The Star-Spangled Chamber: The Venire’s Role in Satisfying the Sixth Amendment to the United States Constitution

“The very word ‘secrecy’ is repugnant in a free and open society; and we are as a people inherently and historically opposed to secret societies, to secret oaths and to secret proceedings.”¹

I. INTRODUCTION

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to a public trial.² This right, although fundamental, is not absolute.³ The Supreme Court has held that a criminal defendant’s public-trial right extends to pretrial proceedings including suppression motions and voir dire of potential jurors.⁴ Moreover, several circuit courts considering the matter have concluded that the right to a public trial also includes jury-selection proceedings and omnibus hearings.⁵ State courts, especially Massachusetts courts, have followed suit in finding structural error when the courtroom is

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2. U.S. CONST. amend. VI. The Sixth Amendment reads as follows:

   In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

   Id.


4. See Presley v. Georgia, 558 U.S. 209, 214 (2010) (noting Sixth Amendment extends to voir dire proceedings of prospective jurors); Waller v. Georgia, 467 U.S. 39, 47-48 (1984) (holding closure of suppression hearing violated Sixth Amendment). Voir dire is the process by which potential jurors are questioned about their backgrounds and potential biases prior to being chosen to sit on a jury. BLACK’S LAW DICTIONARY 1710 (9th ed. 2009).

5. See, e.g., United States v. Withers, 638 F.3d 1055, 1063 (9th Cir. 2011) (holding exclusion of public during jury selection violated Sixth Amendment); United States v. Waters, 627 F.3d 345, 360 (9th Cir. 2010) (holding exclusion of public from omnibus pretrial hearing violated Sixth Amendment); United States v. Agosto-Vega, 617 F.3d 541, 543 (1st Cir. 2010) (holding exclusion of public during jury selection violated Sixth Amendment).
closed during voir dire, jury selection, or trial.\textsuperscript{6}

The Sixth Amendment also guarantees a defendant’s right to be tried by an impartial jury.\textsuperscript{7} An impartial jury comprised of the defendant’s peers aims to prevent overzealous prosecution and biased judges.\textsuperscript{8} Jury-selection proceedings protect criminal defendants by finding an impartial cross section of the community.\textsuperscript{9} This cross section is derived from a panel of prospective jurors, called a venire.\textsuperscript{10}

Recently, appellate courts have begun aggressively canvassing cases where defendants allege a violation of their public-trial rights under the Sixth Amendment, reversing those cases when judges excluded the public from voir dire.\textsuperscript{11} Although one could argue that appellate courts have impliedly rejected the notion that a venire is sufficient to satisfy a defendant’s Sixth Amendment rights under these circumstances, some courts have found otherwise.\textsuperscript{12} For instance, in \textit{Bucci v. United States},\textsuperscript{13} the First Circuit found that the exclusion of some, but not all, members of the public from voir dire resulted in “partial” rather than “total” closure, but declined to decide whether such partial closure would constitute structural error requiring reversal.\textsuperscript{14} Nor did it explicitly consider whether the venire satisfies the constitutional requirements for a public trial.\textsuperscript{15}

While courts pick through the web of legal questions that have and will


\textsuperscript{7} U.S. CONST. amend. VI.

\textsuperscript{8} See Duncan v. Louisiana, 391 U.S. 145, 156 (1968) (explaining importance of right to jury trial).


\textsuperscript{10} BLACK’S LAW DICTIONARY 1694 (9th ed. 2009).

\textsuperscript{11} See Presley v. Georgia, 558 U.S. 209, 214-15 (2010) (holding exclusion of defendant’s uncle from courtroom half filled by venire violated Sixth Amendment); United States v. Quiles-Olivo, 684 F.3d 177, 186 (1st Cir. 2012) (holding no Sixth Amendment violation when court noted and corrected mother’s absence on record); United States v. Rivera, 682 F.3d 1223, 1235-36 (9th Cir. 2012) (holding exclusion of family from sentencing violated defendant’s right to public trial).

\textsuperscript{12} See Presley, 558 U.S. at 214-15. In fact, the Supreme Court has noted that community attendance was

virtually compulsory on the part of the freemen of the community, who represented the “patria,” or
the “country,” in rendering judgment. The public aspect thus was “almost a necessary incident of
jury trials, since the presence of a jury . . . already insured the presence of a large part of the public.”


\textsuperscript{13} 662 F.3d 18 (1st Cir. 2011).

\textsuperscript{14} Id. at 26, 29.

\textsuperscript{15} See id. at 26.
continue to infect Sixth Amendment analysis, it is worth explicitly considering if the venire is sufficient to satisfy public trial concerns. 16 This Note will begin by considering the historical development of the public trial and trial-by-jury clauses of the Sixth Amendment from their English roots through modern case-law analysis. 17 Then, it will briefly touch on the historical role of the venire. 18 Finally, it will argue that the venire is insufficient to satisfy the public-trial clause of the Sixth Amendment. 19

II. SIXTH AMENDMENT HISTORY: FROM ITS ROOTS TO MODERN CASE-LAW ANALYSIS

A. The Right to a Public Trial

1. English Development of Public-Trial Rights and Theories Behind Incorporation

Many authors opine on the origin of the Sixth Amendment’s public-trial guarantee. 20 In England, neither the Magna Carta, nor England’s Petition of Right of 1621, nor the Bill of Rights of 1689 guarantees a public trial. 21 Some evidence posits that the right developed from English common law sometime in the sixteenth and seventeenth centuries, and “obtain’d [its] Force by immemorial Usage or Custom.” 22 Matthew Hale, an English common-law judge and legal scholar of the seventeenth century noted that the common law required that:

the Evidence on either Part is given in upon the Oath of Witnesses, or other

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16. See infra Part III.
17. See infra Part II.A-B.
18. See infra Part II.C.
19. See infra Part III.
21. See Radin, supra note 20, at 381-82 (discussing English history of public-trial rights); Shapiro, supra note 20, at 782 (discussing historical roots of public trial).
22. See Matthew Hale, THE HISTORY OF THE COMMON LAW OF ENGLAND 2 (3d ed. 1739); Radin, supra note 20, at 382 (discussing origin of public-trial right in sixteenth century); Shapiro, supra note 20, at 782 (attributing right’s origin to seventeenth century). According to Hale, the right to a public trial derived from Lex non Scripta, or the unwritten common law. Hale, supra, at 23-24. The King’s Courts of Justice would determine which customs were “good and reasonable,” and make law of those customs. Id. at 25. Similarly, the King’s Courts would void unreasonable customs. Id. Hale attributed the practice of enforcing usage and custom to King Edward I in the thirteenth century, and regarded this practice as vital to the safekeeping of the King’s powers and to maintaining justice within the kingdom. Id. at 65-66. In America, each territory that became a state adopted the practice. See Morris J. Bloomstein, Verdict: The Jury System 28 (rev. ed. 1972) (explaining how modern jury-trial rights evolved).
Evidence by Law allowed . . . in the open Court, and in the Presence of the Parties, their Attornies, Council and all By-standers, and before the Judge and Jury, where each Party has Liberty of excepting, either to the Competency of the Evidence, or the Competency or Credit of the Witnesses, which Exceptions are publickly stated, and by the Judges openly or publickly allowed or disallowed, wherein if the Judge be partial, his Partiality and Injustice will be evident to all By-standers . . . .23

He argued for openness in English courts, as opposed to examinations performed in secret that pressured witnesses into telling the truth.24 Interestingly, Hale makes no mention of the accused’s rights pertaining to a public trial, but couches his argument in consideration of the public’s right and ability to protect against injustice.25

While Hale briefly contrasted the English system of public trials with secret examinations, others have argued that the right to a public trial was indeed a response to the secretive practices of the Court of Star Chamber.26 The Star Chamber developed from a combination of French and English criminal procedures.27 A defendant confronting the Star Chamber pleaded his or her case, received an open hearing, and had a right to counsel at all stages.28

23. HALE, supra note 22, at 253-54.
24. Id. at 254 (discussing impact of public on witnesses).
25. Id. at 249-61 (focusing on public’s, rather than defendant’s, rights). Edward Jenks supports Hale’s argument. See EDWARD JENKS, THE BOOK OF ENGLISH LAW 46-56 (6th rev. ed. 1967) (discussing history of English criminal-justice system). In addressing the peculiarities of English criminal justice that gave England its “unique position in the civilized world,” Jenks begins by identifying “the most conspicuous feature[] of English justice, that all judicial trials are held in open court, to which the public have free access.” Id. at 73. He argued that England’s citizens were accustomed to the availability of open courtrooms, and took their importance for granted. Id. Jenks attributed the English court system’s success to the influence public opinion had upon courtroom proceedings. Id.
26. See, e.g., In re Oliver, 333 U.S. 257, 268-69 (1948) (acknowledging Star Chamber); Davis v. United States, 247 F. 394, 395 (8th Cir. 1917); Commonwealth v. Blondin, 87 N.E.2d 455, 460 (Mass. 1949), abrogated by Commonwealth v. Bly, 830 N.E.2d 1048 (Mass. 2005). But see Radin, supra note 20, at 388 (rejecting claims that public-trial guarantees evolved from secretive Star Chamber practices). Jenks explained that the English rule requiring open courts was violated “[o]nly in rare instances, of which the notorious Court of Star Chamber is the most conspicuous,” leading one to believe that open-court practices were established well before the Court of Star Chamber. JENKS, supra note 25, at 74. However, Jenks goes on to explain, “the unpopularity of [the Court of Star Chamber] is the best proof of the value attached by the nation to the general rule.” Id. This unpopularity begs the question of whether it was such distaste for the practice that led to the incorporation of the right to a public trial into the Sixth Amendment, or the peculiar yet popular public support of open courts that did so. Compare id. (believing Star Chamber indeed a secret court), with Radin, supra note 20, at 388 (denying such an accusation).
27. See 5 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 176, 195 (2d. ed. 1937) (discussing historical influences relevant to England’s Star Chamber). Holdsworth explains that the French, or continental, influences on the Star Chamber were brutal—preventing the defendant from calling witnesses and preparing a defense, depriving him of counsel, and using torture to elicit confessions—but were fairer because “the trials were at least public.” Id. at 195.
28. Id. at 184 (illustrating practices of Star Chamber). Holdsworth distinguishes this open hearing from the idea of an open court we refer to in this country. Id. An open hearing simply meant that a defendant would
However, the defendant and the witnesses against him were secretly interrogated, the defendant’s confessions were commonly extracted through torture, and the defendant was denied the common-law right against self-incrimination.29 The Star Chamber initially received widespread support from citizens who praised the strong government for ensuring security, peace, and order.30 But by the beginning of the seventeenth century, certain practices of the Star Chamber—specifically, the crown’s exclusive right to call witnesses—began to shock the public, resulting in an increased disdain for the Chamber, and its ultimate abolition in 1641.31

Still others argue that neither an intentional incorporation of English common law nor an opposition to Star Chamber practices influenced the nation’s Founders when incorporating the right to a public trial into the Sixth Amendment.32 Instead, as Max Radin argued, “[w]hat happened, then, was that a traditional feature of English trials, more or less accidental, was carried over into the American systems . . . .”33 Radin argues that the venire’s purpose was community representation rather than judicial fact finding.34 As a result, a public trial was “a necessary incident of jury trials, since the presence of a jury—involving a panel of thirty-six men and more—already insured the presence of a large part of the public.”35 If the venire’s purpose was indeed community representation, as Radin suggests, then the argument that the venire’s presence during jury empanelment satisfies the Sixth Amendment becomes much stronger.36

2. The Incorporation of the Right to a Public Trial

Despite its historical presence, debates leading up to the Sixth Amendment’s adoption include scant reasoning for incorporating the public-trial right.37

be present while a judge read the evidence obtained in secret investigations against him, and sentenced accordingly. Id. These rights were adopted from the English common law. Id.
29. Id. (reviewing Star Chamber practices). These rights were adopted from French, German, and Italian inquisition practices. Id. at 186. These practices were not only tolerated for some time, but “there is a good deal of evidence that they commanded popular approval.” Id. at 189.
30. Id. (detailing public support).
31. HOLDSWORTH, supra note 27, at 192-93 (discussing unpopular Star Chamber prohibition against defense witnesses). But see Thomas G. Barnes, Star Chamber Mythology, 5 AM. J. LEGAL HIST. 1, 2-3 (1961) (denying this characterization of Star Chamber’s demise).
32. Radin, supra note 20, at 388 (arguing Founders adopted English common law).
33. Id. (explaining views on Sixth Amendment incorporation).
34. Id. (reviewing principles guiding venire’s purpose).
35. Id. (arguing sufficiency of venire for public-trial purposes).
36. See Radin, supra note 20, at 388; see also infra Part III (arguing venire’s purpose not community representation in public-trial sense).
37. 1 ANNALS OF CONG. 784-85 (1789) (Joseph Gales ed., 1834), available at http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=001/llac001.db&recNum=0 (evidencing lack of discussions surrounding Sixth Amendment’s incorporation). Rather, on August 17, 1789, the discussion on what is now the Sixth Amendment included consideration of the time of trial, compulsory process, place of trial, and criminal prosecutions using informants. Id.
Some early commentators noted that the Sixth Amendment was merely an incorporation of English common law into the Constitution. But discussions surrounding the Bill of Rights tend to imply that the incorporation of the public-trial right was instead a fearful reaction to the dangers of Star Chamber practices. Moreover, the first mention of a public-trial right appears to adopt the view that the right was one of the public rather than the accused.

The conflict between the views of Joseph Story and J. Kendall Few is not immediately apparent, but an important distinction results when one considers the consequences of adopting one view over the other. On the one hand, Story implies that the incorporation of the public-trial right is no more than an adoption of English law and reasoning as set forth in the centuries-long history of England. Few, on the other hand, suggests that the American public-trial incorporation targeted weaknesses within English law, and thus resulted in a more targeted attack on particular ideals that the American Constitution would protect. Evidence surrounding the debates suggests that Few’s theory is correct; the Founders witnessed the Star Chamber’s abuse of criminal defendants and intended to protect against it.

3. The Supreme Court’s Development of the Public-Trial Right

In light of the discussions surrounding the public-trial right’s incorporation into the Sixth Amendment, federal courts have long cited the “historical warnings of the evil practice of the Star Chamber in England” as reason for its
adoption.\textsuperscript{45} The Supreme Court explained that “these institutions obviously symbolized a menace to liberty . . . in ruthless disregard of the right of an accused to a fair trial.”\textsuperscript{46} In \textit{Davis v. United States},\textsuperscript{47} the defendants were charged in federal court in connection with a train robbery.\textsuperscript{48} At the end of trial and in anticipation of a disruption by an excitable crowd that had gathered, the judge cleared the courtroom of most spectators, leaving approximately twenty-five people, including court officers, newspaper reporters, and the defendants’ relatives and attorneys.\textsuperscript{49} The defendants appealed their convictions and the Eighth Circuit reversed on Sixth Amendment grounds, noting how the right to a public trial developed in opposition to secretive practices similar to those witnessed in the Star Chamber.\textsuperscript{50} The court went even further, however, alluding to an important public right whereby the public’s influence prevents injustice.\textsuperscript{51}

It was not until 1948 that the Supreme Court held that the Sixth Amendment was enforceable through the Fourteenth Amendment for state criminal prosecutions.\textsuperscript{52} In \textit{In re Oliver}, the Supreme Court reversed a conviction for criminal contempt of a man who had been summoned by a Michigan judge to testify in private in “a ‘one-man grand jury’ investigation.”\textsuperscript{53} The United States Supreme Court reversed the Michigan Supreme Court, holding that the secretive proceeding violated the Due Process Clause of the Fourteenth Amendment.\textsuperscript{54} As in \textit{Davis}, the Court considered the history of the Sixth Amendment, but this time argued that the right was derived from common law rather than in opposition to practices of the Star Chamber.\textsuperscript{55}

Over thirty years later, the Supreme Court decided \textit{Gannett Co. v. DePasquale},\textsuperscript{56} once again digging into the historical depths of the Sixth Amendment.\textsuperscript{57} The question in \textit{Gannett Co.} was whether members of the

\begin{itemize}
\item \textsuperscript{45} \textit{Davis v. United States}, 247 F. 394, 395 (8th Cir. 1917). Other infamous proceedings leaving a mark similar to Star Chamber include the letters de cachet of the French monarchy and the Spanish Inquisition. Radin, \textit{supra} note 20, at 388-89.
\item \textsuperscript{46} \textit{In re Oliver}, 333 U.S. 257, 269-70 (1948).
\item \textsuperscript{47} 247 F. 394 (8th Cir. 1917).
\item \textsuperscript{48} \textit{Id.} at 395.
\item \textsuperscript{49} \textit{Id.} at 394.
\item \textsuperscript{50} \textit{Id.} at 395 (“The provision is one of the important safeguards that were soon deemed necessary to round out the Constitution, and it was due to the historical warnings of the evil practice of the Star Chamber in England.”).
\item \textsuperscript{51} \textit{Davis}, 247 F. at 395 (“The corrective influence of public attendance at trials for crime was considered important to the liberty of the people, and it is only by steadily supporting the safeguard that it is kept from being undermined and finally destroyed.”).
\item \textsuperscript{52} \textit{In re Oliver}, 333 U.S. 257, 267 (1948) (holding Sixth Amendment applies to states).
\item \textsuperscript{53} \textit{Id.} at 258.
\item \textsuperscript{54} \textit{Id.} at 273.
\item \textsuperscript{55} \textit{Id.} at 266 (“This nation’s accepted practice of guaranteeing a public trial to an accused has its roots in our English common law heritage.”).
\item \textsuperscript{56} 443 U.S. 368 (1979).
\item \textsuperscript{57} Compare \textit{id.} at 384-85 (acknowledging importance of English common law in Sixth Amendment
\end{itemize}
public may compel a public proceeding, even though the parties and judge agree to close the courtroom. 58 Although the trial judge initially recognized a constitutional right of the public to attend criminal proceedings, and the highest court in the State of New York agreed, the Supreme Court reversed, holding that the right to a public trial belonged solely to the accused in a criminal trial. 59 In rejecting the public’s argument seeking a right to attend criminal proceedings, the Court reaffirmed its second premise—that the Sixth Amendment developed from English common law and not as a result of secretive Star Chamber practices. 60 The Court implicitly rejected the dissent’s development), with Davis v. United States, 247 F. 394, 395 (8th Cir. 1917) (attributing Sixth Amendment’s development to hostility against Star Chamber practices). In Gannett Co., dissenters argued that the right to a public trial goes beyond the literal terms of the Sixth Amendment. See Gannett Co., 443 U.S. at 418 (Blackmun, J., dissenting); see also U.S. CONST. amend. VI. Rather, Justice Blackmun argued, the Court previously recognized that the Sixth Amendment’s rights to a speedy trial and jury trial may be waived, and thus a defendant’s waiver of public-trial rights does not necessitate a private trial. Gannett Co., 443 U.S. at 415-18.

58. Gannett Co., 443 U.S. at 370-71. In Gannett Co., the defendants were on trial for murder. Id. at 374. Due to a significant amount of press coverage, the defendants requested that the public be excluded from a suppression hearing. Id. at 375. Neither the state nor a news reporter present during the motion objected to the motion to exclude. Id. The trial judge granted the motion. Id. The following day, the reporter moved the court to set aside the order. Id.

59. Gannett Co., 443 U.S. at 379-80 (noting only defendants entitled to Sixth Amendment guarantee of public trial); see Gannett Co. v. DePasquale, 55 A.D.2d 107 (N.Y. App. Div. 1976) (affirming trial court’s decision granting Sixth Amendment rights to public). The Court goes on to explain that this view is uniformly recognized as belonging solely to the accused. Gannett Co., 443 U.S. at 380. Nevertheless, the Court then directs attention to authority where the right appears to belong to both the defendant and the public. See id. (citing In re Oliver, 333 U.S. 257, 270 (1948)); 1 Thomas M. Cooley, A Treatise on the Constitutional Limitations 647 (8th ed. 1927) (“The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions . . . .”). Subsequently, Richmond Newspapers, Inc. v. Virginia held that the press and public have a right to attend criminal trials under the First Amendment, not the Sixth, in certain instances. 448 U.S. 555, 575-80 (1980). See generally Daniel Levitas, Comments, Scaling Waller: How Courts Have Eroded the Sixth Amendment Public Trial Right, 59 Emory L.J. 493 (2009) (discussing evolution of public-trial right).

60. See Gannett Co., 443 U.S. at 384-86 (noting English common law’s influence on incorporation). The Court began by explaining the significance and rarity of incorporating common-law doctrines into the Constitution. Id. at 384-85 (explaining exclusion of most common-law principles). The Court stated that the “common-law right to a jury trial, for example, is explicitly embodied in the Sixth and Seventh Amendments” while “[t]he common-law rule that looked upon jurors as interested parties who could give evidence against a defendant was explicitly rejected by the Sixth Amendment . . . .” Id. at 385. The Court went on to note “the vast majority of common-law rules were neither made part of the Constitution nor explicitly rejected by it.” Id. The Court adopted the viewpoint that the Sixth Amendment implicitly accepted open proceedings as the norm, but determined that “the Sixth Amendment confers the right to a public trial only upon a defendant and only in a criminal case.” Id. at 387. In a concurring opinion, Justice Rehnquist opined that because “the public does not have any Sixth Amendment right of access to [pretrial] proceedings . . . . the trial court is not required by the Sixth Amendment to advance any reason whatsoever for declining to open a pretrial hearing or trial to the public.” Id. at 404 (Rehnquist, J., concurring). Such a sentiment was not universally held amongst the divided court as chiefy noted by the dissent. Id. at 406 (Blackmun, J., dissenting). The dissent’s scathing disagreement with Justice Rehnquist’s opinion spanned several pages, describing at length how the public-trial guarantee aids in the administration of justice. Id. at 412-15. After thoroughly discussing the historical underpinnings of the Sixth Amendment, the dissent concluded that “the public-trial provision of the Sixth
viewpoint that the right to a public trial “embodies our belief that secret judicial proceedings would be a menace to liberty.”61 The dissent considered In re Oliver62 and the importance of the public-trial right, recognizing the influence that the Star Chamber’s secretive trials had on the Sixth Amendment’s history.63 Specifically, the Court attributed the justice system’s success to the country’s “strong tradition of publicity in criminal proceedings, and the States’ recognition of the importance of a public trial.”64

Over the years, the Court’s reliance on common-law roots became ingrained in Sixth Amendment analysis.65 Then in the 1980s, the Supreme Court moved away from English common-law analysis and established a framework of interests that trial courts must balance when closing a courtroom.66 In Waller v. Georgia, the Court adopted the analysis set forth by Richmond Newspapers, Inc., Globe Newspaper Co., and Press-Enterprise Co., extending the balancing approach to Sixth Amendment challenges.67 The Waller decision signaled a transition in the Court’s Sixth Amendment analysis.68 The Court no longer debated whether the public-trial right derived from common law or an aversion to Star Chamber-like practices, but instead accepted the right’s common-law origin as fact.69 The Court began balancing interests based upon well-accepted principles of constitutional law.70 For instance, in Owens v. United States,71 the defendant stood trial for his role in a

Amendment, prohibits the States from excluding the public from a proceeding within the ambit of the Sixth Amendment’s guarantee without affording full and fair consideration to the public’s interests in maintaining an open proceeding.” Id. at 432-33.

61. Id. at 412; see also Levitas, supra note 59, at 513 (discussing dissent in Gannett Co.).
63. Gannett Co. v. DePasquale, 443 U.S. 368, 414 (1979) (Blackmun, J., dissenting) (noting not “even one such secret criminal trial in England since abolition of the Court of Star Chamber in 1641.” (quoting In re Oliver, 333 U.S. 257, 266 (1948))).
64. See id. (alluding to nation’s legal roots in English common law).
66. See Press-Enter. Co., 464 U.S. at 510 (creating foundation for courtroom-closure procedures enacted in Waller). The balancing framework described in Press-Enterprise Co. states that “openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” Id.; see also Waller v. Georgia, 467 U.S. 39, 47 (1984) (extending First Amendment analysis proposed in Press-Enterprise Co. to Sixth Amendment cases).
67. Waller, 467 U.S. at 47 (extending Press-Enterprise Co. to Sixth Amendment cases). Waller also affirmed the now widespread understanding that a defendant need not show prejudice in order to get relief following a violation of his Sixth Amendment public-trial guarantee. Id. at 48.
68. Id. (accepting public-trial right’s common-law roots).
69. Id.
70. Compare id. (mimicking strict-scrutiny analysis required for fundamental rights and suspect-class due-process analysis), with Press-Enter. Co., 464 U.S. at 505 (noting Sixth Amendment’s common-law heritage).
71. 483 F.3d 48 (1st Cir. 2007).
drug-running enterprise.\footnote{72 Id. at 54. Owens was alleged to have sold kilogram quantities of cocaine in Massachusetts and Rhode Island, used violence, murdered, and provided guns to other members of the enterprise to "extract 'refunds' from cocaine suppliers whose shipments were deemed inadequate." Id.}

To make room for the venire of seventy-two potential jurors, the judge ordered the courtroom cleared.\footnote{73 Id. Although sufficient room was available for Owens’s family, they were continuously barred from reentering the courtroom during jury selection. Id.} The First Circuit reversed the district court’s denial of the defendant’s request for an evidentiary hearing on the issue of courtroom closure, and held that the closure was not justified by an overriding interest, and thus structural error.\footnote{74 See id. at 62, 65.} The court discussed the impact that public scrutiny may have had on the fairness of Owens’s trial.\footnote{75 See Owens, 483 F.3d at 62, 65.} The First Circuit went on to suggest, without deciding, that the venire itself was an insufficient protection against government improprieties.\footnote{76 See generally id. (foregoing any discussion on venire’s role in public-trial analysis).}

Most recently, the Supreme Court reaffirmed its holding that the public-trial guarantee extends to pretrial proceedings, such as voir dire.\footnote{77 Presley v. Georgia, 558 U.S. 209, 214-15 (2010) (reversing trial court’s conclusion stating abuse-of-discretion analysis applied to public-trial contentions).} In \textit{Presley v. Georgia}, the defendant was on trial for cocaine trafficking when his uncle was forced to leave the courtroom during jury empanelment.\footnote{78 See id. at 210.} In accepting the defendant’s argument, the Supreme Court held that the Sixth Amendment right to a public trial extends to jury voir dire, and that courts must entertain reasonable alternatives to courtroom closure.\footnote{79 See id. at 214-15.} Rather than detailing a historical justification for this ruling, the Court instead relied solely on \textit{Waller} and \textit{Press-Enterprise Co.}, impliedly affirming the Court’s reliance on English common law as the origin for the Sixth Amendment’s guarantee to a public trial for criminal defendants.\footnote{80 See id. at 212-13.}

\textbf{B. The Jury’s Role}

\textit{1. Founding and Incorporation of the Jury’s Role in Criminal Trials}

Not surprisingly, the Sixth Amendment’s text sheds little light on the jury’s role in criminal trials.\footnote{81 See U.S. CONST. art. III, § 2, cl. 3 (stating jury’s role in criminal trials); see also U.S. CONST. amend. VI (lacking specific clarity and direction for jury’s role in criminal trials).} Before consideration of the Sixth Amendment, Article III of the Constitution provided that “[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . .”\footnote{82 U.S. CONST. art. III, § 2, cl. 3. Notable commentators agree that the inclusion of this substantive mandate obviates the jury’s importance. See Akhil Reed Amar, The Bill of Rights as a Constitution, 100 YALE L.J. 1131, 1196 (1991) (stating Article III mandate of trial by jury necessarily implies its importance); Rachel}
provided, “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .

83. In Callan v. Wilson, 84 the Court commented that it does “not think that the amendment was intended to supplant that part of the third article which relates to trial by jury. There is no necessary conflict between them.”

In seventeenth- and eighteenth-century England, jurors were viewed as “the first line of defense against the abuses of royal officials.” 85 William Blackstone urged the protection of the jury’s role in criminal trials. 86 The first colonists of North America “enacted local laws to preserve and exercise their right to such [jury] trials.” 87 For example, in 1774, the First Continental Congress passed the Declaration and Resolves, declaring that “the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers . . . .

88. For example, in 1774, the First Continental Congress passed the Declaration and Resolves, declaring that “the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers . . . .” 89 The Framers of the Constitution agreed that the jury was an indispensable piece of the justice system, and indeed interference with the jury system made its way amongst the complaints against the Crown in the Declaration of Independence. 90

The jury’s importance was fundamental at the time of the Constitutional Convention. 91 The Framers believed that the jury was the means by which the

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83. U.S. Const. amend. VI.
84. 127 U.S. 540 (1888).
85. Id. at 549.
90. The Declaration of Independence para. 20 (U.S. 1776).
91. See Gildea, supra note 88, at 1514 (discussing role of jury during constitutional framing). Both the Federalists and Antifederalists agreed upon the importance of trial by jury. See The Federalist No. 83, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“The friends and adversaries of the plan of the convention,
people were injected into the affairs of the judiciary.\footnote{Letter from Thomas Jefferson to the Abbé Arnoux (July 19, 1789), in \textit{The Papers of Thomas Jefferson} 282, 283 (Julian P. Boyd & William H. Gaines, Jr. eds., 1958); see also Harrington, \textit{supra} note 86, at 396 (noting guarantee of jury trial).} Several commentators agree that the Framers’ steadfast support of the jury trial illustrates their desire to formulate another check on government actions.\footnote{J\textsc{effrey} A\textsc{bramson}, \textit{We, the Jury: The Jury System and the Ideal of Democracy} 87 (1994) (illustrating benefits of powerful jury).} Indeed, it was believed that “the criminal jury reliably stood between the individual and government, protecting the accused against overzealous prosecutions, corrupt judges, and even tyrannical laws.”\footnote{\textit{Duncan v. Louisiana}, 391 U.S. 145, 156 (1968) (noting jury drawn from community as necessary safeguard against “the compliant, biased, or eccentric judge”).} The Framers intended that the jury have the power to police all three branches of government simultaneously, but this power has since been limited.\footnote{See Barkow, \textit{supra} note 82, at 49-50 (discussing jury’s ultimate power of acquittal as protection against oppressive governments). Barkow illustrates this idea nicely: [A] jury verdict of acquittal is an absolute check against executive action to punish an individual for a criminal offense. Once a jury has acquitted a defendant, the Double Jeopardy Clause prohibits the executive from prosecuting the individual again for the same offense.

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The jury’s unreviewable power to issue a general verdict of acquittal further acts as a check on judges . . . [because] they cannot impose a conviction when the jury disagrees.

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The jury’s unreviewable power to apply the law to the facts before it also serves as a potent check on the legislature. It allows the jury to ignore the letter of the law when it believes justice so requires.}

2. \textit{The Evolution of the Jury’s Powers}

Over the years, the jury’s power to simultaneously police all three branches of government slowly gave way to judicial oversight.\footnote{See id. at 65-84 (detailing evolution of jury’s powers).} In 1895, the Court first limited the jury’s broad ability to check the government by concluding, contrary to original practices, that criminal juries did not have a right to decide both the law and the facts as they found them, but rather that facts alone were
within the jury’s province. In doing so, the Court effectively announced that the jury had no nullification rights, but acknowledged that the Double Jeopardy Clause resulted in a lasting, unsanctioned power. The Court reflected upon the role of English common-law juries to act only as fact finders, and not judges of the law.

Under English common law, the jury acted exclusively as fact finder. It is argued that this role derived from society’s fear of courts and desires to “check the encroachments of judicial authority.” To act as such a check, Sunderland argued, the jury “must be of the people, bone of their bone and flesh of their flesh.”

The move away from an all-powerful jury continued in Patton v. United States. The Patton Court granted the defendant the right to completely remove the jury from trial. The Court began by establishing that the phrase trial-by-jury included with it an adoption of English common-law practices.

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97. See Sparf v. United States, 156 U.S. 51, 70 (1895) (restricting power of jury to deciding only facts).
98. See id. at 101-02 (noting power, but no such right, to disregard law through unreviewable general verdict). Rachel Barkow aptly interprets the Sparf decision as distinguishing the power of the jury to participate in jury nullification from the right of a jury to do so. See Barkow, supra note 82, at 67. Calling the opinion a “don’t ask, don’t tell” policy, Barkow reduces the ruling to a simple explanation: The Court’s distinction between a right to decide the law and the power to do so affected only the instructions a jury would receive. Although these instructions undoubtedly prevent some jurors from questioning the law and the judge’s interpretation of it, there are also undoubtedly other jurors who will interpret the law differently from the judge, in spite of the instructions.

99. Id. at 67-68. Barkow goes on to explain that the “Supreme Court has deliberately and consistently declined to remove the critical—if imperfect—safety valve for jurors to check general criminal laws.” Id. at 69; see Edson R. Sunderland, The Inefficiency of the American Jury, 13 MICH. L. REV. 302, 305 (1915) (noting jury’s diminishing power).
100. See Sunderland, supra note 98, at 302 (describing pitfalls of American jury system). Sunderland dissociates the English system from that of the rest of Europe—including Scandinavian, German, and “Anglo-Saxon” systems—that were charged with determining both law and facts. Id. at 302-03. According to Sunderland, these systems developed during “tribal days” when the laws and consequences were definite and simple so as to render any separation of the two. Id. at 303. In contrast, the English, and as a result the American system, were charged with finding only the facts because “while laws always grow more intricate with the development of social institutions, facts do not greatly change their nature.” Id. For that reason, “twelve casual citizens may be said to be as well qualified to pass upon an issue of fact in the [present] as were twelve such citizens in the reign of Edward III.”
101. Id. at 304.
102. Id. (stressing importance of jury of peers).
104. See id. at 298, 312 (holding defendant’s consented-to, express, and intelligent waiver of jury trial valid).
105. See id. at 288 (associating English jury laws with Sixth Amendment). The Court stated that the trial-by-jury clause “means a trial by jury as understood and applied at common law, and includes all the essential elements as they were recognized in this country and England when the Constitution was adopted . . . .” Id. These elements included: “(1) That the jury should consist of twelve men . . . ; (2) that the trial should be in the
Later, the Court gave due consideration to Judge Aldrich’s dissenting opinion in *Dickinson v. United States*, in which he noted that, in English common law, a defendant was unable to waive a trial by jury, and that the privilege was there for his protection.106 After considering *Dickinson*, the *Patton* court opined that the privilege of a jury trial in England and the earliest colonies was granted to a criminal defendant for the purpose of protecting his rights against oppressive governments as opposed to being part of the structure of government.107 As such, the Court held that the defendant could make the jury’s presence obsolete without disturbing the court’s jurisdiction.108

### C. The Venire: Its Origin, Development, and Incorporation

Scholars have only tangentially discussed the history and development of venire systems, typically mentioning their use alongside the development of jury trials.109 Even Blackstone referred to the venire in passing, giving rise to the belief that it was merely incidental to the English jury system.110 Traditionally, English courts empaneled juries from a collection of adult males pulled from the local community where the crime occurred.111 Only property owners within that community were included in the venire, disqualifying roughly three-fourths of the adult-male population.112

Adopting the English system, colonists established the American venire early in the eighteenth century, drawing potential jurors from small...
communities where the crime occurred. Originally, American veniremen were not randomly selected from the community, but were instead chosen by public officials. But the final jury was not always composed solely of the hand-picked veniremen. Rather, it was common practice to replace qualified but absent veniremen with mere bystanders to make up a final jury.

Other methods of jury selection included use of telephone books, tax rolls, and volunteers. Such practices tended to produce names of male heads of household because telephone listings and property taxes were expensive. Allowing volunteers to serve may prevent true community representation. Given the wide array of jury-selection processes used in the early twentieth century, the Committee on the Operation of the Jury System advocated, so “that grand and petit jurors who serve in United States district courts may be truly representative of the community, the sources from which they are selected should include all economic and social groups of the community.”

Today, the Federal Jury Selection and Service Act of 1968 provides a framework for federal jury selection procedures. Most importantly, the Act requires that juries be “selected at random from a fair cross section of the community.” In order to acquire the needed veniremen, names of individuals are selected from the district’s voter-registration lists, and then randomly selected names are summonsed to appear for service at a certain time and place. Scholars were unsurprised that jurors were to be drawn from voter-registration lists. For example, Alexis de Tocqueville equated the juror-selection system to universal suffrage, opining that jurors are an

113. Fersko, supra note 111, at 792 (noting history of venire in early America).
114. Alschuler & Deiss, supra note 112, at 879-80 (detailing history of American jury-selection processes). In a similar system, court clerks selected prominent persons in the community, called “key men,” to make up the venire. Section of Judicial Admin., Am. Bar Ass’n, The Improvement of the Administration of Justice 62 (5th ed. 1971) [hereinafter Administration of Justice].
116. Id. at 880.
117. See Administration of Justice, supra note 114, at 63 (reviewing practices whereby telephone books and tax rolls used for jury selection).
118. See id. (explaining discriminatory nature of jury selection based on telephone listings and tax rolls).
119. Rabinowitz v. United States, 366 F.2d 34, 55 n.53 (5th Cir. 1966) (discussing fair representation of cross section of community).
122. Id. § 1861 (imposing random selection of veniremen). The Jury Selection and Service Act has a second purpose, to assure that all citizens “have the opportunity to be considered for service on grand and petit juries . . . and shall have an obligation to serve as jurors when summoned for that purpose.” Id.
123. Id. §§ 1863, 1866 (providing random selection from voter-registration lists best practice for juror selection).
important part of the democratic process. Others, though, criticized the jury-
selection process as drawing together “the common citizenry” incapable of
arriving at a well-founded conclusion. In either case, the Act ensures that
today’s criminal jury trials will have a venire incorporating men and women of
all ages and characteristics.

III. ANALYSIS

The American public-trial right has historical foundations in English
common law, yet the right’s incorporation and subsequent case law support a
key distinction between the English common-law-based and the American
Constitution-based systems. Most prevalent, the foundation upon which the
English built their public-trial guarantee included common-law justifications—
a privilege acknowledged by scholars as preventing injustice through public
hearings. The American system, however, also developed with the Star
Chamber in its recent past. The Founders’ concern for the criminal
defendant—the victim of Star Chamber atrocities—is historically significant.

Our nation’s Founders incorporated the public-trial right into the
Constitution to prevent government interference with the rights of a criminal
defendant. In England, the common-law right to a public trial developed
long before the Star Chamber earned its infamous reputation. Englishmen
and early settlers were content relying on common-law guarantees. But

125. Id. at 117 (equating jury service to suffrage). John Ashby further described jury service as “the most
direct contact that a citizen has with his government and, next to voting, about the only chance he has to
participate in it as a basic decision-maker.” John B. Ashby, Juror Selection and the Sixth Amendment Right to

126. HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 5 (1966) (criticizing American jury
system). Dean Griswold of Harvard Law School stated: “Why should anyone think that 12 persons brought in
from the street, selected in various ways, for their lack of general ability, should have any special capacity for
deciding controversies between persons?” Id. (citation omitted).


128. See supra note 25 and accompanying text (discussing general advantages to jury trials and
significance of English common law); supra note 50 (quoting Supreme Court’s acknowledgment that juries
check government power).

129. See Radin, supra note 20, at 381-82 (reviewing English common-law privilege); Shapiro, supra note
20, at 782 (discussing history of English public-trial guarantee); see also HALE, supra note 22 (discussing
sixteenth-century English history).

130. See FEW, supra note 39, at 73 (illustrating importance of Star Chamber on debates about Sixth
Amendment); see also Gannett Co. v. DePasquale, 443 U.S. 368, 420 (1979) (Blackmun, J., dissenting)
(arguing Star Chamber, although linked to secrecy, in fact open court); Davis v. United States, 247 F. 394, 395
(8th Cir. 1917) (accepting secretive Star Chamber practices as force behind Sixth Amendment’s incorporation).

131. See FEW, supra note 39, at 73 (discussing historical concerns about Star Chamber practices); supra
text accompanying note 39.

132. See FEW, supra note 39, at 73 (detailing incorporation); see also Gannett Co., 443 U.S. at 412-13
(indicating secretive trials greatly influenced Sixth Amendment adoption); Davis, 247 F. at 395
(acknowledging important role Star Chamber played in Sixth Amendment incorporation).

133. See supra note 22 and accompanying text (discussing rise of jury trial well prior to Star Chamber).

134. See HOLDSWORTH, supra note 27, at 163, 189 (detailing rise and fall of Star Chamber); IENKS, supra
during the Sixth Amendment’s ratification processes, the Founding Fathers specifically acknowledged the Star Chamber’s prevalence amongst the concerns requiring incorporation of the public-trial right.135 Had our forefathers wished to proceed by relying on the English common-law guarantee, they would have done so.136

Instead, the Founders reacted to Star Chamber practices, finding it necessary to provide criminal defendants with specific, enumerated safeguards.137 Courts acknowledge that the government must show significant justifications before infringing upon a defendant’s rights.138 The question becomes whether the government’s use of a venire during jury selection satisfies the defendant’s right to a public trial.

Acknowledging the Star Chamber’s importance to Sixth Amendment history supports, rather than detracts from, the majority’s opinion in the heavily divided case of Gannett Co. v. DePasquale.139 On the heels of the Supreme Court’s decision in In re Oliver, the Gannett Co. Court properly decided that the Sixth Amendment guarantees a criminal defendant the right to a public trial, and rejected the contention that the public possessed any reciprocal guarantee.140 While the Gannett Co. Court reviewed the history of the Sixth Amendment’s right to a public trial, it alluded to the probability that the right resulted from a historically significant experience.141 The Court then made the correct inference: English common law failed to adequately protect citizens from secretive courts such as the Star Chamber, triggering fear in America’s Founders and causing them to explicitly guarantee public jury trials for
criminal defendants. In response, our nation’s Founders, most concerned with protecting a criminal defendant’s rights from government abuse, guaranteed that the government would not control his or her public-trial guarantee.

Because our nation’s Founders sought to prohibit government interference with a criminal defendant’s public-trial right, it would be illogical to allow a government-mandated jury pool to satisfy that right. Such a practice could cause the American public-trial guarantee to revert into a Star Chamber-like scenario, essentially allowing the government to control the defendant’s right to a public trial. For example, Congress could require that a single venireman remain in the courtroom for every stage of the defendant’s trial, thus effectively giving the defendant a “public” trial in the most disingenuous sense. Allowing the legislature to singlehandedly dispose of a constitutional safeguard guaranteed to a criminal defendant would run afoul of years of constitutional case law.

Accepting the venire as a sufficient safeguard of the defendant’s public-trial right could have additional consequences. For example, the government may argue that the defendant waives his public-trial right if he or she chooses a bench trial over a jury trial. Although decided prior, Patton v. United States followed a similar logical sequence as In re Oliver and Gannett Co. to conclude


143. Oliver, 333 U.S. at 269-70 (explaining how Star Chamber practices offended liberty and rights of accused); see U.S. Const. amend. VI; see also Holdsworth, supra note 27, at 184, 189 (criticizing Star Chamber practices of torturing defendants to extract self-incriminating confessions). The dissenting justices in Gannett Co. argued that there was “no indication that the First Congress, in proposing what became the Sixth Amendment, meant to depart from the common-law practice by creating a power in an accused to compel a private proceeding.” Gannett Co., 443 U.S. at 426 (Blackmun, J., dissenting). They argued that the proposition that a defendant may control the public nature of his trial via the Sixth Amendment is unsupportable. Id. at 427. But, historical evidence compels the inference that the First Congress intended to solidify the public-trial right amongst the most precious rights of a criminal defendant by designating it as such in the Sixth Amendment, thus departing from the common law. Id. at 384-85 (majority opinion) (giving examples of other constitutional rights secured solely for accused).


145. See Holdsworth, supra note 27, at 184 (illustrating disadvantages of Star Chamber proceedings). As Holdsworth explains, criminal defendants of the Star Chamber were afforded a hearing in which the only people present were government officials and the defendant. Id. During that hearing, the judge would simply read the evidence obtained against the defendant, and sentence him accordingly. Id. Allowing the government, through statute, to interject the “public” into the defendant’s jury empanelment proceeding would be tantamount to giving the government a trump card over the defendant’s public-trial guarantee. Id.; see also von Moschzisker, supra note 109, at 5-6 (discussing incorporation of venire into English law resulted from invader practices).

146. See § 1861 (requiring citizen involvement in jury selection).

147. See U.S. Const. amend. VI, Gannett Co., 443 U.S. at 384-86 (declaring accused, not public, guaranteed public-trial).

that the Framers intended to replace the English common-law jury-trial right with our own.\textsuperscript{149} In explaining the significance of its incorporation, the Court went so far as to distinguish the English common law from the American version by characterizing the former as a "privilege" rather than a fundamental "right."\textsuperscript{150} The \textit{Patton} decision evidences the American system’s significant departure from English common law.\textsuperscript{151} By incorporating the guarantee of a jury trial into the Constitution as a right capable of being waived by the defendant, it follows that the jury’s presence, and thus the use of the venire, is not required in every criminal trial.\textsuperscript{152}

Because a defendant may waive his right to a jury trial, use of the venire is not always necessary.\textsuperscript{153} Treating the venire as a constitutionally significant safeguard could conflate the Sixth Amendment guarantees of a public trial and trial by jury into a single guarantee.\textsuperscript{154} For example, should a defendant waive his right to a jury trial, the government may argue that he simultaneously waived his Sixth Amendment right to a public trial because the “public’s” presence was guaranteed and waived by dismissing the venire.\textsuperscript{155} Such an argument would be especially potent because the government statutorily provided for satisfaction of the right.\textsuperscript{156}

Finally, the Founders’ focus on protecting the criminal defendant from oppressive government would be undermined by treating the venire as a sufficient safeguard to the defendant’s public-trial right. Importantly, the venire lacks the power afforded a seated juror.\textsuperscript{157} While it may be true that the jury has the power to check arbitrary government action, veniremen have no power to protect the defendant from overzealous prosecutors or oppressive

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\bibitem{149} \textit{Id.} at 297-98 ("[T]he framers of the Constitution . . . were intent upon preserving the right of trial by jury primarily for the protection of the accused" rather than "as an integral and inseparable part of the court . . . ").
\bibitem{150} \textit{See id.} at 297 (adopting distinction made by Joseph Story around time of Constitution’s adoption); \textit{see also} Declaration and Resolves, \textit{supra} note 89, at 3 (describing English jury trial as privilege rather than right).
\bibitem{151} \textit{Compare Patton,} 281 U.S. at 297-98 (reasoning accused may waive his or her rights under Constitution), \textit{with Dickinson v. United States,} 159 F. 801, 821 (1st Cir. 1908) (Aldrich, J., dissenting) (arguing accused may waive his or her right to jury trial only in limited circumstances).
\bibitem{152} \textit{Patton,} 281 U.S. at 297-98 (holding criminal defendant may waive jury trial).
\bibitem{153} \textit{See id.} at 298 (implying waiver of jury also waives jury pool).
\bibitem{154} \textit{See U.S. Const.} amend. VI; \textit{see also} 28 U.S.C. § 1861 (2006) (requiring citizen involvement in jury selection); \textit{supra} Part II.A-B (explaining defendant’s enunciated guarantee to public and jury trials).
\bibitem{156} \textit{See § 1861} (describing powers of jury pool members); \textit{supra} Part II.B (documenting jury’s role in criminal trials).
\bibitem{157} \textit{Cooley,} \textit{supra} note 59, at 647 (reviewing power of public oversight of jury). Thomas Cooley argued that the public-trial guarantee benefited the accused by making his or her triers aware that their responsibility would be publicly scrutinized. \textit{Id.} Cooley’s argument supports the view that the venire is insufficient to safeguard a defendant’s public-trial guarantee, and advocates that the public’s viewing of the process by which jurors are selected from the venire helps to protect the defendant’s rights. \textit{See id.}
laws.158 Rather, the U.S. Code describes the venire’s duties and powers.159
Allowing the government to statutorily engrave a constitutional safeguard into
a powerless group of individuals would be inconsistent with the goals of the
Sixth Amendment.160

IV. CONCLUSION

This historical analysis reveals that the nation’s Founders reacted to the
public outcry surrounding the Star Chamber, leading to the incorporation of the
Sixth Amendment right to a public trial. Most notably, the Founders
guaranteed that the government abuse witnessed in the Star Chamber would not
occur under American laws by explicitly restricting government interference
with Sixth Amendment rights. Courts should continue to closely protect the
Sixth Amendment’s right to a public trial, and reverse cases in which the right
is violated.

To this end, it would be unwise and illogical to accept the venire as
sufficient to safeguard the defendant’s rights during jury empanelment. Doing
so would allow the legislature to circumvent the Constitution by requiring
certain “public persons” to be present at every stage of the trial. Moreover,
should a court hold that the venire, a statutory mechanism, is sufficient to
safeguard the defendant’s constitutional rights, prosecutors would regularly
argue that waiving a jury trial would simultaneously waive the defendant’s
right to a public trial. Finally, unlike a jury, the venire is powerless to rectify
any perceived wrongdoing by overzealous prosecutors and biased judges.
Therefore, I conclude that the venire is not, and should not be, an adequate
protection of the defendant’s constitutional right to a public trial.

Eric J. Walz

158. See Jefferson, supra note 92, at 283 (noting jury’s importance); see also Duncan v. Louisiana, 391
U.S. 145, 156 (1968) (noting jury drawn from community safeguards against “the compliant, biased, or
eccentric judge”); Barkow, supra note 82, at 48-49. Only a seated jury member may cast judgment on a
defendant as guilty or not guilty, and thus only a jury member has the power to police the government.
Barkow, supra note 82, at 49-50.
159. See §§ 1861-71 (describing duties and requirements of veniremen).
160. See Barkow, supra note 82, at 48-50 (reaffirming jury has power to check oppressive government
with acquittals); see also COOLEY, supra note 59, at 647 (acknowledging spectators keep triers aware of their
responsibility).