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## COMMENT

### HEARTS ON THEIR SLEEVES: SYMBOLIC DISPLAYS OF EMOTION BY SPECTATORS IN CRIMINAL TRIALS

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*This Comment addresses whether public displays of emotion in the form of expressive or symbolic clothing negatively impact a criminal defendant's right to a fair trial. It weighs the potentially prejudicial influence of allowing expressive clothing in the courtroom against the importance of free speech and victims' rights. This Comment also considers the powerful impact of extrinsic evidence on the psychology of juries. Ultimately, this Comment recommends that all expressive clothing be banned from criminal courtrooms.*

#### I. INTRODUCTION

The pursuit of justice within the American legal system hinges on impartiality, fairness, and evenhandedness.<sup>1</sup> These idealistic concepts are especially imperative in the sphere of criminal law, where the life of the criminally accused may be literally or fundamentally at stake.<sup>2</sup> The Supreme Court captured the deep-seated necessity for fairness in criminal trials in *Gideon v. Wainwright*: "From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law."<sup>3</sup> As the Supreme Court explains, the crucial notion of fairness in the courtroom is

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<sup>1</sup> See *In re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process.").

<sup>2</sup> See *Irvin v. Dowd*, 366 U.S. 717, 727 (1961) ("[W]here one's life is at stake—and accounting for the frailties of human nature—we can only say that in light of the circumstances here the finding of impartiality does not meet constitutional standards.").

<sup>3</sup> 372 U.S. 335, 344 (1963).

grounded in formal laws.<sup>4</sup> The Sixth Amendment to the United States Constitution guarantees criminally-accused defendants the right to a speedy and public trial by an impartial jury.<sup>5</sup> Additionally, the Federal Rules of Evidence aim to ensure fairness and justice in courtroom proceedings.<sup>6</sup>

Despite its optimistic laws and goals, the American criminal justice system is inevitably imperfect because it depends on humans—who are inherently flawed.<sup>7</sup> As a result, it is not implausible for a guilty criminal to be acquitted, nor is it unimaginable for an innocent defendant to be mistakenly put behind bars.<sup>8</sup> Jurors are especially susceptible to external factors, such as compassion, sympathy, and empathy, which can greatly influence their verdicts.<sup>9</sup> Indeed, these peripheral factors can influence the decision of the jury “as much as, if not more than, the factual merits of a case.”<sup>10</sup> Judges and attorneys, then, have a crucial responsibility to guarantee fair trials by protecting the jury from immaterial influences.<sup>11</sup>

Nevertheless, outside factors can still influence a jury.<sup>12</sup> Trial spectators within the courtroom, especially those who sit in plain view of jurors and in close proximity to the jury’s box, can intentionally or unintentionally affect the jury.<sup>13</sup> Justice Holmes once observed that “[a]ny judge who has sat with juries knows that, in spite of forms, they are extremely likely to be impregnated by the environing atmosphere.”<sup>14</sup> In recent years, trial spectators have threatened to “impregnate” the minds of

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<sup>4</sup> *Id.*

<sup>5</sup> U.S. CONST. amend. VI, cl. 1.

<sup>6</sup> FED. R. EVID. 102 (“These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.”).

<sup>7</sup> See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 65 (1866) (Argument for the Petitioner) (“We do not assert that the jury trial is an infallible mode of ascertaining truth. Like everything human, it has its imperfections.”).

<sup>8</sup> See Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1321 (1997).

<sup>9</sup> Peter H. Huang, *Emotional Responses in Litigation*, 12 INT’L REV. L. & ECON. 31, 41 n.12 (1992).

<sup>10</sup> *Id.*

<sup>11</sup> See FED. R. EVID. 401-15; see also MODEL RULES OF PROF’L CONDUCT R. 3.4(e) (2007) (prohibiting attorneys from alluding to “any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence”).

<sup>12</sup> See 58 AM. JUR. 2D *New Trial* § 235 (2002) (explaining how the conduct of spectators can be grounds for a new trial).

<sup>13</sup> See 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 (2007).

<sup>14</sup> *Frank v. Mangum*, 237 U.S. 309, 349 (1915) (Holmes, J., dissenting).

jurors by wearing expressive clothing to court.<sup>15</sup> Specifically, it is a growing trend for spectators to publicly express their emotion by wearing buttons depicting the victim, armbands, and color-coded ribbons to trial.<sup>16</sup>

This Comment examines how symbolic clothing affects a criminal defendant's constitutional rights. It balances free speech and victims' rights considerations against concerns of prejudicial influence. This Comment concludes by proposing a comprehensive ban on expressive clothing in all courtrooms.

After a brief background, Part III(A) concentrates on the compelling justifications for an outright ban: Section One analyzes the issue from a psychological perspective; Section Two details the inherent prejudice in symbolic items in the courtroom; Section Three shows how a defendant's presumption of innocence is undercut by public displays of emotion; Section Four focuses on the Sixth Amendment; and Section Five addresses due process issues. Part III(B) of this Comment analyzes the arguments that expressive clothing does not impede upon the judicial process: Section One addresses the rights of victims; Section Two tackles unavoidable emotion within the courtroom; Section Three discusses First Amendment concerns; and Section Four deals with the practical issues of a ban on expressive clothing.

## II. BACKGROUND

Over the past twenty years, appellate courts across the country have reexamined criminal convictions because spectators wore symbolic displays of emotion during the trial.<sup>17</sup> These cases involve a wide variety of expressive apparel, ranging from ribbons to colored armbands to corsages

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<sup>15</sup> See generally *Musladin v. Lamarque*, 427 F.3d 647 (9th Cir. 2005), *vacated sub nom. Carey v. Musladin*, 127 S. Ct. 649 (2006) (spectators wore buttons depicting the victim during the jury trial); *Palumbo v. Ortiz*, 89 F. App'x 3 (9th Cir. 2004) (unpublished mem.) (victim's relatives wore badges with pictures of the victim on them); *Norris v. Risley*, 918 F.2d 828 (9th Cir. 1990) (spectators wore buttons that said "Women Against Rape" to rape trial); *United States v. Yahweh*, 779 F. Supp. 1342 (S.D. Fla. 1992) (defendant's supporters wore religious garb to his trial); *People v. Houston*, 29 Cal. Rptr. 3d 818 (Ct. App. 2005) (spectators displayed buttons and placards with image of victim on them); *People v. Pennisi*, 563 N.Y.S.2d 612 (Sup. Ct. 1990) (decedent's family wore black and red corsages in the courtroom); *Cooper v. Commonwealth*, No. 0819-03-4, 2004 WL 1876416 (Va. Ct. App. Aug. 24, 2004) (spectators displayed photographs of the victim in the courtroom).

<sup>16</sup> *Carey*, 127 S. Ct. at 651; *Palumbo*, 89 F. App'x at 4; *Norris*, 918 F.2d at 829; *Yahweh*, 779 F. Supp. at 1343; *Houston*, 29 Cal. Rptr. 3d at 831; *Pennisi*, 563 N.Y.S.2d at 613; *Cooper*, 2004 WL 1876416.

<sup>17</sup> See generally *Carey*, 127 S. Ct. at 651; *Palumbo*, 89 F. App'x at 4; *Norris*, 918 F.2d at 829; *Yahweh*, 779 F. Supp. at 1343; *Houston*, 29 Cal. Rptr. 3d at 831; *Pennisi*, 563 N.Y.S.2d at 613; *Cooper*, 2004 WL 1876416.

to matching uniforms to t-shirts.<sup>18</sup> Each court handled the situation differently. Some held that expressive clothing infringes on a defendant's right to a fair trial because it erodes the defendant's right to be presumed innocent and creates an unacceptable risk that the courtroom showing of support will unduly influence the jury.<sup>19</sup> Other courts held that any prejudice presented by a spectator's display can be cured by appropriate instructions from the judge to the jury.<sup>20</sup>

The United States Supreme Court has addressed whether courtroom conditions infringe upon a defendant's right to a fair trial in two cases: *Estelle v. Williams*<sup>21</sup> and *Holbrook v. Flynn*.<sup>22</sup> In *Estelle*, the defendant was compelled to wear identifiable prison garb to his jury trial.<sup>23</sup> The defendant specifically asked to wear his civilian clothes during his trial, but his request was denied.<sup>24</sup> Ultimately, he wore prison-issued clothing and was convicted of murder.<sup>25</sup> The Court determined that when a defendant is compelled to wear a prison uniform to trial, "the constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment."<sup>26</sup> The opinion explained that when a courtroom situation is challenged as prejudicial, the court must determine whether "an unacceptable risk is presented of impermissible factors coming into play."<sup>27</sup>

In *Holbrook v. Flynn*, the front row of the spectators' section was filled with customary courtroom security plus four additional uniformed state troopers.<sup>28</sup> Defense counsel argued that the strong presence of the uniformed state troopers influenced the jury by implying that the defendants were of "bad character."<sup>29</sup> The Supreme Court disagreed and held that the jury could reasonably draw a wide range of inferences from the officers; therefore, the presence of the officers was not inherently prejudicial.<sup>30</sup> The

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<sup>18</sup> See *People v. Aleem*, 149 P.3d 765, 770 (Colo. 2007) (finding that a defendant, who wore a series of controversial t-shirts to trial, should not have been held in contempt of court); *Pennisi*, 563 N.Y.S.2d at 613; *Yahweh*, 779 F. Supp. at 1343; *In re Woods*, 114 P.3d 607, 616 (Wash. 2005) (holding that defendant's right to fair trial was not denied when victim's family wore black and orange commemorative ribbons in the courtroom).

<sup>19</sup> See, e.g., *Norris*, 918 F.2d at 834.

<sup>20</sup> See, e.g., *Houston*, 29 Cal. Rptr. 3d at 851.

<sup>21</sup> 425 U.S. 501 (1976).

<sup>22</sup> 475 U.S. 560 (1986).

<sup>23</sup> *Estelle*, 425 U.S. at 502.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 502-03.

<sup>26</sup> *Id.* at 504-05.

<sup>27</sup> *Id.* at 505.

<sup>28</sup> 475 U.S. 560, 562 (1986).

<sup>29</sup> *Id.* at 563.

<sup>30</sup> *Id.* at 569.

Court distinguished the situation from that in *Estelle* by arguing that unlike forcing a defendant to wear prison garb, placing security guards in a courtroom serves a legitimate state purpose.<sup>31</sup>

On October 11, 2006, the Supreme Court heard oral arguments on the constitutionality of one specific type of non-verbal expression at issue in this Comment: pictorial buttons.<sup>32</sup> In that case, family members of a murder victim wore buttons depicting a photograph of the victim to court.<sup>33</sup> The family sat in the front row of the gallery, and on each day of the trial at least three members of the family wore the buttons.<sup>34</sup> The buttons were several inches in diameter and, according to the defendant, “very noticeable.”<sup>35</sup>

On December 11, 2006, the Court issued an opinion noting that “the effect on a defendant’s fair-trial rights of the spectator conduct to which [the defendant] objects is an open question in our jurisprudence.”<sup>36</sup> The Supreme Court specifically acknowledged that separate courts have handled the issue in different ways.<sup>37</sup> Still, the Court chose not to rule on whether spectator buttons are unconstitutional.<sup>38</sup> The majority did not expressly comment on why it sidestepped the opportunity to make a rule, but Justice Kennedy’s concurrence explained that a rule against buttons in the courtroom “should be explored in the court system, and then established in [the Supreme] Court.”<sup>39</sup>

This Comment picks up where the Supreme Court left off in *Musladin* and argues that the legal conception of symbolic speech within the courtroom should include all forms of non-verbal expression. The Comment looks at the overall effect of all types of symbolic spectator conduct including the aforementioned use of ribbons, armbands, and

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<sup>31</sup> *Id.* at 571-72 (“Unlike a policy requiring detained defendants to wear prison garb, the deployment of troopers was intimately related to the State’s general interest in maintaining custody during the proceedings . . .”).

<sup>32</sup> *Carey v. Musladin*, 127 S. Ct. 649 (2006).

<sup>33</sup> *Musladin v. Lamarque*, 427 F.3d 653, 655 (9th Cir. 2005), *vacated sub nom.* *Carey v. Musladin*, 127 S. Ct. 649 (2006).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Carey*, 127 S. Ct. at 653.

<sup>37</sup> *Id.* at 654 (“[L]ower courts have diverged widely in their treatment of defendants’ spectator-conduct claims.”).

<sup>38</sup> The primary issue in *Musladin* was whether the Ninth Circuit improperly held that a lower court’s decision was contrary to or an unreasonable application of clearly established federal law, as required under the Antiterrorism and Effective Death Penalty Act of 1996. The Supreme Court was able to resolve that issue without opining as to the constitutionality of the spectator conduct involved in the case.

<sup>39</sup> *Id.* at 657 (Kennedy, J., concurring).

clothing, as well as other forms of expression that may be used in the future.

### III. DISCUSSION

There are five chief reasons to forbid expressive clothing and accessories in all courtrooms. Expressive items (i) psychologically affect juries; (ii) are inherently prejudicial;<sup>40</sup> (iii) undercut the presumption of innocence;<sup>41</sup> (iv) violate the Sixth Amendment;<sup>42</sup> and (v) infringe upon a defendant's right to due process.<sup>43</sup> This Comment will address each of these arguments and then respond to the four primary arguments that symbolic clothing should be permitted, namely: (i) victims have a special place in the courtroom;<sup>44</sup> (ii) other displays of emotion are permitted;<sup>45</sup> (iii) the First Amendment authorizes spectators to express themselves; and (iv) the practicality of regulating spectators' clothing makes an outright ban unworkable.

#### A. COMPELLING JUSTIFICATIONS FOR AN OUTRIGHT BAN

##### *1. A Psychological Perspective*

Symbolic clothing and accessories are inherently prejudicial and thus hinder the possibility of a fair trial.<sup>46</sup> The underlying principle that supports each of the following arguments for banning symbolic clothing is the reality that juries are psychologically susceptible to influences within the courtroom.<sup>47</sup> Sociological studies of jurors and juries confirm that they make decisions based on emotional factors.<sup>48</sup> For example, one applied research psychologist argues that "jurors reach their verdict decisions with their right brains, then endorse these decisions with their left brains (i.e.,

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<sup>40</sup> Opening Brief of Petitioner-Appellant at 28-32, *Musladin v. Lamarque*, 403 F.3d 1072 (9th Cir. 2006) (No. 03-16653).

<sup>41</sup> *Id.* at 32.

<sup>42</sup> Brief in Opposition to Petition for Writ of Certiorari at 28, *Carey v. Musladin*, 127 S. Ct. 649 (2006) (No. 05-785), 2006 WL 2506636.

<sup>43</sup> *Id.* at 9.

<sup>44</sup> See Brief of Amici Curiae New Jersey Crime Victims' Law Center in Support of Petitioner at 4, *Carey v. Musladin*, 547 U.S. 1069 (2006) (No. 05-785), 2006 WL 1746419 [hereinafter Brief for New Jersey Crime Victims' Law Center].

<sup>45</sup> *Id.* at 9.

<sup>46</sup> See *Estelle v. Williams*, 425 U.S. 501, 503 (1976) (finding that the state cannot force a defendant to stand trial in prison garb because such attire could undermine the fairness of the fact finding process by undercutting the presumption of innocence).

<sup>47</sup> See Huang, *supra* note 9, at 41-42 n.12.

<sup>48</sup> *Id.*

jurors utilize emotions to decide the case, then shuffle through the evidence to authenticate their emotional reactions on an intellectual basis).<sup>49</sup> Since jurors rely on emotions in their decision-making process, it follows that they are especially receptive to emotional factors. The juxtaposition of courtroom displays of emotion with emotionally-influenced jurors creates a severe risk that verdicts will be rendered on sentiments rather than facts.

In order to fully understand the extent to which emotions play a role in a jury's verdict, it is useful to examine the psychological basis for the idea. There are essentially three reasons that emotions, particularly sympathy, affect jurors' abilities to reach decisions.<sup>50</sup> First, sympathy informs jurors that someone else is "suffering significantly and undeservedly."<sup>51</sup> This can cause people to feel that an injustice has been done because there is a "discrepancy between what the sufferer deserves and what has happened to him."<sup>52</sup> As a result of this inconsistency, jurors often feel the desire to relieve the suffering of another.<sup>53</sup> Applied to the issue of expressive clothing in the courtroom, spectators are purposefully and deliberately exposing their emotional sentiments to the jury. Once the jury recognizes that the victims are experiencing undue suffering, it will want to redistribute justice to alleviate their pain.<sup>54</sup>

Of course, juries may feel sympathy for victims' family and friends even in the absence of public displays of emotion. Jurors can logically deduce that crimes negatively affect all associates of the victim. They may not know, however, the extent to which the crime has pained the family members and friends of the victim. Symbolic pieces of clothing and expressive accessories communicate to the jury that the loss was enormous. Additionally, they serve as constant reminders of the suffering endured, implicitly appealing to the sympathies of the jury. The unspoken message of the spectators is clear: the way to ease our pain is to convict the defendant for doing this to us. Given the human tendency to value the suffering of others, it is not unreasonable to believe that the jury will subconsciously obey the spectators' wishes.<sup>55</sup>

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<sup>49</sup> Amy Singer, *The Use of Singerian Litigation Psychology to Persuade Jurors During Eminent Domain Cases*, SE45 ALI-ABA COURSE MATERIALS J. 259, 275 (2000).

<sup>50</sup> Neal R. Feigenson, *Sympathy and Legal Judgment: A Psychological Analysis*, 65 TENN. L. REV. 1, 29 (1997).

<sup>51</sup> *Id.* at 30 (emphasis omitted).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 31.

<sup>54</sup> See generally *id.* at 30-32.

<sup>55</sup> *Id.* at 30.



Second, emotions allow jurors to view the world from the sufferer's perspective and shape their decisions accordingly.<sup>56</sup> In fact, "perspective-taking gives the legal decision-maker an enhanced appreciation of the victim's situation that might not be available" without sympathy.<sup>57</sup> When a juror is able to see the case from the victim's perspective, that juror is more likely to identify with the victim's side of the trial.<sup>58</sup> Again, the danger of bias resulting from public displays of emotion in the courtroom is evident.

Third and finally, experiencing emotion "motivates the decision-maker to do something about the suffering she perceives because sympathy indicates that the decision-maker (properly) cares about and values that suffering."<sup>59</sup> This is true because "whatever one's principles of justice they are utterly meaningless without that fundamental human sense of caring and compassion, our ability to understand and be concerned about the well-being of other human beings . . ."<sup>60</sup> Under this logic, a juror's human instinct to care for others will prompt that juror to make the decision that will most likely alleviate suffering.<sup>61</sup>

The overarching problem with jurors experiencing sympathy prompted by external factors is that "[t]o the extent that justice depends on impartial fairness, sympathetic bias may yield unfair decisions."<sup>62</sup> Juries are instructed to make a decision based solely on the evidence presented to them during the trial. The Supreme Court has "declared that one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial."<sup>63</sup> Whenever the sympathies of the jury are inflamed to the point that the verdict is influenced by those emotions, the jury has not based their decision solely on the evidence introduced. Indeed, the Federal Rules of Evidence explicitly prohibit evidence that purposefully plays upon the sympathies of a jury from being introduced at trial.<sup>64</sup>

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<sup>56</sup> *Id.* at 33.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 36.

<sup>60</sup> *Id.* at 36 (quoting Robert C. Solomon, *The Emotions of Justice*, 3 SOC. JUST. RES. 345, 360 (1989)).

<sup>61</sup> Feigenson, *supra* note 50, at 36 ("Experiencing sympathy motivates the decision-maker to do something about the suffering she perceives . . .").

<sup>62</sup> *Id.* at 49.

<sup>63</sup> *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978).

<sup>64</sup> FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

## 2. *The Inherent Prejudice of Expressive Items*

Taking psychological effects into consideration, symbolic expression in the courtroom decreases the possibility of a fair trial.<sup>65</sup> In *Estelle*, the Supreme Court laid out a legal standard for determining whether courtroom conditions infringe upon a defendant's right to a fair trial.<sup>66</sup> The Court stated that a courtroom arrangement was inherently prejudicial, and thus infringed upon a defendant's right to a fair trial, when "an unacceptable risk is presented of impermissible factors coming into play."<sup>67</sup> In *Holbrook*, the Court stated that the standard for determining whether something is inherently prejudicial does not depend on "whether jurors articulated a consciousness of some prejudicial effect," but whether there is a *risk* that external factors could influence the verdict.<sup>68</sup>

Under this standard, symbolic items are inherently prejudicial. As the Supreme Court stated, even the *threat* of impermissible factors coming into play should preclude such items.<sup>69</sup> In *In re Murchison*, the Court made explicit this low threshold for measuring prejudice: "[O]ur system of law has always endeavored to prevent even the probability of unfairness."<sup>70</sup> The grave importance of fairness in the criminal system demands that even *potentially* prejudicial factors be removed from the process.<sup>71</sup> Applied here, the mere chance that symbolic displays of emotion could bring "impermissible factors into play" should exclude the items from the courtroom.

As explained above, the Supreme Court clearly recognizes that "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of . . . other circumstances not adduced as proof at trial."<sup>72</sup> When imperfect humans<sup>73</sup> sitting on a jury are given the opportunity to reach a decision based on something other than the merits of the case, there is an inherent danger of injustice. The emotional displays of spectators may tempt jurors to make a decision based on sympathy, rather than on legal facts.

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<sup>65</sup> See *Estelle v. Williams*, 425 U.S. 501, 504-05 (1976).

<sup>66</sup> *Id.* at 505.

<sup>67</sup> *Id.*

<sup>68</sup> *Holbrook v. Flynn*, 475 U.S. 560, 570 (1986).

<sup>69</sup> *Id.*

<sup>70</sup> 349 U.S. 133, 136 (1955).

<sup>71</sup> *Id.*

<sup>72</sup> *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978).

<sup>73</sup> See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 65 (1866) (referring to the natural flaws of juries: "We do not assert that the jury trial is an infallible mode of ascertaining truth. Like everything human, it has its imperfections.").

Opponents argue that non-verbal expressions are not inherently prejudicial because they do not portray an explicit message.<sup>74</sup> Under this reasoning, there is no risk of impermissible factors coming into play because the factors are not overt. In deciding *Holbrook*, the Court recognized that “prison clothes are unmistakable indications of the need to separate a defendant from the community at large.”<sup>75</sup> In other words, the prison clothes sent a clear message to the jury that the State believed the defendant to be dangerous, harmful, and, implicitly, guilty.<sup>76</sup> Unlike prison clothes, however, expressive items can be interpreted in many different ways. The family and friends of a murder victim may simply be expressing their grief rather than implicating any guilt onto the defendant. They may be wearing the expressive items out of a simple desire to remember the victim. Thus, some argue that just as the presence of state troopers could produce a wide variety of inferences,<sup>77</sup> so too could the presence of expressive items relay a variety of messages to the jury.<sup>78</sup>

However, even assuming that family and friends intend the expressive items to be mere memorials to the victim, the items are still inserting irrelevant external factors into the case.<sup>79</sup> The families are still communicating non-verbally with the jury. It is true that a wide variety of inferences may be drawn from the non-verbal communication, but that is precisely the problem. The danger is that despite the intentions of the spectators, the jury may interpret the symbols as signs of guilt, or emotional pleas for a guilty verdict. The possibility that the items will inflame the jury’s desire to “rectify” the family’s loss as best they can is very serious.

Additionally, the danger of unfair prejudice from expressive mementos outweighs any legal interest the state may have in allowing such items to be displayed. The Supreme Court in *Estelle* considered that “[u]nlike physical restraints . . . compelling an accused to wear jail clothing furthers no essential state policy.”<sup>80</sup> Stated differently, the Court recognized that outside factors may be permissible if they serve another state purpose.<sup>81</sup>

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<sup>74</sup> See *Stahl v. Henderson*, 472 F.2d 556, 557 (5th Cir. 1973) (“No prejudice can result from seeing that which is already known.”).

<sup>75</sup> *Holbrook v. Flynn*, 475 U.S. 560, 569 (1986).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Brief in Opposition to Petition for Writ of Certiorari at 25, *Carey v. Musladin*, 127 S. Ct. 649 (2006) (No. 05-785), 2006 WL 1746418.

<sup>79</sup> See *Estes v. Texas*, 381 U.S. 532, 562 (1965) (“The basic premise behind the Court’s conclusion has been the notion that judicial proceedings can be conducted with dignity and integrity so as to shield the trial process itself from . . . irrelevant external factors, rather than to aggravate them . . .”).

<sup>80</sup> *Estelle v. Williams*, 425 U.S. 501, 505 (1976).

<sup>81</sup> *Id.*

The Court reiterated the importance of a state's interest in *Holbrook*, when it stated that the deployment of state troopers was justified because it was "intimately related to the State's legitimate interest in maintaining custody during the proceedings."<sup>82</sup> There is no essential state interest in allowing spectators to wear expressive clothing that might justify allowing such prejudicial materials into the courtroom. The probability of impermissible communication, therefore, easily overshadows the non-existent state concern.

### 3. The Presumption of Innocence

The presumption that every criminal defendant is innocent until proven guilty is undermined when spectators display their opinions in front of the jury.<sup>83</sup> In 1895, the Supreme Court unequivocally articulated the importance of a presumption of innocence for the criminally accused: "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."<sup>84</sup> In doing so, the Court made clear that every criminal defendant deserves to be presumed innocent.<sup>85</sup> If trial spectators are allowed to make non-verbal statements to the jury regarding the guilt of the defendant, they implicitly threaten this presumption of innocence. A jury, after all, is composed of fallible people who, despite their best efforts, may be swayed by a group of spectators declaring the defendant's guilt.<sup>86</sup> As the Supreme Court stated in *Estelle*, "To implement the presumption [of innocence], courts must be alert to factors that may undermine the fairness of the fact-finding process."<sup>87</sup> This danger of undercutting the presumption of innocence is particularly present when large numbers of spectators are wearing expressive items.<sup>88</sup>

Again, opponents could argue that public displays of emotion are not statements of the defendant's guilt. It seems unlikely, however, that family members of victims, attending court in order to see justice fulfilled, would use expressive items to make impartial statements. Indeed, it seems logical that the family would only go to the effort of creating and wearing expressive pieces in order to send a message of support for the victim. The items are most likely worn to elicit sympathy, to show the innocence of the

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<sup>82</sup> *Holbrook v. Flynn*, 475 U.S. 560, 572 (1986).

<sup>83</sup> *Norris v. Risley*, 918 F.2d 828, 834 (9th Cir. 1990).

<sup>84</sup> *Coffin v. United States*, 156 U.S. 432, 453 (1895).

<sup>85</sup> *Id.*

<sup>86</sup> See Feigenson, *supra* note 50, at 36-37.

<sup>87</sup> *Estelle v. Williams*, 425 U.S. 501, 503 (1976).

<sup>88</sup> See, e.g., *People v. Pennisi*, 563 N.Y.S.2d 612, 614 (Sup. Ct. 1990) (noting that thirty-five spectators occupying one-half of the seats were wearing symbolic clothing).

victim, and to impliedly implicate the defendant in any pain endured. If the spectators truly believed the defendant was innocent, and therefore not responsible for their grief, it is improbable that they would wear any expressive clothing. The purpose for attending court in expressive clothing day after day is to send a message.

Even if the message is purely one of sorrow, without any insinuation of guilt, expressive items are still an impermissible communication in the courtroom because they are irrelevant to the defendant's guilt.<sup>89</sup> There is an evidentiary purpose for only allowing family and friends to testify to the intensity of their sorrow during the *sentencing* phase of a given trial: grief produced by the crime is irrelevant to the culpability of the defendant.<sup>90</sup> If spectators are allowed to create constant symbols of their grief—assuming arguendo that the expressive items are only intended to implicate sorrow and not guilt as well—irrelevant factors are introduced into the guilt phase of the trial.<sup>91</sup>

Proponents of allowing victims and their family members to wear symbolic pieces also argue that assertions of the defendant's guilt by the victims should not surprise the jury.<sup>92</sup> A connected argument is that expressions of guilt from the courtroom should not make the jury suddenly believe a defendant is automatically guilty. These supporters claim that in practice, juries can be given instructions by the judge to presume the innocence of the defendant despite the atmosphere of the courtroom.<sup>93</sup> There are two key problems with this argument. First, when victims' families assert guilt there is a possibility that they are in fact influencing the jury.<sup>94</sup> The jury may assume that people close to the victim are familiar with the facts of the case and have drawn a reasonable conclusion of guilt.<sup>95</sup> The pressures of conformity might also influence the jury into thinking that an entire courtroom of spectators cannot be wrong. Second, even if the presiding judge gives clear instructions to the jury regarding the messages sent from spectators, there is no guarantee that the jury will subconsciously

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<sup>89</sup> See *Estes v. Texas*, 381 U.S. 532, 561 (1965) (declaring that the presence of irrelevant factors, such as television, does not contribute to the chief function of ascertaining the truth).

<sup>90</sup> See generally *Payne v. Tennessee*, 501 U.S. 808 (1991) (limiting victim-impact statements to the sentencing phase).

<sup>91</sup> See *Estes*, 381 U.S. at 562 (discussing irrelevant external factors in the courtroom).

<sup>92</sup> See Brief for Respondent at 29, *Musladin v. Lamarque*, 403 F.3d 1072 (9th Cir. 2004) (No. 05-785), 2004 WL 1394298.

<sup>93</sup> See *Weeks v. Angelone*, 528 U.S. 225, 234 (2000) ("A jury is presumed to follow its instructions.").

<sup>94</sup> See generally Feigenson, *supra* note 50.

<sup>95</sup> See generally *id.*

be able to disregard what they have already seen.<sup>96</sup> As the Supreme Court noted in 1968, “The naïve assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing attorneys know to be unmitigated fiction.”<sup>97</sup> The better solution is to avert the need for any instruction, and eliminate the danger that the instruction will be disregarded, by preventing the questionable conduct from occurring in the first place.

#### 4. The Sixth Amendment

If spectators are permitted to communicate through symbolic items in the courtroom, the Sixth Amendment rights of criminal defendants will be violated.<sup>98</sup> The Sixth Amendment to the Constitution ensures that a criminal defendant has the right “to be confronted with the witnesses against him.”<sup>99</sup> The Sixth Amendment does not, however, guarantee any rights to crime victims or to their families. Victims’ wishful desires should not override the clear constitutional rights of defendants.

The Confrontation Clause’s “functional purpose” is to “promot[e] reliability in criminal trial[s]” by “ensuring a defendant an opportunity for cross-examination.”<sup>100</sup> This purpose is undermined when spectators are allowed to make statements through the use of expressive items without allowing the defendant to cross-examine the information. The symbolic items can be interpreted as external testimony free of the force of cross-examination.<sup>101</sup> In *Norris*, the Ninth Circuit agreed that symbolic accessories in the courtroom can violate the Confrontation Clause.<sup>102</sup> The court held that the presence of spectators wearing buttons deprived the defendant of a fair trial because the buttons “allow[ed] extraneous, prejudicial considerations to permeate the proceedings without subjecting them to the safeguards of confrontation and cross-examination.”<sup>103</sup>

Spectators wearing expressive items are essentially allowed to “argue” a point, through images or symbols, without having to endure cross-examination. Instead, the jury is exposed to a viewpoint without hearing

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<sup>96</sup> See Lisa Eichhorn, *Social Science Findings and the Jury’s Ability to Disregard Evidence Under the Federal Rules of Evidence*, 52 LAW & CONTEMP. PROBS. 341, 346-47 (1989).

<sup>97</sup> *Bruton v. United States*, 391 U.S. 123, 129 (1968) (citing *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring)).

<sup>98</sup> See *Norris v. Risley*, 918 F.2d 828, 834 (9th Cir. 1990).

<sup>99</sup> U.S. CONST. amend. VI, cl. 2.

<sup>100</sup> *Kentucky v. Stincer*, 482 U.S. 730, 739 (1987).

<sup>101</sup> *Norris*, 918 F.2d at 833-34.

<sup>102</sup> *Id.* at 834.

<sup>103</sup> *Id.*

why it should not trust that opinion. The thrust of the Confrontation Clause ensures that:

(1) . . . the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the “greatest legal engine ever invented for the discovery of truth;” (3) permits the jury that is to decide the defendant’s fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.<sup>104</sup>

Statements made by spectators are inherently in tension with these stated goals of the Confrontation Clause. First, the statements are not made under oath. Rather, they are made by spectators who walked into the courtroom without taking any oath to tell the truth. Admittedly, symbolic ribbons and armbands contain no language to be interpreted as a “lie.” They can still, nevertheless, symbolically misrepresent the truth of the situation.

Second, the expressive statements are not subject to any form of inquiry. The jury has no tool to discover whether the statements are indeed true. Again, this applies to any message the spectators might be trying to send: guilt or sympathy. In fact, “though far more subtle than a direct accusation, [a symbolic accessory’s] message was all the more dangerous precisely because it was not a formal accusation.”<sup>105</sup>

Finally, without cross examination, the jury has no way of telling whether the spectators are credible. Especially in the case of victims’ families, there might be powerful motives of bias to lead the jurors to a certain verdict. This bias may not be fully revealed without cross-examination. Thus the jury is left to evaluate and assess the spectators’ credibility without the aid of cross-examination. In effect, the symbolic accusation from the gallery stands “unchallenged, lending credibility and weight to the state’s case without being subject to the constitutional protections to which such evidence is ordinarily subjected.”<sup>106</sup>

The trial system uses an oath, cross-examination, and physical presence to ensure that evidence admitted against a defendant is reliable and trustworthy, thereby serving the purpose of the Confrontation Clause.<sup>107</sup> When a defendant’s right to confront evidence presented to the jury (in this case visual statements from spectators) is violated, there is no guarantee that evidence submitted to the jury is reliable or relevant. The *Norris* court

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<sup>104</sup> *California v. Green*, 399 U.S. 149, 158 (1970).

<sup>105</sup> *Norris*, 918 F.2d at 833.

<sup>106</sup> *Id.* at 833.

<sup>107</sup> *Maryland v. Craig*, 497 U.S. 836, 846 (1990).

agreed that symbolic displays of emotion “constituted a statement, not subject to cross-examination.”<sup>108</sup>

In addition, all statements made during a criminal trial should come from the practitioners’ side of the bar.<sup>109</sup> Under that logical reasoning, no evidence should be presented from the gallery. Spectators should not be allowed to add arguments, in any form, because (1) they are not subject to cross-examination, and (2) they are not presented through the regular means of witness testimony. When spectators are permitted to express opinions and sentiments, the Sixth Amendment rights of the criminally accused are violated.

### 5. Due Process

Due process also requires that expressive items be banned from courtrooms. The Sixth Amendment right to an impartial trial is applicable to the states through the Fourteenth Amendment.<sup>110</sup> Together, these explicit Constitutional liberties afford every criminal defendant the right to a fair trial.<sup>111</sup> In *Sheppard v. Maxwell*, the Supreme Court determined: “Due process requires that the accused receive a trial by an impartial jury free from outside influences.”<sup>112</sup> Once established, the Court has repeatedly affirmed a defendant’s right to a fair trial. As early as 1927, the Court explained how a defendant could easily be deprived of due process:

Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law.<sup>113</sup>

The Supreme Court considers it a denial of due process if the factfinder has even a mere *temptation* to render a verdict based on something other than the evidence presented.<sup>114</sup> Applied to the issue of symbolic displays of emotion, there is a strong argument that expressive items could, at the very least, tempt a fact finder to reach a conclusion without considering the burden of proof or the evidence at hand. Symbolic

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<sup>108</sup> *Norris*, 878 F.2d at 1183.

<sup>109</sup> See *Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965) (“In the constitutional sense, 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.”).

<sup>110</sup> See *Duncan v. Louisiana*, 391 U.S. 145, 158-59 (1968).

<sup>111</sup> U.S. CONST. amend VI; U.S. CONST. amend. XIV, § 1.

<sup>112</sup> 384 U.S. 333, 362 (1966).

<sup>113</sup> *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

<sup>114</sup> *Id.*



accessories may inflame the compassion of the jury and coax them into making a decision based on something other than the merits of the case.

The danger that outside influences may affect the jury strikes at the heart of due process.<sup>115</sup> When criminal defendants are not protected from prejudicial influences, they are inevitably denied due process: “[C]ourts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function.”<sup>116</sup>

Lower federal courts have specifically addressed the threat to due process posed by influences within the courtroom.<sup>117</sup> In *United States v. Yahweh*, the district court explained that “[t]his court has an obligation to ensure that the trial is a fair process and most certainly has an obligation to protect jurors from any possibility of influence . . . .”<sup>118</sup> The court held that the criminal defendant’s associates violated due process by dressing in a uniform of white turbans and white robes to court every day of the trial.<sup>119</sup> The district judge agreed with the reasoning employed by the Ninth Circuit in *Norris*: “[T]o sanction this sort of extrajudicial participation by trial attendees is not only antithetical to notions of due process but also risks converting the ‘courtroom proceedings [into] little more than a hollow formality.’”<sup>120</sup>

Given this judicial responsibility to protect criminal defendants from outside influences, judges should take proactive steps to prevent any external impediments on criminal trials.<sup>121</sup> Not only are judges granted the power and authority to remove symbolic items from the courtroom, they are required to do so in order to protect the defendant’s fundamental right to due process.<sup>122</sup> Unless criminal defendants are tried in atmospheres free of avoidable outside influences, their due process rights will be jeopardized. And until expressive and symbolic clothing is removed, criminal courtrooms will not be truly free of outside influences.

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<sup>115</sup> *Sheppard*, 384 U.S. at 362-63.

<sup>116</sup> *Id.*

<sup>117</sup> *United States v. Yahweh*, 779 F. Supp. 1342 (S.D. Fla. 1992).

<sup>118</sup> *Id.* at 1344.

<sup>119</sup> *Id.* at 1343.

<sup>120</sup> *Norris v. Risley*, 918 F.2d 828, 833 (9th Cir. 1990) (citing *Turner v. Louisiana*, 379 U.S. 466, 473 (1965)).

<sup>121</sup> 48A C.J.S. *Judges* § 148 (2004) (“[A] judge must assist in the search for truth, and it is the function of the judge to see that justice is accomplished.”).

<sup>122</sup> *Yahweh*, 779 F. Supp. at 1343.

## B. ANALYSIS OF ARGUMENTS AGAINST AN OUTRIGHT BAN

*1. Victim's Rights*

Some argue that victims have a special place in the courtroom, and as a result victims' families should be able to visibly represent and remember the victim.<sup>123</sup> The idea is that if courts were genuinely sensitive to the needs of crime victims, they would willingly allow families to wear sentimental symbols during courtroom proceedings.<sup>124</sup> While this viewpoint is not without merit, it extends the rights of victims too far.

The Supreme Court has ruled that a "right of access to *criminal trials* in particular is properly afforded protection by the First Amendment."<sup>125</sup> The Court highlighted the importance of allowing access to criminal trials because it "permits the public to participate in and serve as a check upon the judicial process . . . ."<sup>126</sup>

In addition to the right of access, the Supreme Court has also discussed the involvement of crime victims in the criminal process.<sup>127</sup> Justice Blackmun has opined that "the family of the victim, [and] those who have suffered similarly . . . have an interest in observing the course of a prosecution."<sup>128</sup> In *Payne v. Tennessee*, Justices Souter and Kennedy described the importance of victim's family and friends within the judicial process:

[J]ust as defendants appreciate the web of relationships and dependencies in which they live, they know that their victims are not human islands, but individuals with parents or children, spouses or friends or dependents. Thus, when a defendant chooses to kill, or to raise the risk of a victim's death, this choice necessarily relates to a whole human being and threatens an association of others, who may be distinctly hurt.<sup>129</sup>

These Supreme Court decisions reflect the importance for victims' associates to be able to participate in the judicial process, especially when they are indirectly or directly affected by the crime at issue.

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<sup>123</sup> See generally Brief for National Crime Victim Law Institute et al. as Amici Curiae in Support of Petitioner, *Carey v. Musladin*, 127 S. Ct. 649 (2006) (No. 05-785), 2006 WL 1746420.

<sup>124</sup> *People v. Chatman*, 133 P.3d 534, 550 (Cal. 2006).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 606.

<sup>127</sup> See, e.g., *Payne v. Tennessee*, 501 U.S. 808 (2006) (addressing the right of a victim's friends and family members to participate in and be recognized during the sentencing phase of criminal trials).

<sup>128</sup> *Gannett Co. v. DePasquale*, 443 U.S. 368, 428 (1978) (Blackmun, J., concurring in part, dissenting in part).

<sup>129</sup> *Payne*, 501 U.S. at 838 (Souter, J., joined by Kennedy, J., concurring).

Although victims have a special place in the courtroom, their entitlements are not unlimited. While the Supreme Court recognizes that victims have a right to attend trial, it has not granted victims the right to do whatever they want once inside the courtroom.<sup>130</sup> The decorum of the courtroom should reflect respect for the judicial process, and judges have a right to prohibit spectators from doing anything that might undermine that atmosphere.<sup>131</sup>

Lower courts have recognized the need to balance the right of public access with the defendant's constitutional right to a fair trial.<sup>132</sup> For instance, in *State v. Franklin*, the Supreme Court of Appeals of West Virginia determined that a group of spectators wearing Mothers Against Drunk Driving (MADD) badges in the courtroom impermissibly affected the judicial process.<sup>133</sup> The court stated that "[a]n important element [in balancing public access to trials with the right to a fair trial] is insuring that the jury is always insulated, at least to the best of the court's ability, from every source of pressure or prejudice."<sup>134</sup>

There are already restrictions on what spectators may wear to court.<sup>135</sup> The rights of victims to attend trial and participate in the judicial process will not be infringed if they are prohibited from wearing certain clothes.<sup>136</sup> The spirit behind the right of access to the trial is that victims, and more generally, all those affected by the crime, should be "at the center of the criminal justice process, not on the outside looking in."<sup>137</sup> Crime victims and their families are no less in the center of the criminal process when they are prohibited from wearing expressive clothing. Indeed, they are more likely to see a just prosecution of the offender if they attend trial without symbols of emotion.<sup>138</sup> They will still be able to hear the arguments; they

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<sup>130</sup> See Zitter, *supra* note 13.

<sup>131</sup> See *Anderson v. Dunn*, 19 U.S. 204, 277 (1821) ("Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates . . .").

<sup>132</sup> *State v. Franklin*, 327 S.E.2d 449, 455 (W. Va. 1985).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> For one example of restrictions that a state has imposed, see MINN. SUPREME COURT, VISITOR'S GUIDE TO ORAL ARGUMENTS, at 2, available at [http://www.mncourts.gov/Documents/0/Public/Court\\_Information\\_Office/SC\\_Guide\\_to\\_Oral\\_Arguments6.08\(legal\).pdf](http://www.mncourts.gov/Documents/0/Public/Court_Information_Office/SC_Guide_to_Oral_Arguments6.08(legal).pdf) ("Remove hats before entering the courtroom.").

<sup>136</sup> *Id.*

<sup>137</sup> William J. Clinton, Proclamation on Crime Victims Rights Week (released Apr. 15, 1997), available at [http://findarticles.com/p/articles/mi\\_m2889/is\\_n16\\_v33/ai\\_19601959](http://findarticles.com/p/articles/mi_m2889/is_n16_v33/ai_19601959).

<sup>138</sup> Sharon Blanchard Hawk, *State v. Mann: Extraneous Prejudicial Information in the Jury Room: Beautiful Minds Allowed*, 34 N.M. L. REV. 149, 155 (2004) ("External influences on the jury may be grounds for impeachment of a verdict when the improper

will still be able to observe the witness's expressions; they will still be able to see that justice is served.

## 2. Other Public Displays of Emotion

The National Crime Victim Law Institute argues that because displays of emotion, such as tears and visible reactions, naturally occur in the courtroom, expressive clothing would not add an emotional element to the criminal trial.<sup>139</sup> Further, proponents contend that juries should not be surprised in highly emotional trials when victims are themselves highly emotional.<sup>140</sup> Since the jury already knows that family and friends want to support the victim, symbolic accessories will not give the jury any new information.

This argument is well-grounded but limited. It is true that during highly emotional trials, spectators close to the victim may cry, sigh, gasp, or weep.<sup>141</sup> As the Supreme Court of California has noted, "Courts cannot expect that families will always conform their behavior to the standards of trained professionals."<sup>142</sup> The victim's family and friends may noticeably react to testimony or information in a way that makes it clear to the entire courtroom that they are upset. While these reactions may potentially influence the jury, they are unavoidable in a system that protects access to the courtroom. Even if the spectators are completely composed and silent throughout the entire trial, the jury might notice their mere presence. Family members and friends tend to sit together in the courtroom and it would not be hard for the jury to figure out who they were.

A spectator's unavoidable physical showing of emotion should not be equated with a spectator's privilege to capture that emotion in a piece of expressive clothing. Emotional reactions may be inevitable and unpredictable, and the court must accept the imperfections of the system.<sup>143</sup> But the use of symbolic clothing is premeditated and communicative, while sighs and tears are involuntary and unplanned. Unlike tears, symbolic displays are not natural reactions to mourning. While courts cannot control when or how a spectator may react to the given events in a trial, they do have the ability to prevent other types of public displays of emotion. The court can, therefore, prevent the manifestation of emotions through

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influence is material to the verdict and the jury's consideration of the improper evidence deprives a party of a just result.").

<sup>139</sup> See Brief for New Jersey Crime Victim's Law Center, *supra* note 44, at 9.

<sup>140</sup> *Id.* at 9 (citing *People v. Chatman*, 38 Cal. 4th 344 (Cal. 2006)).

<sup>141</sup> See *Hallman v. United States*, 410 A.2d 215, 217 (D.C. 1979).

<sup>142</sup> *People v. Chatman*, 133 P.3d 534, 551 (Cal. 2006).

<sup>143</sup> See *State v. Jones*, 479 S.E.2d 517, 521 (S.C. Ct. App. 1996) (finding that removal of crying spectators was a proper exercise of judicial discretion).

symbols, and in doing so limit the amount of influential emotion in a given courtroom.

### 3. *The First Amendment*

A third argument against a ban on symbolic items is that the First Amendment's right to free speech guarantees spectators the right to communicate their views.<sup>144</sup> The First Amendment unquestionably provides that a criminal trial will be open to the public.<sup>145</sup> However, the Court has carefully limited its recognition of the First Amendment rights of trial spectators:

Our holding today does not mean that the First Amendment rights of the public and representatives of the press are absolute. Just as a government may impose reasonable time, place, and manner restrictions upon the use of its streets in the interest of such objectives as the free flow of traffic . . . so may a trial judge, in the interest of the fair administration of justice, impose reasonable limitations . . .<sup>146</sup>

Victims' families have the constitutional right to attend trial, gather information, hear evidence, and see witnesses.<sup>147</sup> They do not have the right to communicate, implicitly or explicitly, with the jury. The right to access the courtroom is distinguishable from the right to communicate with the decision-makers.<sup>148</sup>

Further, there are important justifications for public access to trials:

[T]he 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.<sup>149</sup>

No comparable legal interest justifies irrelevant spectator involvement in a trial. Spectator communication with the jury is not for the benefit of

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<sup>144</sup> See *Carey v. Musladin*, 127 S. Ct. 649, 658 (2006) (Souter, J., concurring) (Justice Souter suggested that First Amendment rights might apply, but chose not to "decide whether protection of speech could require acceptance of some risk raised by [the] spectators' buttons" at issue in the case).

<sup>145</sup> See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 (1980) ("Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public.").

<sup>146</sup> *Id.* at 593 n.18.

<sup>147</sup> *Id.* at 576.

<sup>148</sup> See Christopher R. Goddu, Comment, *Victim's "Rights" or a Fair Trial Wronged?*, 41 *BUFF. L. REV.* 245, 261-62 (1993).

<sup>149</sup> *In re Oliver*, 333 U.S. 257, 270 n.25 (1948) (citation omitted); see also *People v. Pennisi*, 563 N.Y.S.2d 612, 614-15 (Sup. Ct. 1990) ("This court rejects any premise that people who want to communicate protests, views or feelings of any kind or nature, for or against any person, issue or cause, have a constitutional right to do so within the confines of a public courtroom.").

the accused. The right of the defendant to a fair trial outweighs the First Amendment rights of spectators.<sup>150</sup> The right to free speech is not absolute, especially when other constitutional interests are at stake.<sup>151</sup> Quite simply, a courtroom is not the space for demonstration. The rights contained in the First Amendment “must bow to the constitutional right to a fair trial” when there is a threat of an unfair trial.<sup>152</sup>

Finally, the courtroom is a unique forum; it cannot be as open to free speech and irreverent behavior as are other venues, such as city streets.<sup>153</sup> A New York court captured this idea in *People v. Pennisi*:

There are some public places, such as a courtroom, which are so clearly committed to special and defined purposes that their use for the airing of general grievances would be clearly out of order, i.e., the communication of feelings or concerns about any person, issue or cause involved or otherwise would be entirely out of place.<sup>154</sup>

*Pennisi* arose when approximately thirty-five family members and friends of a murder victim wore red and black ribbon corsages in the courtroom.<sup>155</sup> The prosecutors argued that the ribbons were merely symbols of “concern and solidarity for the victim’s family,” but the court held they were disruptive and inappropriate for a courtroom.<sup>156</sup>

Further, the court has the power and the responsibility to “preserve and enforce order in its immediate presence, to prevent interruption, disturbance, or hindrance to its proceedings, and to control all persons connected with a judicial proceeding before it. A large measure of discretion resides in the trial court in this respect . . . .”<sup>157</sup> Thus, a court can restrict spectator conduct, even if such limitation also curtails free speech rights. As the Supreme Court has stated, “In securing freedom of speech, the Constitution hardly meant to create the right to influence judges or juries. That is no more freedom of speech than stuffing a ballot box is an exercise of the right to vote.”<sup>158</sup>

Consequently, while spectators have a First Amendment right to attend trial, there is no First Amendment right to influence the trial process. As

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<sup>150</sup> *Gannet v. DePasquale*, 443 U.S. 368, 393 (1979) (affirming the trial judge’s conclusion that the public’s constitutional right of access to the court was outweighed by the defendant’s right to a fair trial).

<sup>151</sup> *Id.* (examining the competing societal interests involved).

<sup>152</sup> *Norris v. Risley*, 918 F.2d 828, 832 (9th Cir. 1990); *see also* *Levine v. U.S. Dist. Ct.*, 764 F.2d 590, 597-98 (9th Cir. 1985).

<sup>153</sup> *Pennisi*, 563 N.Y.S.2d at 614.

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

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> 75 AM. JUR. 2D *Trial* § 189 (2007).

<sup>158</sup> *Pennekamp v. Florida*, 328 U.S. 331, 366 (1946) (Frankfurter, J., concurring).

Justice Stevens recently wrote, “[T]here 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.”<sup>159</sup>

Furthermore, if the defendant is convicted, family and friends can express their opinions, sentiments, and sorrows during the sentencing phase of the trial.<sup>160</sup> In *Payne v. Tennessee*, the Supreme Court explicitly granted courts permission to consider victim impact evidence in determining appropriate sentences.<sup>161</sup> The Court expressed that the “assessment of harm caused by the defendant as a result of the crime charged has understandably been an important concern of the criminal law.”<sup>162</sup> Taking that into consideration, the speech of spectators is only limited for a portion of the trial. They are still afforded the opportunity to articulate their pain during the sentencing portion of the case.<sup>163</sup> Indeed, at that point they are able to clearly vocalize the precise sentiment they can only hope to send through expressive items.

#### 4. Practical Concerns

Finally, advocates for expressive clothing could point to the expense and impracticality of regulating spectators’ clothing as an argument for allowing it in courtrooms. The logistics of banning all expressive clothing from courtrooms, however, are actually quite simple. Court marshals are responsible for maintaining decorum in the courtroom.<sup>164</sup> As part of that duty, they currently may ask spectators to remove hats, sunglasses, and inappropriate clothing, as is done at the United States Supreme Court.<sup>165</sup> It would be a simple, inexpensive move to add symbolic items to that list. The government would not need to hire any additional employees and the new restriction would not add any noticeable demand on the current court marshals.

Banning expressive items from all courtrooms may in fact advance, rather than hinder, state interests. A general ban would prevent expensive

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<sup>159</sup> *Carey v. Musladin*, 127 S. Ct. 649, 656 (2006) (Stevens, J., concurring).

<sup>160</sup> *See Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 819.

<sup>163</sup> *Id.*

<sup>164</sup> 91 C.J.S. *United States Marshals* § 16 (2006) (“It is the duty of the marshal and his deputies to guard against any outside influences which might pervade the minds of the jury in arriving at a just verdict.”).

<sup>165</sup> *See* SUPREME COURT OF THE U.S., VISITOR’S GUIDE TO ORAL ARGUMENT AT THE SUPREME COURT OF THE UNITED STATES, available at <http://www.supremecourtus.gov/visiting/visitorsguidetooralargument.pdf> [hereinafter VISITOR’S GUIDE].

and timely appeals that might arise if symbolic pieces of clothing are permitted in courtrooms on a case by case, or judge by judge basis. The rule would promote efficiency in the legal system by preventing unnecessary appeals. Further, a universal ban would leave no doubt as to what items might be permissible and what pieces of attire are considered prejudicial. As the court in *Norris* held, “[W]hile the risk of prejudice [created by expressive buttons] was profound, the burden of alleviating that risk was minimal.”<sup>166</sup> The practical burden of preventing symbolic and expressive clothing is extremely low and is substantially overshadowed by the potentially grave consequence of an unfair trial.

#### IV. CONCLUSION

The right of the criminally accused to receive a fair trial is a bedrock principle of American justice. It is explicitly guaranteed by the Sixth Amendment and entrenched in the adversary system. Courts continually strive to ensure that every verdict is based exclusively on the evidence and arguments presented, and not on external factors. It naturally follows, then, that courts should endeavor to eliminate external factors that could influence the outcome of a case. An outright ban on symbolic expressions of emotions by trial spectators would significantly further this objective.

Although this absolute prohibition restricts the free speech of trial spectators, it does so in a very limited capacity. Victims are still free to express their emotions publicly through other avenues. They should not, however, be allowed to undermine a trial process that demands complete fairness. The courtroom is a distinct venue that depends on a unique set of rules in order to function properly. Indeed, “Few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds. Within the courtroom, the government invokes its laws to determine the rights of those who stand before it.”<sup>167</sup> If spectators are allowed to bring their emotional viewpoints to the table through symbolic means, it will deteriorate the sanctity of the courtroom.

The Supreme Court has implicitly agreed that symbolic expressions do not belong in the courtroom.<sup>168</sup> When the Supreme Court hears oral arguments it allows spectators to listen, but it expressly prohibits them from wearing symbolic clothing.<sup>169</sup> In fact, the *Visitor’s Guide to Oral Argument at the Supreme Court of the United States* unambiguously states that

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<sup>166</sup> *Norris v. Risley*, 918 F.2d 828, 834 (9th Cir. 1990).

<sup>167</sup> *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628 (1991).

<sup>168</sup> See VISITOR’S GUIDE, *supra* note 165, at 3.

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



“display buttons and inappropriate clothing may not be worn.”<sup>170</sup> In banning such items, the Supreme Court acknowledges that they add an unnecessary element to proceedings.

In light of the high probability that jurors will be psychologically influenced by the emotional statements of spectators, the judicial system needs to be particularly wary of anything that might send an emotional message. Even if symbolic items are not intended to put blame on the criminal defendant, they still may influence the jury. As the National Association of Criminal Defense Lawyers states:

There is no conceivable version of a just and fair trial that includes the regular, deliberate intrusion of such outside influences into the trial process. Such factors are at once highly prejudicial to the disfavored party and utterly irrelevant to the trial’s truthseeking function.<sup>171</sup>

Indeed, it is precisely these grief-filled messages that pull at the heartstrings of jurors. Due to the psychological susceptibility of juries, public displays of emotion are inherently prejudicial. They endanger the accused’s right to a fair trial by tainting the minds of the jury. Ultimately, since the risk of an unfair trial increases with the presence of emotionally-charged expressions by trial spectators, such displays should be prohibited in the interest of fair administration. Whenever the integrity of a trial is endangered, the rights of the criminal defendant are also in jeopardy. The legal system has a responsibility to keep the trial process as uncontaminated as possible. Public policy requires, and the Constitution demands, that expressive symbols are proscribed in criminal trials. The Supreme Court should therefore enact a prophylactic rule prohibiting all symbolic displays of emotion in courtrooms.

To return to the words of the Supreme Court, “The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not ‘still be done.’”<sup>172</sup> As long as trial spectators are allowed to express their emotions through symbolic means, justice will not and can not be done.

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

<sup>171</sup> Brief of the National Association of Criminal Defense Lawyers as Amici Curiae in Support of Respondent at 3, *Carey v. Musladin*, 127 S. Ct. 649 (2006) (No. 05-785), 2006 WL 2430574.

<sup>172</sup> *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).