early eighteenth century, however, as the broader criminal-justice goals of deterrence and retribution started to garner support, once-private criminal prosecutions became public, and individual victims of crime had to yield their control to government prosecutors.⁶⁷ It was not until the 1970s, at the start of the victims’ rights movement, that victims finally started to regain their footing in the eyes of the arguably unreceptive government-run criminal justice system.⁶⁸ With the creation of President Ronald Reagan’s President’s Task Force on Victims of Crime in the 1980s⁶⁹ and the work of the National Victims Constitutional Amendment Network in the 1990s,⁷⁰ the movement truly came into its own.⁷¹

64. *Id.* at 572. Furthermore, the Court upheld the long-existing view that a juror’s opinion of the prejudicial nature of the incident is not dispositive. *Id.* at 570.

65. *Id.*

66. Peggy M. Tobolowsky, *Victim Participation in the Criminal Justice Process: Fifteen Years After the President’s Task Force on Victims of Crime*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 21, 25 (1999).

67. *Id.* at 21–27.

68. *Id.* at 27–29.

69. Exec. Order No. 12,360, 47 Fed. Reg. 17, 975 (Apr. 23, 1982).

70. See Robert P. Mosteller, *Victims’ Rights and the Constitution: Moving from Guaranteeing Participatory Rights to Benefiting the Prosecution*, 29 ST. MARY’S L.J. 1053, 1055

“By the end of 1994, twenty states had adopted victims’ rights amendments,” and in 1995, the first victims’ rights amendment to the U.S. Constitution was proposed.⁷² Since then, all fifty states and the federal government have enacted victims’ rights statutes and, in some cases, state constitutional amendments.⁷³ Congress also passed the Crime Victims’ Rights Act of 2004,⁷⁴ helping to solidify the victim’s place within the system.⁷⁵ Although there is no consensus for the underlying philosophies of victims’ rights among advocates,⁷⁶ this widespread implementation and codification of victims’ rights throughout the country has substantially changed the culture of criminal law.

One scholar notes, “Victims’ rights has emerged . . . as one of the most important social movements of our time, comparable in its influence on our political culture to the civil rights movement or

(1998) (stating that the National Victims Constitutional Amendment Network “represent[ed] all major victims’ rights organizations”).

71. See Tobolowsky, *supra* note 66, at 29–31 (discussing how “victim participation in the criminal justice process has increased exponentially in the fifteen years since the issuance of the Task Force Final Report”).

72. Mosteller, *supra* note 70, at 1055. A constitutional amendment has not been adopted. See H.R. Res. 10, 108th Cong. (2003) (proposing an amendment to the Constitution of the United States to protect the rights of crime victims).

73. Protections vary from state to state and often include the right to be present and heard at all critical stages of judicial proceedings, *e.g.*, ALA. CONST. art. I, § 6.01; the right to restitution, *e.g.*, The Property Crime Restitution and Compensation Act, KAN. STAT. ANN. §§ 19-4801 to -13 (2006); the right to be informed and make a statement at sentencing, *e.g.*, WASH. CONST. art. I, § 35; and the right to a timely disposition of the case, *e.g.*, MICH. CONST. art. I, § 24, cl. 1. The federal system has also implemented legislation providing rights to crime victims. See, *e.g.*, 18 U.S.C. § 3510 (2006) (“[A] United States district court shall not order any victim of an offense excluded from the trial of a defendant accused of that offense.”).

74. Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims’ Rights Act, Pub. L. No. 108-405, tit. I, 118 Stat. 2260, 2261–65 (2004) (codified as amended at 18 U.S.C. § 3771 (2006) and to be codified at 42 U.S.C. §§ 10603(d)–(e)).

75. The rights include (1) the “right to be reasonably protected”; (2) the right to “reasonable, accurate, and timely notice . . . involving the crime or of release or escape of the accused”; (3) the right not to be excluded (absent clear and convincing evidence to the contrary); (4) the “right to be reasonably heard at any public proceeding”; (5) the “reasonable right to confer with the attorney for the Government”; (6) the “right to full and timely restitution”; (7) the “right to proceedings free from unreasonable delay”; and (8) the “right to be treated with fairness and with respect.” 18 U.S.C. § 3771(a). For a discussion of the possible effects of the Crime Victims’ Rights Act of 2004, see Matthew B. Riley, Note, *Victim Participation in the Criminal Justice System: In re Kenna and Victim Access to Presentence Reports*, 2007 UTAH L. REV. 235, 235–53.

76. See Mosteller, *supra* note 70, at 1054 (identifying three groups of advocates: (1) those with the goal of attaining participatory rights, (2) those with a pro-prosecution slant, and (3) those who want greater victim aid and protection from the government).

feminism.”⁷⁷ Although jurisdictions vary in the extent to which they involve victims, “[t]he role of the victim in the legal process [can start] at the beginning of a criminal case,” when the government determines whether to “press charges” or offer a plea bargain, can continue to trial, in the form of victim testimony, and might not end until the sentencing, probation, or parole stage, postconviction.⁷⁸ Criminal laws themselves are also being defined “in part by reference to the status or characteristics of the victim . . . even when the defendant is not aware of such characteristics.”⁷⁹ Furthermore, “as socio-legal scholar Jonathan Simon reminded us [in 2000]: . . . [a]lmost all demographic segments of the population, and both political parties, supported [Victims’ Rights] measures,”⁸⁰ effectively reinforcing the prevalence of sympathy for crime victims.⁸¹ The heightened awareness of victims in the criminal justice system, however, has influenced not only legislation but also judges’ decisions, such as approving spectator demonstrations.

C. Resulting Jurisprudence: Spectator Demonstrations

As spectator conduct in the courtroom evolved from outbursts to demonstrations, lower court judges were forced to determine whether in certain circumstances spectator demonstrations could warrant a new trial in the way that spectator outbursts once did. Importantly, these judges were asked to weigh in on this issue beginning in the 1980s,⁸² which coincided with the newly publicized victims’ rights movement.⁸³ This Section contends that although both spectator outbursts and demonstrations are disruptive in nature, the backdrop of the victims’ rights movement garnered greater consideration for sympathetic victims and their cause when courts were first deciding spectator demonstrations cases. Therefore, instead of promptly

77. Jonathan Simon, *Megan’s Law: Crime and Democracy in Late Modern America*, 25 LAW & SOC. INQUIRY 1111, 1136 (2000).

78. Aya Gruber, *Victim Wrongs: The Case for a General Criminal Defense Based on Wrongful Victim Behavior in an Era of Victims’ Rights*, 76 TEMP. L. REV. 645, 654–60 (2003).

79. *Id.* at 658 (referring specifically to assault laws and hate-crime legislation).

80. Vik Kinwar, *Capital Punishment as “Closure”: The Limits of a Victim-Centered Jurisprudence*, 27 N.Y.U. REV. L. & SOC. CHANGE 215, 232 (2002).

81. *Cf. id.* at 233 (“Certainly, the popular sympathy for crime victims is so prevalent that there might eventually be sufficient political mobilization to secure the passage of a measure like . . . the proposed Victim’s Rights Amendment to the Constitution of the United States.”).

82. For a discussion of court decisions regarding spectator demonstrations, see *infra* Parts I.C.1–3.

83. For a discussion of the timeline of the victims’ rights movement, see *supra* Part I.B.

terminating spectator conduct as they had in the outburst cases,⁸⁴ many courts were willing to weigh the extent of the particular spectator demonstration and give the victims more leeway.⁸⁵ Unfortunately, this gesture of respect for those experiencing the loss of a loved one may endanger the constitutional principles that shape the foundation of the criminal justice system. Yet the resulting jurisprudence reveals that not all courts have fallen prey to this phenomenon and have upheld the cautionary ideals of the past (the status-quo courts). Many courts, however, have given more weight to victims' or spectators' rights by allowing them to demonstrate during trial (the pro-victim courts), a practice this Note argues is a mistake. Finally, other courts remain unclear as to *what* the law for spectator demonstrations should be, especially when determining whether to apply a legal balancing test (the unsettled courts).

1. *Status-Quo Courts*. Although their approaches vary, the status-quo courts seem willing to overturn convictions in cases in which spectator demonstrations occur, similar to the precedent set by reviewing courts in spectator-outburst cases. For example, in *State v. Franklin*,⁸⁶ “ten to thirty [Mothers Against Drunk Driving (MADD)] demonstrators . . . sat directly in front of the jury.”⁸⁷ “Some cradled sleeping infants in their laps and all prominently displayed their MADD buttons.”⁸⁸ Concerned about the defendant’s right to a fair trial, the court ruled for the defendant and stated, “the [lower] court’s cardinal failure in this case was to take no action whatever against a predominant group of ordinary citizens who were tooth and nail opposed to any finding that the defendant was not guilty.”⁸⁹

In a murder prosecution in which the trial court did take action and “sternly admonished” the victim’s family members and ordered them to stop wearing large buttons and holding childhood pictures depicting the victim, the appellate court did not find prejudice.⁹⁰ Similarly, in *State v. Lord*,⁹¹ the defendant objected when thirteen out

84. See *supra* Part I.A.

85. See *infra* Part I.C.2.

86. *State v. Franklin*, 327 S.E.2d 449 (W. Va. 1985).

87. *Id.* at 454.

88. *Id.*

89. *Id.* at 455.

90. *Mitchell v. State*, 884 P.2d 1186, 1196 (Okla. Crim. App. 1994), *rev'd on other grounds sub nom.* *Mitchell v. Gibson*, 262 F.3d 1036 (10th Cir. 2001).

91. *State v. Lord*, 114 P.3d 1241 (Wash. Ct. App. 2005).

of thirty-one spectators wore buttons portraying the victim on the first day of trial.⁹² At first, the trial court refused to exclude the buttons.⁹³ Two days later, however, the judge directed the spectators to remove the buttons.⁹⁴ Upholding the conviction, the court of appeals noted, “Although the better practice would have been to have prohibited the buttons in the courthouse at first sight, the trial court later ordered the buttons removed, in spite of the absence of prejudice. . . . [to] avoid[] the possibility of future contamination of the jury and prejudice to [the defendant].”⁹⁵

In *Norris v. Risley*,⁹⁶ a group of women spectators wore “Women Against Rape” buttons during the trial.⁹⁷ The court, noting that “[t]he women . . . obviously intended to convey a message,”⁹⁸ held that the exposure to the buttons constituted an unacceptably high risk of prejudice in light of the presumption of innocence,⁹⁹ the right of confrontation,¹⁰⁰ and the right of cross-examination.¹⁰¹ Finally, in another trial that involved the murder of a prison guard, when it appeared that “[a]bout half of the spectators [wore] prison guard uniforms,”¹⁰² the court determined that the demonstration, combined with the pretrial publicity of the case, “marred” the trial.¹⁰³ “The officers . . . were there for one reason: they hoped to show solidarity with the killed correctional officer . . . [and] communicate a message to the jury,” a message that the “jury could not help but receive.”¹⁰⁴

2. *Pro-Victim Courts*. In contrast, pro-victim courts depart from the status quo and grant extensive rights to spectators. They do so not only by inquiring into spectators’ motives and jurors’ assessments of potential prejudice but also by trivializing spectator outbursts in a

92. *Id.* at 1244.

93. *Id.*

94. *Id.*

95. *Id.* at 1245.

96. *Norris v. Risley*, 918 F.2d 828 (9th Cir. 1990).

97. *Id.* at 829–30.

98. *Id.* at 832.

99. *Id.* at 831.

100. *Id.* at 833.

101. *Id.*

102. *Woods v. Dugger*, 923 F.2d 1454, 1458 (11th Cir. 1991).

103. *Id.* at 1459. The Court, however, clarified its decision in this case, stating “[w]e do not mean to imply that presumed prejudice can occur only when there is a combination of courtroom demonstrations and pretrial publicity.” *Id.* at 1460 n.12.

104. *Id.* at 1459–60.

way earlier courts did not.¹⁰⁵ For example, in *In re Woods*,¹⁰⁶ the victims' family members wore "black and orange remembrance ribbons while in the courtroom."¹⁰⁷ When the defendant asked the judge to order them to remove the ribbons, the judge decided to "ask[] for comment from some of the spectators who were wearing the ribbons."¹⁰⁸ After the parent of the murder victim told the judge that the ribbons were "[j]ust representative of my daughter and the tragedy that has taken place' . . . the trial court declined to order the removal of the ribbons."¹⁰⁹ On appeal, the Supreme Court of Washington noted that the ribbons "were simply ribbons that the wearers indicated they wore in memory of the victims."¹¹⁰ Citing a juror, the court continued, "In fact, juror Randall Thornburg stated . . . 'I thought the ribbons were nice, but they did not influence my decision or that of the other jurors.'"¹¹¹ In another homicide prosecution, "the spectator cried and yelled the victim's name for about [thirty-five] seconds," while a forensic pathologist was testifying.¹¹² Rejecting the motion for mistrial, the court reasoned that because "[t]he spectator never accused defendant of the victim's murder" and the jury members were told to "disregard the spectator's comments," there was no constitutional error.¹¹³

3. *Unsettled Courts.* Many of the defendants who ultimately lose their appeals after trial courts fail to grant mistrials are in jurisdictions that are unclear as to how they should treat spectator demonstrations. For example, many unsettled courts focus on a procedural flaw in the case and avoid the substantive issue. In *Pachl v. Zenon*,¹¹⁴ for example, the court proposed that defense counsel's failure to object to button wearers was likely a reasonable "tactical

105. For a description of courts' reluctance to take into account an individual juror's opinion about prejudice and the overall concern for the potential risk of prejudice on the jury before the advent of the victims' rights movement, see *supra* Part I.A.

106. *In re Woods*, 114 P.3d 607 (Wash. 2005) (en banc).

107. *Id.* at 616.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 617.

112. *State v. Wilson*, 826 S.W.2d 79, 82 (Mo. Ct. App. 1992).

113. *Id.*; cf. *Kinnamon v. Scott*, 40 F.3d 731, 734 (5th Cir. 1994) (finding no constitutional error when the victim's teenage daughter may have accused the defendant of murder in a loud and emotional display in front of the jury, defendant, and prosecutor).

114. *Pachl v. Zenon*, 929 P.2d 1088 (Or. Ct. App. 1996) (en banc).

decision” and therefore would not warrant a new trial.¹¹⁵ In *Nguyen v. State*,¹¹⁶ “the record contain[ed] no indication where the individuals were sitting, whether they were seated together, or if the jurors did in fact see the buttons.”¹¹⁷ Consequently, the reviewing court was unable to determine whether it was “reasonably probable” that the buttons influenced the jury’s verdict.¹¹⁸

Other unsettled courts send mixed signals. For example, in *State v. McNaught*,¹¹⁹ the Kansas Supreme Court demonstrated a willingness to approve of spectator demonstrations when it upheld the defendant’s conviction, stating that “[t]he record in the case . . . d[id] not show the factual circumstances present on this issue. . . . [and t]he record [was] absolutely silent regarding the number of MADD and SADD [Students Against Drunk Driving] members . . . [that] wore buttons.”¹²⁰ A later case by the Kansas Supreme Court, however, signaled its disapproval of spectator demonstrations.¹²¹ Reminding lower courts that an appellate court cannot overturn convictions when the record is incomplete, it warned that spectator demonstrations were “not a good idea,” and the displays should have been removed because of the possibility of prejudice.¹²²

Still other unsettled courts struggled to determine whether the Supreme Court precedents in *Holbrook v. Flynn* and *Estelle v.*

115. *Id.* at 1093.

116. *Nguyen v. State*, 977 S.W.2d 450 (Tex. Ct. App. 1998).

117. *Id.* at 457.

118. *Id.*; see also *State v. Braxton*, 477 S.E.2d 172, 177 (N.C. 1996) (“[T]his Court will not assume a relationship exists between the murder victims and the spectators wearing the badges and thereby infer their intention to influence the jury’s verdicts.”).

119. *State v. McNaught*, 713 P.2d 457 (Kan. 1986).

120. *Id.* at 468.

121. *State v. Speed*, 961 P.2d 13, 30 (Kan. 1998).

122. *Id.* at 30. The court noted the possibility that spectator demonstrations may lead to prejudice:

In *McNaught* . . . [w]e then determined that where the record did not show the number of persons wearing buttons, or contain any evidence that the jurors showed concern about the buttons, no prejudice or abuse of discretion resulted.

. . . As in *McNaught*, there was no evidence [in this case] regarding the number of spectators wearing the buttons or t-shirts and also no evidence that the jurors were in any way affected by the buttons or t-shirts. That being said, however, it would seem that the wearing of such buttons or t-shirts is not a good idea because of the possibility of prejudice which might result. Under the circumstances, it would have been better for the district court to have ordered the buttons removed or the t-shirts covered up.

Id. at 29–30 (citation omitted).

Williams, which set out the “inherent prejudice” legal balancing test,¹²³ were supposed to apply to spectator demonstrations. The inherent prejudice test establishes a constitutional violation when an “unacceptable risk is presented of impermissible factors coming into play.”¹²⁴ Some of both the pro-victim courts¹²⁵ and the status-quo courts¹²⁶ have applied this test to spectator demonstrations, with differing results, but many of the unsettled courts were unclear whether the Supreme Court mandated the test for spectator demonstrations.¹²⁷ For example, in *Billings v. Polk*,¹²⁸ the defendant claimed that he was denied a fair trial when “an alternate juror wore a T-shirt one day during trial that said ‘No Mercy—No Limits,’ and members of the jury saw and joked about the T-shirt.”¹²⁹ The state court “concluded that these facts, even if proven true, were insufficient to entitle [the defendant] to relief.”¹³⁰ Upon review, the Fourth Circuit agreed with the district court, concluding that the U.S. Supreme Court had not “clearly establish[ed] that a jury’s exposure to a T-shirt like the one at issue here amount[ed] to a violation of a defendant’s constitutional rights.”¹³¹ This flux among lower courts and the question regarding the applicability of the inherent prejudice test apparently led the Supreme Court to consider the issue in 2006.

123. *Carey v. Musladin*, 127 S. Ct. 649, 654 (2006); *see also* *Holbrook v. Flynn*, 475 U.S. 560, 570 (1986) (“The only question we need answer is thus whether the presence of these four uniformed and armed officers was so inherently prejudicial that respondent was thereby denied his constitutional right to a fair trial.”); *Estelle v. Williams*, 425 U.S. 501, 512, 505 (1976) (holding that “the State cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes” because “an unacceptable risk is presented of impermissible factors coming into play”).

124. *Williams*, 425 U.S. at 505.

125. *See, e.g., In re Woods*, 114 P.3d 607, 617 (Wash. 2005) (en banc) (“Many courts have used the *Holbrook* standard and have found that no inherent prejudice exists so as to taint the defendant’s right to fair trial from the wearing of buttons or other displays. . . . We conclude, in sum, that *Woods* does not meet the burden of proving that his right to a fair trial was prejudiced by the trial court’s action in allowing members of the victims’ families to wear the black and orange ribbons in the courtroom.” (citations omitted)).

126. *See, e.g., Norris v. Risley*, 918 F.2d 828, 830–31 (9th Cir. 1990) (holding that “Women Against Rape” buttons constituted an unacceptably high risk of prejudice).

127. *Carey v. Musladin*, 127 S. Ct. 649, 654 (2006) (“Reflecting the lack of guidance from this Court, lower courts have diverged widely in their treatment of defendants’ spectator-conduct claims. Some courts have applied *Williams* and *Flynn* to spectators’ conduct. Other courts have declined to extend *Williams* and *Flynn* to spectators’ conduct.” (citations omitted)).

128. *Billings v. Polk*, 441 F.3d 238 (4th Cir. 2006).

129. *Id.* at 246.

130. *Id.*

131. *Id.* at 247; *see also id.* at 248 n.6 (“[I]t is not even clear precisely what message, if any, the words ‘No Mercy—No Limits’ conveyed . . .”).

II. THE DEBATE: VICTIMS' RIGHTS VERSUS DEFENDANTS' RIGHTS

In 2006, after more than twenty years of variance among the lower courts, the U.S. Supreme Court granted certiorari in *Carey v. Musladin*, which involved a spectator demonstration. Although it seemed that with this case the Supreme Court would finally resolve the issue of spectator demonstrations, the Court merely perpetuated uncertainty with its decision. This Part introduces the Supreme Court's decision and describes how the decision gave limited guidance to lower courts dealing with spectator demonstrations. This Part also illustrates conflicting views of the practice using anecdotal data from sixteen prosecutors who agreed to be interviewed on this topic. Because prosecutors act in the best interest of the state,¹³² confer with defense attorneys, answer to judges, *and* have relationships with crime victims or surviving family members,¹³³ they can help shed light upon the multiple views and perspectives behind spectator demonstrations. By evaluating the contentious elements of the spectator demonstrations debate from this anecdotal perspective, this Part lays the groundwork for Part III, which challenges these demonstrations.

A. *Carey v. Musladin*

In *Carey v. Musladin*, the defendant stood trial for murder.¹³⁴ During the trial, “several members of [the victim’s] family sat in the front row of the spectators’ gallery” wearing buttons depicting the victim that were visible to the jury.¹³⁵ Defense counsel moved to order the removal of the buttons, but the judge refused.¹³⁶ On appeal, the Ninth Circuit reversed and remanded the case, holding that “the state court’s application of a test for inherent prejudice that differed from the one stated in *Williams* and *Flynn* ‘was contrary to clearly

132. *Berger v. United States*, 295 U.S. 78, 88 (1935) (“The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all.”).

133. For a summary of the inherent problems with prosecutorial neutrality in dealing with victims, see Susan Bandes, *Loyalty to One’s Convictions: The Prosecutor and Tunnel Vision*, 49 *HOW. L.J.* 475, 483–86 (2006) (noting that prosecutors face external pressures, including “the often vocal concerns of the community or particular advocacy groups, such as victims’ rights groups”); Medwed, *supra* note 12, at 145–47 (explaining that prosecutors may “naturally develop an allegiance to—and affinity for—the crime victims in their cases”).

134. *Carey v. Musladin*, 127 S. Ct. 649, 651 (2006).

135. *See id.* at 651 & n.1 (“The buttons were two to four inches in diameter.”).

136. *Id.* at 652.

established federal law and constituted an unreasonable application of that law.”¹³⁷

The Supreme Court granted certiorari on the issue, but quickly disposed of the case in a little over one page. The Court held that *Williams* and *Flynn*, having only dealt with “state-sponsored courtroom practices,”¹³⁸ did not answer the question of whether the inherent prejudice test applies to “private-actor courtroom conduct.”¹³⁹ Therefore, the lower courts were not required to follow any particular test and the lower court’s decision was not “contrary to or an unreasonable application of clearly established federal law.”¹⁴⁰ As a consequence of the majority’s opinion in *Carey v. Musladin*, lower courts were assured that the inherent prejudice test, or any legal balancing test for that matter, did not automatically apply. On the other hand, the majority had seemingly failed to establish an alternative uniform standard for the lower courts to follow.

Fortunately, the three justices who filed concurring opinions—Justices Stevens, Kennedy, and Souter—offered insight into the competing concerns regarding spectator demonstrations. Justice Kennedy seemed to support a case-by-case analysis when dealing with spectator demonstrations but also thought that courts should consider ending the practice all together.¹⁴¹ He stated, “[T]here [was] no indication [in this case] . . . of coercion or intimidation to the severe extent demonstrated in [*Sheppard* and *Estes*].”¹⁴² But “[it] does present the issue whether as a preventative measure, or as a general rule to preserve the calm and dignity of a court, buttons proclaiming a message relevant to the case ought to be prohibited as a matter of course.”¹⁴³

Both Justices Stevens and Souter also favored a case-by-case approach but advocated applying the inherent prejudice test to both

137. *Id.* (quoting *Musladin v. Lamarque*, 427 F.3d 653, 659–60 (9th Cir. 2005)). The defendant in *Carey* was prosecuted in state court, but the federal district court eventually “granted [the defendant] a certificate of appealability on the buttons issue.” *Id.*

138. *Id.* at 653 (“In *Williams*, the State compelled the defendant to stand trial in prison clothes, and in *Flynn*, the State seated the troopers immediately behind the defendant.”).

139. *Id.*

140. *Id.* at 654 (“Reflecting the lack of guidance from this Court, lower courts have diverged widely in their treatment of defendants’ spectator-conduct claims.”).

141. *Id.* at 656–57 (Kennedy, J., concurring in the judgment).

142. *Id.* at 657.

143. *Id.*

state-sponsored practices and private actors' conduct.¹⁴⁴ In applying the test, however, Justice Souter stated, "one could not seriously deny that allowing spectators at a criminal trial to wear visible buttons with the victim's photo can raise a risk of improper considerations. . . . The only debatable question is whether the risk in a given case reaches the 'unacceptable' level."¹⁴⁵ He continued, "[T]wo considerations keep me from concluding that the state court acted unreasonably . . . in failing to embrace a no-risk standard."¹⁴⁶ "First, of the several courts that have considered the influence of spectators' buttons, the majority have left convictions standing."¹⁴⁷ Second, "in the absence of developed argument it would be preferable not to decide whether protection of speech could require acceptance of some risk raised by spectators' buttons."¹⁴⁸ Although Justice Stevens agreed with Justice Souter's adoption of the inherent prejudice test and the sentiment about the lower courts, he failed to find merit in the First Amendment argument.¹⁴⁹

But Justices Stevens' and Souter's reluctance to assume "that every trial and reviewing judge . . . was unreasonable as well as mistaken in failing to embrace a no-risk standard"¹⁵⁰ underestimates the complexity of the issue. As discussed in Part I.C, some trial courts before *Carey v. Musladin* were unsure whether they were bound by the inherent prejudice test,¹⁵¹ and other courts did not rule on the substantive issue of spectator demonstrations because the records were incomplete.¹⁵² Consequently, the debate about the validity of

144. *Id.* at 656 (Stevens, J., concurring in the judgment); *id.* at 657 (Souter, J., concurring in the judgment).

145. *Id.* at 657–58 (Souter, J., concurring in the judgment).

146. *Id.* at 658.

147. *Id.*

148. *Id.*

149. Justice Stevens dismissed the First Amendment argument:

[M]y reasons for joining the Court's judgment in this case are essentially the same as those expressed by Justice Souter, with one caveat. In my opinion, there is no merit whatsoever to the suggestion that the First Amendment may provide some measure of protection to spectators in a courtroom who engage in actual or symbolic speech to express any point of view about an ongoing proceeding.

Id. at 656 (Stevens, J., concurring in the judgment).

150. *Id.* at 658 (Souter, J., concurring in the judgment); *accord id.* at 656 (Stevens, J., concurring in the judgment) (adopting Justice Souter's rationale).

151. *See supra* Parts I.C.1–2; *supra* notes 125–26 and accompanying text.

152. *See supra* Part I.C.3. Furthermore, *State v. Speed*, *State v. Braxton*, *State v. Lord*, and *Nguyen v. State*, all cases that Justice Souter uses to demonstrate a lack of overturned convictions, came from courts whose approach was unsettled. *See supra* Part I.C.3.

spectator demonstrations is still very much alive, and *Carey v. Musladin* has left open an opportunity for reform in this area.

*B. Prosecutorial Perspectives*¹⁵³

The culture has evolved in terms of the victim's presence in the process. Victim input is a positive change because it keeps the victim informed, raises public confidence, and prevents misconceptions. On the other hand, however, it is not appropriate to allow victims to decide cases . . . [T]hat would border vigilantism.¹⁵⁴

All of the prosecutors who were interviewed for this Note understood the tension that spectator demonstrations cause between victims' rights and defendants' constitutional rights. In evaluating the data, three common prosecutorial positions on the practice surfaced. First, some supported spectator demonstrations and did not believe demonstrations negatively influence the jury (supportive prosecutors). Second, some preferred to evaluate all cases on a case-by-case basis because they believed that some but not all spectator demonstrations may affect the jury (case-by-case prosecutors). Third, some wished to abolish spectator conduct all together because of the influence it may have on the jury (abolitionist prosecutors). The following excerpts reveal the arguments proposed by each group and give some perspective on the competing interests that surround spectator demonstrations.

The majority of those from the interview sample who constituted the supportive prosecutor group were domestic violence prosecutors. Regardless of region, political ideology, office, and number of cases tried, the domestic violence prosecutors interviewed overwhelmingly favored spectator demonstrations. Whether this support stemmed from their relationships with victims or the nature of their cases is unclear,¹⁵⁵ but their message was unambiguous: "Most [jurors] would

153. Sixteen prosecutors were interviewed for this Note. *See supra* note 23.

154. Interview with Prosecutor No. 3 (Nov. 8, 2007).

155. Interestingly, all of the domestic violence prosecutors concur: "The strength of domestic violence cases, unlike others, relies heavily on the availability of the victim. We usually have more contact with victims and want that contact. There are so many things working against us." This difficulty may fuel their desire to have victim participation in every stage of the prosecution. Interview with Prosecutor No. 4 (Nov. 9, 2007); Interview with Prosecutor No. 9 (Nov. 30, 2007); Interview with Prosecutor No. 10 (Dec. 14, 2007); *see also, e.g.*, Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1857 (1996) (discussing the need for participation from domestic violence victims to "improv[e] the criminal justice system's response to domestic violence").

assume that the family and friends of the victim would be in support of that victim. Those things don't intimidate juries or move them to do things that they wouldn't otherwise do. So, it doesn't have any implications on a fair trial."¹⁵⁶ Similarly, another domestic violence prosecutor noted, "I don't think [spectator conduct is] inflammatory, not at all. To deny them the ability to wear something just with a face on it . . . that's [what is] inflammatory. The jury knows that the family is hurting."¹⁵⁷ Another put herself in the shoes of the victim's family members: "If it was my son who was murdered, I would not want anyone to tell me what I could and couldn't wear. Wearing a t-shirt or something, that would probably be cathartic for me."¹⁵⁸ Importantly, not all of the prosecutors who favored spectator demonstrations did domestic violence work, but, commonly, the supportive prosecutors emphasized the "rights" of the spectators, similar to the First Amendment argument proposed by Justice Souter,¹⁵⁹ and also, the reality that families of crime victims are distraught.

Based on those interviewed, the case-by-case prosecutors consisted of a wide variety of prosecutors, including conservatives, liberals, women, and men. As the most diverse group, their primary concerns were the spectators' motives, the number of spectators making the demonstration, and the ostentatious nature of the displays. One prosecutor, in adopting a position very similar to the inherent prejudice standard, said,

[Spectator conduct] is definitely inflammatory but I'm not sure that it violates the defendant's rights. If it's just a picture, and not a picture of the murder scene or a slogan that says 'You murdered my son,' I could understand it. But in one case, the family wanted to hold up *huge* signs. The judge had them removed and I agreed with that.¹⁶⁰

Many of these prosecutors were very specific about pictures. One said, "Definitely no murder scenes or dead victims, no words on the pictures . . . but just pictures, like old pictures of the person – that's ok."¹⁶¹ Others asked questions when asked to comment on the buttons in *Carey v. Musladin*, indicating that certain details would change

156. Interview with Prosecutor No. 3, *supra* note 154.

157. Interview with Prosecutor No. 9, *supra* note 155.

158. Interview with Prosecutor No. 4, *supra* note 155.

159. *See supra* note 148 and accompanying text.

160. Interview with Prosecutor No. 4, *supra* note 155.

161. Interview with Prosecutor No. 9, *supra* note 155.

their position on whether the demonstrations should have been allowed. One prosecutor said, “How big *are* the buttons?”¹⁶² Another, after hearing about *Carey v. Musladin*, replied, “Were they baby pictures on the buttons or adult pictures?”¹⁶³

Lastly, the abolitionist prosecutors, also a very diverse group, encompassed almost all of the liberal and larger-city prosecutors interviewed. This group was by far the strongest in their beliefs. For example, when told about the spectators’ buttons in *Carey v. Musladin*, one prosecutor immediately said, “No. No—I wouldn’t allow that. Do I think it’s so overwhelmingly prejudicial? That’s so difficult to prove. But I would not allow sympathy votes because of victims in the courtroom.”¹⁶⁴ Another noted, “[T]hese common links can unnecessarily speak to the jury throughout the trial and it’s not from a lawyer or someone that has been sworn in to testify.”¹⁶⁵ One prosecutor explained,

People think that defendants get too many rights. I don’t think so. I understand that people think that the victim is forgotten because the jury looks at the defendant all day. But speaking on behalf of the victim in trial is my job, not [the job of] the victim themselves.¹⁶⁶

Another laments,

There’s a reason that the criminal justice system is supposed to be at arm’s length. With buttons and things you are trying to sway the jury, [symbolically] to get [a] message across [that is not expressly allowed]. I don’t know if you’ve ever been through voir dire, but seventy percent of the questions are “can you be fair,” “can you keep an open mind throughout the entire trial?” Why then you would allow that to happen indirectly [through buttons] is beyond me!¹⁶⁷

Still other abolitionists were less worried about the potential prejudice and more concerned about the practical implications of allowing the spectator conduct. For example, one prosecutor noted, “I’d ask them to take it off because it isn’t worth the case coming

162. Interview with Prosecutor No. 10, *supra* note 155.

163. Interview with Prosecutor No. 13 (Dec. 14, 2007).

164. Interview with Prosecutor No. 5 (Nov. 15, 2007).

165. Interview with Prosecutor No. 1 (Nov. 8, 2007).

166. Interview with Prosecutor No. 6 (Nov. 15, 2007).

167. Interview with Prosecutor No. 8 (Nov. 16, 2007).

back for something like that.”¹⁶⁸ Another was influenced by his experience in a case he tried: “[The victim’s family] just didn’t get it. Their son was not totally innocent in the case [even though he was the one that was killed]. That was just one of the reasons I didn’t think they should wear those ribbons.”¹⁶⁹ This prosecutor also mentioned that judges sometimes put the onus of correcting the practice on the prosecutor:

When the judge called us into his chambers [to discuss the ribbon-wearing family in the spectator’s gallery] he basically said, “I’m not going to tell these victims’ families that they cannot wear some common ribbons if they want to.” Then he turned to me, “But Mr. Prosecutor, I do think this is a dirty pull.” In truth, [the judge] didn’t want to be the bad guy.¹⁷⁰

* * *

As this Part illustrates, courts and prosecutors have multiple perspectives of and varying opinions about spectator demonstrations. Particularly, defendants’ rights, victims’ rights, and the possible jury effects are at the forefront of this ongoing discussion. Part III tackles these issues and concludes that a complete ban on spectator demonstrations in criminal courtrooms is the only way to ensure the presumption of innocence.

III. THE UNACCEPTABLE RISK: ERODING THE PRESUMPTION OF INNOCENCE

Although many legal actors, including lower courts¹⁷¹ and judges,¹⁷² prosecutors,¹⁷³ the concurring Justices in *Carey v. Musladin*,¹⁷⁴ and defense attorneys,¹⁷⁵ have some reservations about

168. Interview with Prosecutor No. 16 (Dec. 21, 2007). When the prosecutor said “have the case come back,” he was noting that if the trial court allowed the spectator display, the appellate court would reverse the conviction due to prejudice, and he would have to retry the case.

169. Interview with Prosecutor No. 1, *supra* note 165.

170. *Id.*

171. For a description of the positions of courts in the status-quo group and at least one of the courts in the unsettled group, see *supra* Parts I.C.1, 3.

172. See *supra* note 170 and accompanying text.

173. For a description of the perspectives of prosecutors, see *supra* Part II.B.

174. See *supra* Part II.A.

175. See, e.g., Brief of the National Ass’n of Criminal Defense Lawyers as Amicus Curiae in Support of Respondent at 3, *Carey v. Musladin*, 127 S. Ct. 649 (2006) (No.05-785), 2006 WL

spectator demonstrations,¹⁷⁶ some members of these groups are still reluctant to completely ban the practice. Two central legal concerns fuel this reluctance. First, Justice Souter and the supportive group of prosecutors, for example, are especially concerned about the victim's or spectator's potential right to free speech. Second, there are varying opinions regarding whether a courtroom display from the spectators' gallery *can* actually affect the jury's verdict. This Part addresses these legal issues by first dispelling the First Amendment argument that spectator rights must be balanced with a defendant's rights and then, most importantly, arguing that spectator demonstrations do create remarkable potential for biased jury verdicts.

A. *The Unnecessary Balancing Act*

The First Amendment mandates that "Congress shall make no law . . . abridging the freedom of speech."¹⁷⁷ It is one of the people's most cherished rights in the United States.¹⁷⁸ Fittingly then, many supporters of spectator demonstrations are concerned that eliminating a victim's or spectator's right to demonstrate may constitute an unconstitutional restraint on free speech. Some advocate balancing the victim's First Amendment right with the defendant's Sixth Amendment right to a fair trial and impartial jury,¹⁷⁹ and even Justice Souter noted in *Carey v. Musladin*, "[I]n the absence of developed argument it would be preferable not to decide whether the protection of speech could require acceptance of some risk raised by spectators' buttons."¹⁸⁰ But, upon reviewing the law regarding the First Amendment in the criminal courtroom, it is evident that First Amendment rights succumb to other, more important trial interests.

2430574 ("There is no conceivable version of a just and fair trial that includes the regular, deliberate intrusion of such [public displays of emotion by spectators] into the trial process.").

176. In the minority are those who seemingly have no qualms with spectator demonstrations. For a description of the positions of pro-victim courts, see *supra* Part I.C.2.

177. U.S. CONST. amend. I.

178. See *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 381–82 (1973) ("There is little need to reiterate that the freedoms of speech and of the press rank among our most cherished liberties.").

179. See, e.g., Terri A. Belanger, Note, *Symbolic Expression in the Courtroom: The Right to a Fair Trial Versus Freedom of Speech*, 62 GEO. WASH. L. REV. 318, 344–52 (1994) (discussing the exclusion of individuals from courtrooms and advocating for a balancing test of their First Amendment rights with the defendant's Sixth Amendment rights); see also *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976) ("The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other.").

180. *Musladin*, 127 S. Ct. at 658 (Souter, J., concurring in the judgment).

The Sixth Amendment guarantees every criminal defendant “the right to a speedy and *public* trial.”¹⁸¹ In particular, the Court values the public aspect of the trial because it “assur[es] that the proceedings [are] conducted fairly to all concerned.”¹⁸² A public trial “discourage[s] perjury, the misconduct of participants, and decisions based on secret bias or partiality.”¹⁸³ Consequently, the Supreme Court has recognized the right of the press to access the courtroom under the First Amendment.¹⁸⁴ Nevertheless, the Court stated, “While maximum freedom must be allowed the press in carrying on this important function in a democratic society its exercise must necessarily be subject to the maintenance of absolute fairness in the judicial process.”¹⁸⁵ The Court recognized that sometimes the public aspect of the system may itself encourage misconduct, bias, or partiality, thereby violating the right to an impartial jury.¹⁸⁶ Consequently, after interpreting the Sixth Amendment to guarantee that every “verdict [is] based upon the evidence developed at the trial,”¹⁸⁷ the Court has, in certain circumstances, excluded the media

181. U.S. CONST. amend. VI (emphasis added).

182. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980).

183. *Id.*

184. *See, e.g., Neb. Press Ass’n*, 427 U.S. at 570 (“We reaffirm that the guarantees of freedom of expression are not an absolute prohibition [against excluding the press] under all circumstances, but the barriers to prior restraint remain high and the presumption against its use continues intact.”).

185. *Estes*, 381 U.S. at 539.

186. The Court has warned trial courts that news coverage poses a danger:

[W]e note that unfair and prejudicial news comment on pending trials has become increasingly prevalent. . . . Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused.

Sheppard v. Maxwell, 384 U.S. 333, 362 (1966).

187. *Irvin v. Dowd*, 366 U.S. 717, 728 (1961) (reversing the defendant’s conviction after significant unfavorable publicity about his crime circulated in the community prior to trial).

and other third parties from the courtroom.¹⁸⁸ Some courts have excluded spectators altogether.¹⁸⁹

Moreover, as the Ninth Circuit pointed out in *Norris*, spectator demonstrators request far different privileges than those who simply assert the right to *receive* information.¹⁹⁰ Trial spectators seek a “more active role: to make a statement about [the defendant’s] guilt.”¹⁹¹ Notably, this adjudicative speech, or “speech intended to influence court decisions,” is heavily constrained in the courtroom.¹⁹² In fact, some argue that a trial by definition is one vast restriction of speech. Take for example the following explanation:

Trials, of course, are highly structured affairs, in which there appears to be quite little free speech. There are elaborate rules about who goes when, about who speaks, and about who does not speak. . . . [T]he law of evidence that deals with relevance and materiality can [also] be thought of as a prohibition on speech, a prohibition on saying what (a judge believes) is irrelevant to the particular matter at hand. Those who persist in saying irrelevant things after a ruling by the judge risk punishment for contempt.

In much the same way, testimony at trial may be suppressed because the matters with which it deals were secured in violation of the Fourth, Fifth, or Sixth Amendments, or because the testimony is hearsay, not the best evidence, or not preceded and supported by an

188. See, e.g., *Gannet Co. v. DePasquale*, 443 U.S. 368, 393–94 (1979) (upholding the trial court’s exclusion of the press from the courtroom). Likewise, the Court has chastised trial courts for allowing press coverage or involvement to become prejudicial. See, e.g., *Sheppard*, 384 U.S. at 355, 362–63 (reversing the conviction because the enormous amount of publicity prevented the defendant from receiving a fair trial when “newsmen took over practically the entire courtroom”); *Estes*, 381 U.S. at 550, 552 (reversing a conviction in which the trial judge’s decision to televise the pretrial hearing and otherwise permit excessive media coverage prejudiced the defendant and noting that the courtroom “was a mass of wires, television cameras, microphones and photographers”).

189. The Second Circuit, for example, has accepted that courts may ban disorderly spectators from the courtroom:

The guarantee of a public trial does not mean that all of the public is entitled under all circumstances to be present during the trial. It means only that the public must be freely admitted so long as those persons and groups who make up the public remain silent and behave in an orderly fashion. . . . When the trial judge has reason to believe that . . . spectators are disorderly and may continue to be so he may exclude [them].

United States ex rel. Orlando v. Fay, 350 F.2d 967, 971 (2d Cir. 1965).

190. *Norris v. Risley*, 918 F.2d 828, 833 n.5 (9th Cir. 1990).

191. *Id.*

192. Christopher J. Peters, *Adjudicative Speech and the First Amendment*, 51 UCLA L. REV. 705, 705 (2004).

appropriate foundation. If we were to move our thinking about what happens at a trial away from the category ‘trials’ and into the category ‘free speech,’ it would appear that the very institution we call a trial exists by virtue of an elaborate system of restrictions on the freedom of speech

The point of the foregoing . . . is to illustrate the fact that our notion of freedom of speech is less expansive than we typically think¹⁹³

As this passage indicates, restrictions on adjudicative speech occur all the time in the courtroom, and courts do not find it constitutionally controversial.¹⁹⁴ The Supreme Court’s justification in *Gentile v. State Bar of Nevada*¹⁹⁵ supports this point.

The outcome of a criminal trial is to be decided by impartial jurors, who know as little as possible of the case, based on material admitted into evidence before them in a court proceeding. . . . It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to “free speech” an attorney has is extremely circumscribed.¹⁹⁶

These sentiments emphasize that “conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence.”¹⁹⁷ Therefore, “in the interest of the fair administration of justice,”¹⁹⁸ courts may impose “reasonable time, place, and manner restrictions”¹⁹⁹ on spectator conduct. Consequently, the First Amendment “must be curtailed at the courthouse door”²⁰⁰ if society is to espouse the goal of producing fair trials for criminal defendants.

193. Frederick Schauer, *The Speech of Law and the Law of Speech*, 49 ARK. L. REV. 687, 689–90 (1997).

194. Peters, *supra* note 192, at 725.

195. *Gentile v. State Bar*, 501 U.S. 1030 (1991).

196. *Id.* at 1070–01 (distinguishing between “in court” and “out of court” restrictions on speech); *see also* *Zal v. Steppe*, 968 F.2d 924, 928–29 (9th Cir. 1992) (“Under our current system, the trial judge is charged with preserving the decorum that permits a reasoned resolution of issues. Zealous counsel cannot flout that authority behind the shield of the First Amendment.”).

197. *Patterson v. Colorado*, 205 U.S. 454, 462 (1907).

198. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 n.18 (1980).

199. *Norris v. Risle*, 918 F.2d 828, 833 n.5 (9th Cir. 1990).

200. *Id.* at 832.

B. Practical Implications: The Jury

Although victims lack a First Amendment basis to argue for spectator demonstrations as a right, the question remains, can spectator demonstrations really make a difference in trial outcomes? Three concepts from the field of psychology—attention, priming effects, and the availability heuristic—provide evidence that spectator demonstrations will bias a jury. Furthermore, research suggests that these effects are uniform whether the demonstration is a ribbon, button, T-shirt, or urn.

First, as the Court in *Estes* recognized, juror distraction may lead to prejudice,²⁰¹ because jurors' minds may focus on the distraction rather than the testimony.²⁰² Attention plays a huge role in memory and therefore decisionmaking. One well-accepted theory of attention, the capacity model, assumes that the mind has a finite capacity for information at a given time.²⁰³ Consequently, the more attention used for one thing, such as reading spectator buttons, the less those resources are available for something else, such as evaluating the credibility of a witness. Furthermore, as various studies demonstrate, jurors already tend to pay attention to many things during the course of a trial that are irrelevant to the facts of the case. For example, the defendant's attractiveness²⁰⁴ or race²⁰⁵ and the lawyer's sex²⁰⁶ or

201. *Estes v. Texas*, 381 U.S. 532, 546 (1965).

202. *Id.*

203. See DANIEL KAHNEMAN, ATTENTION AND EFFORT 7–8 (1973) (“[A] capacity theory assumes that there is a general limit on man’s capacity to perform mental work. It also assumes that this limited capacity can be allocated with considerable freedom among concurrent activities.”).

204. See, e.g., Billy Thornton, *Effects of Rape Victim’s Attractiveness in a Jury Simulation*, 3 PERSONALITY & SOC. PSYCHOL. BULLETIN 666, 666 (1977) (testing the hypothesis that a rape victim’s attractiveness may influence the decisions of jurors and finding that it did affect the defendant’s punishment).

205. See, e.g., Michael J. Sargent & Amy L. Bradfield, *Race and Information Processing in Criminal Trials: Does the Defendant’s Race Affect How the Facts are Evaluated?*, 30 PERSONALITY & SOC. PSYCHOL. BULLETIN 995, 1003 (2004) (“Consistent with the hypothesis that a defendant’s race could affect observers’ sensitivity to informational factors, the present studies demonstrated that under conditions designed to elicit relatively low motivation, the impact of legally relevant information was often greater when the defendant was Black than when he was White.”).

206. See, e.g., Nora K. Villemur & Janet Shibley Hyde, *Effects of Sex of Defense Attorney, Sex of Juror, and Age and Attractiveness of the Victim on Mock Juror Decision Making in a Rape Case*, 9 SEX ROLES 879, 885–86 (1983) (“The most striking result of this study was that significantly more not-guilty verdicts were given when the defense attorney was female (71%) than when the defense attorney was male (49%).”).

presentation style²⁰⁷ all distract the jury and potentially prejudice the jury's decisionmaking. Unlike those factors, however, spectator conduct can be eliminated easily to prevent the possible biasing effect of the distraction.

Second, a juror may not only be distracted from the case by attending to a spectator demonstration, but the display may also act as a prime for subsequent decisionmaking behavior. Priming refers to "a facilitation or bias in performance as the result of recently encountered information."²⁰⁸ An experiment by Professors Morrison, Wheeler, and Smeesters helps to illustrate the concept.²⁰⁹ After distinguishing between high and low self-monitors (people who tend to use external cues and people who do not, respectively),²¹⁰ the researchers presented the question, "How and under what conditions do significant others affect the goals that people pursue?"²¹¹ In the experiment, the researchers gathered participants whose mothers had high achievement goals for them but who did not have high achievement goals for themselves.²¹² Then, the researchers subjected them to a mother prime.²¹³ For example, they asked the participants about their mother's appearance, typical activities, and place of birth.²¹⁴ The researchers found that the high self-monitors performed better than controls on a subsequent achievement test because when provided with an external cue (their mothers) they unconsciously

207. See, e.g., Peter W. Hahn & Susan D. Clayton, *The Effects of Attorney Presentation Style, Attorney Gender, and Juror Gender on Juror Decisions*, 20 LAW & HUM. BEHAV. 533, 548 (1996) ("Aggressive attorneys were found to be more successful than passive attorneys . . .").

208. R. REED HUNT & HENRY C. ELLIS, *FUNDAMENTALS OF COGNITIVE PSYCHOLOGY* 117 (7th ed. 2004). To illustrate priming, psychologists often use the example taken from an experiment by the scientist Marcel in 1980. *E.g., id.* at 84. The experiment asks the subject to "decide as rapidly as possible" whether a string of letters represents a word. *Id.* When the word *doctor* is presented, participants are much faster in recognizing it as a word when it was preceded by the word *nurse* rather than the word *peach*. *Id.* at 85. This suggests that the related word can contribute to the recognition of the next word. *Id.*

209. Kimberly Rios Morrison, S. Christian Wheeler & Dirk Smeesters, *Significant Other Primes and Behavior: Motivation to Respond to Social Ques Moderates Pursuit of Prime-Induced Goals*, 33 PERSONALITY & SOC. PSYCHOL. BULLETIN 1661, 1664 (2007).

210. *Id.* at 1663 ("High self-monitors are social chameleons who tend to use external cues (e.g., from the situation, from other people) to guide their behavior. Low self-monitors, in contrast, rely primarily on internal cues, such as their attitudes and beliefs, in deciding how to behave.").

211. *Id.* at 1671.

212. *Id.* at 1664.

213. *Id.* at 1665.

214. *Id.*

altered their behavior to match that of their mothers' goals.²¹⁵ Similarly, Professors Morrison, Wheeler, and Smeesters duplicated their results in an experiment with college students whose roommates wanted them to keep their living spaces clean.²¹⁶ After a priming manipulation, the high self-monitors pursued the cleanliness goal even when they did not hold that goal for themselves.²¹⁷ This research supports the theory that priming can alter one's behavior and "[the level of] self-monitoring can moderate the extent to which external stimuli automatically affect behavior."²¹⁸ Applying both studies to jury behavior, one can foresee how spectators who visibly display their goals, such as convicting the defendant, can prime certain members of the jury and in turn unconsciously alter their behavior.

Third, allowing spectator demonstrations from the gallery also disrupts the balance of the courtroom. The American criminal justice system is set up as an adversarial system, which "according to most definitions, consists of three features: a neutral and passive decision-maker, party presentation of evidence, and a highly structured procedure."²¹⁹ Correspondingly, one of the main arguments in *Payne v. Tennessee*,²²⁰ the case favoring victim impact statements at sentencing hearings, was the importance of a balanced system. In comparing the defense to the prosecution, the Court said, "virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce."²²¹ Therefore, "[t]he State has a legitimate interest in counteracting the mitigating evidence."²²² This argument, that a fair system should assign a one-to-one ratio, is deeply rooted in the criminal justice process. For example, each side makes an opening statement, there are direct and cross examinations, and each side makes a closing statement. This balancing is not only equitable, but it also combats the availability heuristic.

215. *Id.* at 1665–66.

216. *Id.* at 1666.

217. *Id.* at 1666–69.

218. *Id.* at 1663; *see also id.* at 1673 ("[These findings] provide insight into [how] being reminded of mothers, roommates, and other important people will cause people to act in ways consistent (or sometimes even inconsistent) with what these individuals would like to see.").

219. Stephen G. Coughlan, *The "Adversary System": Rhetoric or Reality?*, CAN. J.L. & SOC'Y, Fall 1993, at 139, 142.

220. *Payne v. Tennessee*, 501 U.S. 808 (1991).

221. *Id.* at 822.

222. *Id.* at 825 (quoting *Booth v. Maryland*, 482 U.S. 496, 517 (1987) (White, J., dissenting)).

The availability heuristic states that a judgment can be “influenced by the ease with which something is brought to mind.”²²³ For example, in the wake of a major airplane crash, people are more anxious about flying even though statistically it is the safest time to fly.²²⁴ The thought itself helps to bias the subsequent actions.²²⁵ “[W]hatever most occupies juror attention during the trial will most influence what jurors focus on during deliberations and disproportionately use in rendering a verdict.”²²⁶ Notably, information that is presented early in the trial tends to “remain[] vivid and is more apt to be used for interpreting subsequent evidence.”²²⁷ Furthermore, in interpreting evidence, jurors tend to “construct a story that confirms their prior beliefs.”²²⁸ This data elucidates the importance of equality in the courtroom. If spectators’ buttons or T-shirts are allowed, a juror may disproportionately recall the hurt and devastation of the victim and their family or buttress their desire to seek justice for the family, which may in turn diminish the jurors’ ability to remain impartial.

Given that the American criminal justice system otherwise goes to great lengths to avoid jury bias, jurors should ultimately make decisions based on the evidence at trial and not the sympathetic nature of the victim or the spectator’s loss. For example, the voir dire process and rules against the admission of the defendant’s previous crimes are meant to filter out potential bias²²⁹ and prevent the jury from acting on an irrational basis.²³⁰ It would be unjust to circumvent these goals by allowing prejudicial spectator demonstrations. Furthermore, because the display itself adds an element of distraction, may prime the jury, and may create an availability heuristic, employing a balancing test that allows certain or limited spectator demonstrations misses the point. T-shirts, buttons, or

223. HUNT & ELLIS, *supra* note 208, at 359.

224. *Id.*

225. *Id.*; see also Craig R. Fox, *The Availability Heuristic in the Classroom: How Soliciting More Criticism Can Boost Your Course Ratings*, 1 JUDGMENT & DECISION MAKING 86, 87–89 (2006) (discussing the availability heuristic and how it affects graduate students’ assessments of their classes).

226. David A. Wenner & Gregory S. Cusimano, *Combating Juror Bias*, TRIAL, June 2000, at 30, 38.

227. *Id.* at 37.

228. *Id.*

229. 47 AM. JUR. 2D *Jury* § 167 (2008) (“The purpose of conducting voir dire is to secure an impartial jury.”).

230. Peters, *supra* note 192, at 758.

urns—no matter how many exist—have the ability to take the focus away from the trial and bias the jury. Therefore, only a complete ban on spectator demonstrations can secure a defendant's right to a fair trial.

CONCLUSION

The presumption of innocence makes up the core of the American criminal justice system.²³¹ Consequently, a victim's right should never come at the expense of a defendant's right to a fair trial. In light of the Supreme Court's decision in *Carey v. Musladin*, the law in this area is ripe for reform, and this Note contends that allowing spectator demonstrations in courtrooms creates a *per se* unacceptable risk. This Note does not dismiss the fact that victims' rights should allow a victim to be present, heard, and respected throughout judicial proceedings. It simply recognizes that juries are "likely to be impregnated by the enviroing atmosphere,"²³² and it mandates that "at the very least,"²³³ evidence should "come from the witness stand"²³⁴ and courtrooms should be free from "public passion."²³⁵

Spectator demonstrations contravene all of these principles. Juries must already combat prejudicial pitfalls that present themselves in the criminal justice system, and adding yet another temptation unrelated to the facts of the case is unwarranted. This Note urges courts to be mindful that although allowing spectator demonstrations give some victims comfort, the demonstrations only create more victims in the long run—those who end up in prison for someone else's crime.

231. *See Coffin v. United States*, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.").

232. *Turner v. Louisiana*, 379 U.S. 466, 472 (1965) (quoting *Frank v. Mangum*, 237 U.S. 309, 349 (1915) (Holmes, J., dissenting)).

233. *Id.* at 472.

234. *Id.* at 472–73.

235. *Irvin v. Dowd*, 366 U.S. 717, 728 (1961) ("[I]t is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion . . .").