Confrontation After COVID

Ayyan Zubair*

The opportunity to face one's accuser is a fundamental right guaranteed by the Sixth Amendment's Confrontation Clause. It is a historical right that the Romans afforded to Jesus's disciples. And it is a right that may soon fall by the wayside in our new socially distant reality and beyond.

In Maryland v. Craig, *the United States Supreme Court established a two-step "necessity and reliability" test for allowing video testimony offered by child survivors of sexual abuse against their alleged abuser. As we inhabit an increasingly virtual world due to the COVID-19 pandemic, courts, prosecutors, defense attorneys, and legal scholars are conflicted as to whether government witnesses in criminal trials should be permitted to testify by videoconference during the pandemic and thereafter.*

In this Note, I enter this debate by arguing that the Court, in light of its later decision in Crawford v. Washington, *should abandon its reliability and public policy analyses in* Craig. *Instead, I recommend that the Court adopt what I call the "hierarchy of methods" approach, permitting video testimony only when securing in-court testimony or a Rule 15 deposition of an essential witness is infeasible.*

DOI: https://doi.org/10.15779/Z389P2W69R

* J.D., Class of 2021, University of California, Berkeley, School of Law. I am indebted to Avani Mehta Sood, Brittni Tanenbaum, Angelo Guisado, Rebecca Wexler, Olivia Souza-Gee, Annie Sloan, Noor Hasan, Mohsin Mirza, Richard Friedman, Justice Halim Dhanidina, Justice Lidia Stiglich, Judge Guido Calabresi, Andrea Roth, Tasnim Motala, Waqar Vick Rehman, Deborah Oh, Chelsea Hanlock, Joon Hwang, and Paul Messick for their advice, encouragement, and revisions. And my most sincere appreciation to the editors of the *California Law Review*—specifically Kamran Jamil, Grace (Ho Jung) Kim, Tian Kisch, Mickeala Tu, Livia Katroshi, Samantha McNichols, Gayatri Paranjape, and Rasha Suleiman—for their terrific feedback. The views expressed herein are strictly my own.

INTRODUCTION

"Call my accuser before my face," pleaded Sir Walter Raleigh.[1] Once a landed English writer knighted by Queen Elizabeth I, Raleigh found himself now begging for a semblance of due process after he was put on trial accused of capital treason against Elizabeth's successor, James I. Deprived of the opportunity to confront the witness whose testimony held the weight of his life in the balance, Raleigh was found guilty and later executed.[2]

Whether the English nobleman was truly guilty of the crime for which he was put to death is a mystery that may never be known. It is clear, however, that he was deprived of a fundamental protection that has existed for millennia: the opportunity to confront an accuser face-to-face. This right is so established that the Roman Governor Festus—the very man responsible for the crucifixion of Jesus—granted his prisoner, Paul, the right to confront his accusers before being condemned to death.[3] Recognizing its value, the nascent United States enshrined

1. 2 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, at 16–17 (T.B. Howell ed., London, T. C. Hansard 1816).

2. *See generally* W. Jeremy Counseller & Shannon Rickett, *The Confrontation Clause After* Crawford v. Washington*: Smaller Mouth, Bigger Teeth*, 57 BAYLOR L. REV. 1, 7 (2005) (chronicling the history of Sir Walter Raleigh's trial).

3. *See* Frank R. Herrmann & Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 VA. J. INT'L L. 481, 482 (1994) (citing Coy v. Iowa, 487 U.S. 1012, 1015–16 (1988)).

the right to confrontation within the Sixth Amendment to the United States Constitution as a fundamental protection for criminal defendants.[4]

Nevertheless, this centuries-old protection is slowly meeting its demise in our increasingly digital world. In *Maryland v. Craig*,[5] a divided Supreme Court established a two-step test for allowing a child survivor of sexual abuse to remotely testify against their alleged abuser via one-way video, a method where a survivor testifies in front of a camera and cannot see the defendant. First, the video testimony must be "necessary to further an important public policy."[6] Second, the video testimony may only be allowed if it is deemed reliable.[7] However, the Court's subsequent decision in *Crawford v. Washington*,[8] which forbade a "mere judicial determination of reliability,"[9] calls into question the reliability analysis it outlined in *Craig*. Consequently, lower courts remain conflicted as to whether, and when, two-way video testimony—where an accusing witness can see the defendant on the screen—meets constitutional muster.[10]

4. *See* U.S. CONST. amend. VI.

5. 497 U.S. 836, 857 (1990).

6. *Id.* at 850.

7. *Id.*

8. 541 U.S. 36, 59 (2004) (holding that out-of-court "testimonial" statements are inadmissible unless the witness is unavailable and the defendant had an opportunity to cross-examine the witness in a prior proceeding).

9. *Id.* at 62.

10. Some federal and state courts have permitted two-way video testimony. *See* United States v. Gigante, 166 F.3d 75, 82 (2d. Cir. 1999) (allowing an ill witness in witness protection to testify via two-way videoconference); City of Missoula v. Duane, 355 P.3d 729, 731, 734 (Mont. 2015) (permitting video testimony on cost-saving and efficiency grounds); Horn v. Quarterman, 508 F.3d 306, 318 (5th Cir. 2007) (allowing a terminally ill witness's testimony via two-way live video); United States v. Benson, 79 F. App'x 813, 820 (6th Cir. 2003) (per curiam) (permitting an eighty-five-year-old witness to testify via two-way live video on account of his poor health). Other courts vehemently disagree. *See* State v. Smith, 636 S.W.3d 576, 587 (Mo. 2022) ("To decide two-way video procedures categorically satisfy the safeguards of the Confrontation Clause would be to easily dispense with the 'face-to-face confrontation requirement[.]'"); People v. Jemison, 505 Mich. 352, 356 (2020) (writing that *Crawford* "took out [*Craig*'s] legs" and finding two-way video testimony unconstitutional); State v. Thomas, 376 P.3d 184, 193 (N.M. 2016) (holding that two-way video testimony is unconstitutional and noting that "*Crawford* may call into question the prior holding in *Craig* to the extent that *Craig* relied on the reliability of the video testimony"); United States v. Carter, 907 F.3d 1199, 1206 n.3 (9th Cir. 2018) (positing that "[t]he vitality of *Craig* itself is questionable in light of the Supreme Court's later decision in *Crawford*"); State v. Rogerson, 855 N.W.2d 495, 495 (Iowa 2014) (finding the state's justification of distance, cost, and inefficiency could not overcome a defendant's confrontation rights); Lipsitz v. State, 442 P.3d 138, 140 (Nev. 2019) (ruling it was necessary to use two-way video technology for a witness who was medically unavailable due to being admitted to an out-of-state residential treatment center); Bush v. State, 193 P.3d 203, 214–16 (Wyo. 2008) (holding no confrontation violation when a witness testified over two-way video when his physician warned against traveling and he gave testimony after being sworn in by a district court judge); United States v. Bordeaux, 400 F.3d 548, 555 (8th Cir. 2005) (finding that a child's fear of facing the defendant did not meet *Craig*'s important public policy requirement since her fear was not "the dominant reason" why she could not testify in open court); United States v. Yates, 438 F.3d 1307 (11th Cir. 2006) (en banc) (holding that mere efficiency is not a strong enough public policy rationale to justify using two-way video testimony).

The COVID-19 pandemic has brought this debate to the fore, testing courts' resolve to maintain constitutional protections while ensuring public safety. SARS-CoV-2, which causes COVID-19, is a highly contagious airborne virus.[11] First identified in December 2019 in China and detected in the United States in early 2020,[12] COVID-19 has spread largely uncontrolled. In just one year (from March 2020 to March 2021), it caused well over five hundred thousand deaths,[13] manifold more hospitalizations, and the American economy to shutter to a standstill.[14] Nearly every state adopted some version of a stay-at-home order in this time period, allowing residents to leave their homes only if they were essential workers, to gather groceries, or to obtain urgent medical care.[15]

Courts have used videoconferencing technology in unprecedented ways to combat the spread of the virus. Late into a trial held right before the implementation of stay-at-home measures, Judge Alison Nathan of the Southern District of New York allowed two jurors who were suspected of having contracted the novel coronavirus to deliberate remotely in a criminal trial.[16] Judges primarily conducted pre-trial motions over videoconference, and some jurisdictions have impaneled grand juries remotely as well.[17] Texas courts alone held over one million remote proceedings from March 2020 to February 2021.[18]

---

11. Adeel S. Zubair, Lindsay S. McAlpine, Tova Gardin, Shelli Farhadian, Deena E. Kuruvilla & Serena Spudich, *Neuropathogenesis and Neurologic Manifestations of the Coronaviruses in the Age of Coronavirus Disease 2019: A Review*, 77 JAMA NEUROLOGY 1018 (Aug. 2020).

12. Anthony S. Fauci, Clifford Lane & Robert R. Redfield, *COVID-19 — Navigating the Uncharted*, 382 NEW ENG. J. MED. 1268, 1269 (2020).

13. *Mortality Analyses*, JOHN HOPKINS CORONAVIRUS RSCH. CTR., https://coronavirus.jhu.edu/data/mortality [https://perma.cc/3VYZ-72JD].

14. *See* Jonathan Wolfe, *Coronavirus Briefing: What Happened Today*, N.Y. TIMES (Aug. 19, 2020), https://www.nytimes.com/2020/08/19/us/coronavirus-today.html?searchResultPosition=3 [https://perma.cc/487H-SHQT].

15. *See* Sarah Mervosh, Denise Lu & Vanessa Swales, *See Which States and Cities Have Told Residents to Stay at Home*, N.Y. TIMES (Apr. 20, 2020), https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html [https://perma.cc/JWF4-X5KT] (noting that only Arkansas, Iowa, North Dakota, South Dakota, and Nebraska declined to institute a stay-at-home order for at least part of their state).

16. *See* Stewart Bishop, *SDNY Judge Lets Sick Juror Deliberate via Videoconference*, LAW360 (Mar. 16, 2020), https://www.law360.com/articles/1253726/sdny-judge-lets-sick-juror-deliberate-via-videoconference [https://perma.cc/SUW9-A8RA]. Judge Nathan overruled the prosecution's motion to declare a mistrial. *Id.* The prosecution argued that these jurors' ability to access outside materials could potentially taint the jury deliberation process. *Id.* The defendant was ultimately convicted in this case. *Id.*

17. *See* Corinne Ramey, *Covid Is No Excuse for Grand Jury Duty When You Can Serve From Your Bedroom*, WALL ST. J. (Aug. 20, 2020), https://www.wsj.com/articles/covid-courts-virtual-jury-duty-zoom-wifi-indictments-grand-jury-pandemic-lockdown-11597931499 [https://perma.cc/LN77-KCLB] (noting that Mohave County, Arizona, McLennan County, Texas, Bergen and Mercer Counties in New Jersey, and other state district attorney offices are experimenting with virtual grand juries). This has not been without controversy, criticized by opponents as unconstitutional "Wi-Fi indictments" that cannot ensure that proceedings remain secret. *See id.*

18. *See* Eric Scigliano, *Zoom Court Is Changing How Justice Is Served*, ATLANTIC (Apr. 13, 2021), https://www.theatlantic.com/magazine/archive/2021/05/can-justice-be-served-on-zoom/618392/ [https://perma.cc/F5EN-AZRY].

While the COVID-19 pandemic may have proliferated the use of videoconferencing platforms like Zoom in the classroom and in corporate America, video technology has been used in the American legal system for decades.[19] Courts often employ video technology for hearings on bail, sentencing, and violations of probation or parole.[20]

Whether courts should extend the use of videoconferencing to government witnesses in criminal trials, however, is a hotly-contested issue in scholarly literature, in part because the COVID-19 pandemic has caused us to rethink what is possible via videoconferencing technology.[21] Some proponents recognize that while in-court testimony provides "[i]deal confrontation," exceptions should be made for survivors of sex crimes or domestic violence.[22] These advocates argue that the public policy benefits of allowing video testimony from accusatory witnesses in these cases—which may only have two witnesses, the defendant and the victim—outweigh the "preference" for in-court confrontation.[23] Other scholars promote an even more liberal policy,[24] promoting an expansive use of

19. *See, e.g.*, Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 TUL. L. REV. 1089, 1094 n.8 (2004) (listing sources that have examined the use of technology in legal contexts since the 1970s); Joe Beck, *New Video System Up and Running*, N. VA. DAILY (Nov. 14, 2018), https://www.nvdaily.com/news/courts/new-video-system-up-and-running/article_7968da89-c8a3-59be-8dd0-64b9a883a487.html [https://perma.cc/DJK6-ZZQ8] (describing new video conferencing technology in Virginia that allows inmates in jail to testify in court via live video feed). Using video conferencing in jail, defendants were able to "see and hear everything and communicate through the equipment on [their] end of the connection." Beck, *supra* note 19. Minor preliminary matters in this jurisdiction were handled quickly, causing less stress for attorneys, less travel time for inmates, and less time spent on each case. *Id.*

20. Poulin, *supra* note 19, at 1095.

21. Throughout this note, I use the terms "videoconferencing," "remote testimony," and "virtual testimony" to allude to both one- and two-way videoconferencing. One-way videoconferencing allows the defendant to see the witness, but not the other way around. Two-way videoconferencing, on the other hand, permits both parties to see each other.

22. Caitlin Erin Murphy, *It's Time to Extend* Maryland v. Craig*: Remote Testimony by Adult Sex Crime Victims*, 19 CONN. PUB. INT. L.J. 367, 367–68 (2020) (arguing that while "[i]deal confrontation requires the prosecution's witnesses to testify in court, under oath, subject to cross-examination, and in view of the jury[,] . . . 1) there is an important public policy interest in prosecuting perpetrators and 2) it is important to protect victims of sexual assault, regardless of age"); *see* Elizabeth A. Mulkey, *Confronting Legal and Technological Incongruity: Remote Testimony for Child Witnesses*, 17 VAND. J. ENT. & TECH. L. 463, 489 (2015) (proposing a "*Craig* plus" test in which a child witness would be able to testify remotely if a medical professional determines that the child witness is medically unavailable to come to court).

23. Jessica Brooks, *Two-Way Video Testimony and the Confrontation Clause: Protecting Vulnerable Victims After* Crawford, 8 STAN. J. C.R. & C.L. 183, 199; *see also id.* at 185 (contending that since "there are rarely third-person witness accounts and arguments often dilute to 'he said, she said' arguments," courts should use two-way videoconference to provide an alternative means of testifying that protects victims, upholds defendants' constitutional right to confrontation, and allows a trial to go forward).

24. *See, e.g.*, J. Benjamin Aguinaga, *Confronting Confrontation in a FaceTime Generation: A Substantial Public Policy Standard to Determine the Constitutionality of Two-Way Live Video Testimony in Criminal Trials*, 75 LA. L. REV. 175, 177 (2014) (arguing for the Supreme Court to adopt a "substantial public policy" test that would "lower[] the bar that prosecutors must meet to use two-way

this technology because it is far more reliable and secure than in years past[25] and a much more efficient option than hauling a witness into court from miles away.[26] Opponents dismiss these public policy considerations as anathema to the unconditional guarantees of the Confrontation Clause, arguing that videoconferencing cannot approximate in-court testimony. These detractors hold that *Craig* was a decision of "dubious merit"[27] and that expediency should never justify infringement on a defendant's constitutional rights. Some take the absolutist stance that government witnesses should never testify by videoconference.[28]

In this Note, I enter into this debate with two proposals that will at once protect the accused's right to in-person confrontation in the pandemic and post-COVID, while also recognizing that the rare case may make in-person confrontation impossible. In Part I, I present an overview of the Confrontation Clause: its origins, guarantees, and jurisprudence. In Part II, I discuss the complexities that virtual testimony presents with respect to the Confrontation Clause. I introduce Federal Rules of Criminal Procedure 15 and 26 and discuss the jurisprudence around video testimony, beginning with the Court's decision in *Maryland v. Craig*. In Part III, I present to the reader my two proposals. First,

---

live video testimony" and advance public policies that are "not as important as protecting child abuse victims").

25. Of course, the reliability and security of video testimony is also hotly debated. *See* Jamie Walker & Laura Carlsen, *"Can I Testify via Skype?" Using Videoconferencing Technology to Enhance Remote Witness Testimony*, NWSIDEBAR (June 11, 2014), https://nwsidebar.wsba.org/2014/06/11/skype-testimony-courtroom/ [http://perma.cc/9Y4N-AYYS] (noting that courts are skeptical of video conferencing due to security concerns and because many courts are not equipped with such capabilities); Brian X. Chen, *The Lesson We Are Learning from Zoom*, N.Y. TIMES (Apr. 8, 2020), https://www.nytimes.com/article/zoom-privacy-lessons.html?searchResultPosition=3 [https://perma.cc/VB8V-ZV9J] ("The issues with basic security practices culminated with 'Zoombombing,' in which trolls crashed people's video meetings and bombarded them with inappropriate material like pornography.").

26. *See* Carolyn W. Kenniston, *You May Now "Call" Your Next Witness: Allowing Adult Rape Victims to Testify via Two-Way Video Conferencing Systems*, 16 J. HIGH TECH. L. 96, 99 (2015) ("Although at first video conferencing was problematic, the technology now is far more sophisticated and advanced, and is becoming more widely used."); Michael D. Roth, *Laissez-Faire Videoconferencing: Remote Witness Testimony and Adversarial Truth*, 48 UCLA L. REV. 185, 190–91 (2000) (noting a New Jersey first-degree murder case in which the cost of an appearance was significantly reduced through use of video conference).

27. Richard D. Friedman, *Remote Testimony*, 35 U. MICH. J.L. REFORM 695, 706 (2002) (arguing that "*Craig* was a 5-4 decision of dubious merit, and it should not be extended outside the realm of child witnesses, or beyond the circumstance in which a particularized showing is made that the specific witness would be subject to trauma by testifying in the courtroom").

28. *See, e.g.*, Maryland v. Craig, 497 U.S. 836, 861 (1990) (Scalia, J., dissenting) ("The purpose of enshrining this protection in the Constitution was to assure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant's right to face his or her accusers in court."). Later in the opinion, Justice Scalia wrote that "there is simply no room for interpretation with regard to 'the irreducible literal meaning of the Clause.'" *Id.* at 865 (quoting Coy v. Iowa, 487 U.S. 1012, 1020–21 (1987)). And in 2002, Justice Scalia opined, "Virtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones." Order of the Supreme Court, 207 F.R.D. 89, 94 (2002).

I contend that trial judges should read *Craig* narrowly, permitting only child witnesses testifying against their alleged abusers to do so by video. Instead of video testimony, I argue that courts should expand the use of Rule 15 depositions, allowing the defendant to be in the witness's presence while the witness is offering evidence against the defendant. While not as ideal as a witness's presence in court, this physical proximity mirrors the Confrontation Clause's original promise closer than does video testimony. I contend that the Rule 15 depositions should be recorded to provide the jury with a visual. Normatively, I argue that the Court should remove its reliability analysis outlined in *Craig*, since its later decision in *Crawford* has eroded the reliability prong. Instead, I propose that the Court adopt a "hierarchy of methods" approach, permitting video testimony only when in-court testimony of an essential witness is impractical and Rule 15 depositions are impossible. This solution, I contend, would extend the protections guaranteed by in-person confrontation, while also allowing for alternatives to ensure that trials do not grind to a halt if a witness truly cannot come to the courthouse.

I.
THE CONFRONTATION CLAUSE

The right to confront one's accuser is a long-honored tradition across civilizations. Over 2,000 years ago, Governor Festus, while discussing the treatment of the imprisoned Saint Paul, decreed that "It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges."[29]

The nascent Catholic Church recognized this right of confrontation as "essential to doing justice."[30] Similarly, Islamic law mandates this "safeguard[] to the accused."[31] The right to confrontation in England arose out of the trial of Sir Walter Raleigh in 1603, when he was condemned to death on the sole basis of an unavailable declarant's "confession."[32] Later that century in the American

29. Herrmann & Speer, *supra* note 3, at 482 (citing *Coy*, 487 U.S. at 1015–16).

30. *Id.* at 494. It should be noted, however, that the Catholic Church soon reneged on its promise and allowed private examinations to occur outside of the defendant's presence. *Id.* at 515. In what was known as the "Daniel and Susanna" procedure, ecclesiastical courts prevented witnesses from learning what other witnesses had said by questioning them privately. *Id.* at 516–18. The name for this procedure comes from the biblical tale of Susanna, a woman who was falsely accused of adultery with a young man in an orchard after she spurned the advances of two other men. *Daniel* 13:1–63. Daniel, who was said to have been moved by the spirit of God, questioned these two men separately about the site of the alleged act. *Id.* When the two men gave conflicting testimony outside of each other's earshot, the assembly realized that the men were lying and acquitted Susanna. *Id.*

31. Muhammad Munir, *Fundamental Guarantees of the Rights of the Accused in the Islamic Criminal Justice System*, 40 HAMDARD ISLAMICUS 45, 45 (2018) (finding that the "Islamic criminal justice system has provided many safeguards to the accused [such as] . . . confrontation and cross-examination of the accusers and witnesses").

32. For more on Sir Walter Raleigh, see The Trial of Sir Walter Raleigh, 2 HOWELL'S STATE TRIALS 1 (1603).

Colonies, the Massachusetts legislature issued a mandate during the height of the Salem Witch Trials ordering that those accused of witchcraft have the opportunity to confront their accusers before conviction.[33] While the Founders' intent in drafting the Confrontation Clause may be "murky,"[34] they included it among the panoply of rights afforded to criminal defendants in the Sixth Amendment:

> 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.[35]

Courts have stipulated that the right of confrontation requires that the accusatory witness be: (1) under oath; (2) subject to cross-examination; and (3)

---

33. For more on the Salem Witch Trials, see WITCH-HUNTING IN SEVENTEENTH-CENTURY NEW ENGLAND 130 (David D. Hall ed., 1st ed. 1991).

34. *See generally* Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77 (1995) (discussing the history of the Confrontation Clause). It is difficult to trace how much historical considerations weighed on the Founders' minds when they authored the Confrontation Clause. *See* White v. Illinois, 502 U.S. 346, 359 (1992) (Thomas, J., concurring) ("There is virtually no evidence of what the drafters of the Confrontation Clause intended it to mean."); California v. Green, 399 U.S. 149, 173–74 (1970) (Harlan, J., concurring) ("The Confrontation Clause comes to us on faded parchment."); Howard W. Gutman, *Academic Determinism: The Division of the Bill of Rights*, 54 S. CAL. L. REV. 295, 332 n.181 (1981) (arguing that congressional intent is virtually impossible to determine since "[t]he clause was debated for a mere five minutes before its adoption"); Murl A. Larkin, *The Right of Confrontation: What Next*?, 1 TEX. TECH. L. REV. 67, 67 (1969) ("[T]he remembered harms or injuries suffered or feared by the colonists which impelled them to add this right to the panoply of guarantees of the [S]ixth [A]mendment cumulate at best to only a sketchy relevant historical background.").

Notwithstanding the ambiguity, the Court's originalist bloc, including Justices Scalia and Thomas, have concluded that the origin of the Confrontation Clause can be traced to the English common law right of confrontation that developed as a response to the secret interrogation of witnesses. *See White*, 502 U.S. at 361 ("[A] common-law right of confrontation began to develop in England during the late 16th and early 17th centuries."); *id.* at 361–62 (The English common-law right evolved "[a]pparently in response to such abuses . . . . The Court consistently has indicated that the primary purpose of the Clause was to prevent the abuses which had occurred in England."). An abundance of scholarship supports this proposition. *See, e.g.*, Daniel Shaviro, *The Supreme Court's Bifurcated Interpretation of the Confrontation Clause*, 17 HASTINGS CONST. L.Q. 383 (1990); Roger W. Kirst, *The Procedural Dimension of Confrontation Doctrine*, 66 NEB. L. REV. 485 (1987); Frank T. Read, *The New Confrontation-Hearsay Dilemma*, 45 S. CAL. L. REV. 1 (1972).

However, Randolph N. Jonakait proposed an alternate reading of the history, arguing that the Sixth Amendment "did not constitutionalize English procedures," but rather "sought to constitutionalize criminal procedure as it then existed in the states." *See* Jonakait, *supra* note 34, at 81. This understanding of the history, Jonakait argues, "indicates that confrontation should operate with other Sixth Amendment rights that affirmatively grant an accused the opportunity for meaningful defense advocacy. At the core of these rights is the opportunity to challenge the information the government relies upon." *Id.* at 82.

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

in the presence of the defendant.[36] Traditionally, these safeguards are understood to allow the jury to ascertain the witness's credibility,[37] sway the hearts of the jury towards the presumptively innocent defendant,[38] force the witness to look the defendant in the eye while testifying—making it harder for them to lie[39]—and impress upon the witness the solemnity of the proceedings.[40]

Despite judicial recognition of the importance of confrontation, the Supreme Court's decision in *Ohio v. Roberts* introduced exceptions to this right.[41] At trial, the prosecution introduced a transcript of an unavailable accusatory witness's testimony at a preliminary hearing over the defendant's objection. In a 6-3 opinion, Justice Blackmun wrote that hearsay may be admissible under the Confrontation Clause if the declarant is unavailable and the statement bears "adequate 'indicia of reliability.'"[42] To the Court, evidence is reliable if it falls within a "firmly rooted" hearsay exception that bears a "particularized guarantee[] of trustworthiness."[43]

After almost a quarter century, the Court drastically changed its Confrontation Clause jurisprudence in *Crawford v. Washington*,[44] which overruled *Roberts*'s "indicia of reliability" test."[45] *Crawford* held that out-of-court "testimonial" statements are inadmissible unless the witness is unavailable and the defendant had an opportunity to cross-examine the witness in a prior proceeding.[46] The *Crawford* Court dismissed judicial determinations of reliability as "amorphous," inconsistently applied from one jurisdiction to the next and deviating from the Founders' intent.[47] *Crawford* determined that the right to confrontation is a "procedural rather than substantive guarantee": it is meant to provide the defendant and the jury with the opportunity to contest the reliability of an accusatory witness, not to permit the judge to make a substantive judgement on the reliability of such testimony.[48] Writing for the majority, Justice Scalia opined on the *Roberts* test, stating that "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty."[49]

36. Mattox v. United States, 156 U.S. 140, 142–43 (1892).
37. *Id.*
38. Crosby v. U.S., 506 U.S. 255, 259 (1993).
39. Coy v. Iowa, 487 U.S. 1012, 1019 (1988).
40. California v. Green, 399 U.S. 149, 158 (1970).
41. 448 U.S. 56, 66 (1980).
42. *Id.*
43. *Id.*
44. *See* Brooks, *supra* note 23, at 193 ("*Crawford* revolutionized the way that all criminal prosecutions must manage the right to confrontation.").
45. 541 U.S. 36, 68 (2004).
46. *Id.* at 59.
47. *Id.* at 60–61 (opining that the "amorphous" reliability test created in *Roberts* "often fails to protect against paradigmatic confrontation violations").
48. *Id.* at 62.
49. *Id.*

In short, the Court's Confrontation Clause jurisprudence is clear: out-of-court testimonial statements may be admitted only when the witness is unavailable, and the defendant has had an opportunity to cross-examine them in a prior proceeding. This principle, rooted in the idea that such face-to-face confrontation elicits the truth, has not only been enshrined in the Sixth Amendment but also tested vis-à-vis the crucible of our legal system, with the Supreme Court looking unfavorably upon any exception.

II.
CONFRONTATION CLAUSE WRINKLES

Notwithstanding the Confrontation Clause's importance, two distinct potential deviations from its tenets have emerged. First, the Federal Rules of Criminal Procedure permit out-of-court depositions in certain circumstances. Second, lower courts have wrestled with the question of remote testimony in the wake of *Maryland v. Craig*. This Section chronicles Federal Rules of Criminal Procedure 15 and 26, which consider the prospect of remote testimony. It then goes on to cover jurisprudence on virtual confrontation, contrasting the different approaches courts have taken with respect to remote testimony by government witnesses.

A. Federal Rules of Criminal Procedure

As a general matter, the Federal Rules of Criminal Procedure require witnesses to offer their testimony live and in open court.[50] Specifically, Rule 26 states that "[i]n every trial the testimony of witnesses must be taken in open court."[51] And the Supreme Court has implicitly approved of this broad rule. While the Supreme Court usually serves as "a mere conduit" to proposed amendments to the Federal Rules submitted by the Judicial Conference,[52] it rejected an amendment[53] to Rule 26 that would have allowed two-way video testimony if there were "exceptional circumstances," "appropriate safeguards," and the witness was unavailable within the bounds of Federal Rule of Evidence 804(a)(4)–(5).[54] Congress ultimately deferred to the Supreme Court's judgment and declined to adopt the Judicial Conference's suggested amendments.

Federal Rule of Criminal Procedure 15 presents an exception to Rule 26. Rule 15 permits courts to grant a motion to allow the testimony of a prospective

50. Fed. R. Crim. P. 26.

51. *Id.*

52. Statement of Douglas, J., dissenting from the submission to Congress of Rules of Evidence, 409 U.S. 1132, 1133 (1972); *see also* Statement of Justice White, 507 U.S. 1091, 1095 (1993) (stating that the Court's role "is to transmit the Judicial Conference's recommendations without change and without careful study, as long as there is no suggestion that the committee system has not operated with integrity").

53. Professor Richard D. Friedman discussed the Court's opinion at length. *See generally* Friedman, *supra* note 27.

54. Order of the Supreme Court, 207 F.R.D. 89, 96 (2002).

witness to be offered by deposition, under "exceptional circumstances" and in the interest of justice.[55] Courts have repeatedly held that this Rule makes no exception for convenience and efficiency.[56] Rule 15 establishes a right for the defendant to be in the witness's presence during the deposition, except when the defendant waives their right to be present or is persistently disruptive even after judicial remonstration.[57] The Rule provides a narrow exception for the government to conduct a deposition outside the United States without the defendant's presence if the witness can provide "substantial proof of a material fact" in a felony prosecution, a "substantial likelihood" that the witness will not appear at trial, and the witness will not be present for a deposition in the United States.[58] This rare exception only applies if the following conditions are met: first, the defendant's inability to be present must be caused by either (A) the nation where the witness is located rejecting custody of the defendant for deposition or (B) a lack of secure transportation and continuing custody for in-custody defendants; and second, the defendant must be able to "meaningfully participate" in the deposition by other means.[59]

Courts have not found a constitutional defect with Rule 15. President Gerald Ford offered his testimony against his attempted assassin via a Rule 15 videotaped deposition, though the district court permitted it to be conducted at the place of President Ford's choosing and without the defendant's presence.[60] Even in a post-*Crawford* landscape, courts have found "no reason" to question the constitutionality of admitting testimony preserved by a properly conducted Rule 15 deposition, because these depositions meet both the unavailability and cross-examination requirements outlined in *Crawford*.[61]

55. Fed. R. Crim. P. 15.

56. *See, e.g.*, United States v. Fei Ye, 436 F.3d 1117, 1123–24 (9th Cir. 2006); United States v. Cutler, 806 F.2d 933, 935–36 (9th Cir. 1986).

57. Fed. R. Crim. P. 15(c)(1)(A)–(B).

58. Fed. R. Crim. P. 15(c)(3)(A)–(C).

59. Fed. R. Crim. P. 15(c)(3)(D)(i)–(ii), (E).

60. United States v. Fromme, 405 F. Supp. 578, 583 (E.D. Cal. 1975). The district court's allowances in this case would almost surely not be seen as exceptional circumstances if Ford was not President. *See* Trump v. Vance, 140 S. Ct. 2412, 2451 (Alito, J., dissenting) (noting that this "represented a sharp departure from conventional practice" under Rule 15). The district court flatly ignored Rule 15(c)(1)'s requirement that the defendant be in the presence of the witness during the deposition. *See* Fed. R. Crim. P. 15(c)(1) (requiring that "the officer who has custody of the defendant must produce the defendant at the deposition and keep the defendant in the witness's presence during the examination, unless the defendant: (A) waives in writing the right to be present; or (B) persists in disruptive conduct justifying exclusion after being warned by the court that disruptive conduct will result in the defendant's exclusion").

61. United States v. Cannon, 539 F.3d 601, 604 (7th Cir. 2008); *see also* United States v. Yates, 438 F.3d 1307, 1314 (11th Cir. 2006) (noting that "Rule 15 gives the defendant the opportunity to be present at the deposition and thus an opportunity for physical face-to-face confrontation").

B. Virtual Confrontation

While Rule 15 depositions present one complication with respect to the Confrontation Clause, technological innovation presents another. As technology advanced in the late twentieth century, courts around the country were faced with a novel constitutional question: does remote testimony offered by an accusatory witness violate the defendant's confrontation right? This Section discusses the murky case law on this question, beginning with the Court's seminal case *Maryland v. Craig*, and then chronicling three approaches lower courts have taken.

1. The Supreme Court's Maryland v. Craig *Decision*

In *Maryland v. Craig*, the Supreme Court held that minor survivors of sexual assault were permitted to testify through one-way closed-circuit television, in which the defendant can see the witness but the witness cannot see the defendant.[62] The Court wrote that the Confrontation Clause's main concern is ensuring reliability of the evidence used to prove a criminal defendant's guilt.[63] Face-to-face confrontation is a means of ensuring such reliability by: (1) requiring that the testimony be given under oath; (2) providing the opportunity for cross-examination; (3) allowing the finder of fact to assess the witness's demeanor; and (4) reducing the risk that a witness will wrongfully testify against an innocent defendant.[64] However, the Court reasoned that confrontation cannot exclusively mean face-to-face interaction, citing a number of cases in which hearsay evidence was permitted against the defendant without opportunity for face-to-face confrontation.[65] The Court opined that face-to-face confrontation, while preferred, is not "an indispensable element of the Sixth Amendment."[66]

Craig held that trial courts must make a case-specific inquiry before allowing video testimony,[67] applying a two-step necessity and reliability test to determine if: (1) "denial of such confrontation is necessary to further an important public policy" and (2) "only where the reliability of the testimony is otherwise assured."[68] Protecting a child abuse victim from further trauma may

62. 497 U.S. 836, 857 (1990).

63. *Id.* at 845 ("The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.").

64. *Id.* at 845–86.

65. *Id.* at 849 (citing Bourjaily v. United States, 483 U.S. 171 (1987); United States v. Inadi, 475 U.S. 387 (1986)).

66. *Id.*

67. *Id.* at 855.

68. *Id.* at 850; *id.* at 852 (writing that the "use of the one-way closed circuit television procedure, where necessary to further an important state interest, does not impinge upon the truth-seeking or symbolic purposes of the Confrontation Clause").

be one such acceptable policy rationale.[69] In light of the *Craig* decision, Congress enacted the Child Witnesses' Rights Act, giving child witnesses the ability to testify through a two-way closed-circuit television or by videotaped deposition against criminal defendants in federal court.[70]

In a strongly-worded dissent, Justice Scalia argued that the Court's holding in *Craig* deprives "a categorical guarantee of the Constitution."[71] The dissent contended that the Framers drafted the Sixth Amendment precisely to ensure that no countervailing policy interest could ever overcome the right of the accused to confront their accuser.[72] Justice Scalia deplored the "subordination of explicit constitutional text to currently favored public policy."[73] In closing, Justice Scalia questioned the necessity of having this debate, as "the Court has no authority to question [the value of confrontation]."[74]

2. Craig*'s Progeny*

Lower federal and state courts have offered differing approaches to analyzing *Craig*, especially those cases decided after *Crawford v. Washington* revolutionized Confrontation Clause jurisprudence.[75] This Section will discuss three different approaches courts have taken.[76]

First, in *United States v. Gigante*, the Second Circuit considered whether a terminally ill, "crucial" witness's out-of-court testimony offered through two-way videoconferencing technology, which allows both witness and defendant to see each other, violated the Confrontation Clause.[77] While acknowledging that the use of this technology "must be carefully circumscribed," the court ultimately held that it did not deprive the defendant of his right to confrontation.[78] Decided seven years before *Crawford*, the Second Circuit found that the two-way video testimony in this case met the four safeguards of reliability outlined in *Craig*: (1) "[the witness] was sworn;" (2) "he was subject to full cross-examination;" (3) "he testified in full view of the jury, court, and defense counsel;" and (4) "[the witness] gave this testimony under the eye of [the defendant] himself."[79]

69. *Id.* at 852 (holding that "a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court").

70. 18 U.S.C. § 3509(b) (1994).

71. *Craig*, 497 U.S. at 860 (Scalia, J., dissenting).

72. *Id.* at 861.

73. *Id.*

74. *Id.* at 869–70 (further stating that the Court is not "free to conduct a cost-benefit analysis of clear and explicit constitutional guarantees").

75. *See* Crawford v. Washington, 541 U.S. 36 (2004).

76. These cases are emblematic of the larger debate amongst the judiciary. *See supra* note 10 and accompanying text (discussing these cases).

77. 166 F.3d 75, 79 (2d Cir. 1999).

78. *Id.* at 80.

79. *Id.*

However, the *Gigante* court concluded that it was not bound by the *Craig* standard, which examined one-way video testimony, since this case considered a two-way system.[80] Rather, the majority compared two-way videoconferencing to a Rule 15 deposition.[81] Since the trial judge would have permitted a Rule 15 deposition in this case but for the witness's participation in the Witness Protection Program and the defendant's poor health to travel,[82] the judge allowed live testimony offered through a two-way videoconferencing system that "afford[ed] greater protection of [the defendant's] confrontation rights than would a deposition."[83]

While the *Gigante* court acknowledged that in-court testimony may have "intangible elements"[84] that could be lost by videoconference, it ultimately found that a trial court may use two-way videoconferencing in "exceptional circumstances" when doing so is in the "interest of justice."[85] The combination of the witness's illness, his participation in the Witness Protection Program, and the defendant's illness that prevented him from traveling to a deposition satisfied such an exceptional circumstance.[86]

The Eleventh Circuit, by contrast, declined to follow *Gigante*. In *United States v. Yates*, the court considered whether the district court's denial of in-court confrontation was necessary to further an important public policy (and thus satisfied the first prong of the *Craig* test).[87] The witnesses in question, both deemed "essential" to the government's case-in-chief, resided in Australia and were unwilling to travel to the United States to testify against the defendants.[88] The trial court permitted the use of two-way video testimony over the defendants' objections, and the jury eventually convicted the defendants.[89]

The *Yates* court concluded that the government's "need" for the video testimony to "expeditiously" resolve the case was not a sufficiently strong public policy justification to outweigh the defendants' right to confrontation.[90] The court invoked a "floodgate[s]" argument, reasoning that if it permitted the government to use videoconferencing in this case, then every prosecutor could argue that it would be necessary to "provid[e] crucial evidence and resolv[e] the case expeditiously."[91] The court further opined that using two-way videoconferencing was not truly "necessary" because the government had the

80. *Id.* at 81. ("Because [the trial judge] employed a two-way system . . . it is not necessary to enforce the *Craig* standard in this case.").
81. *Id.*
82. United States v. Gigante, 971 F. Supp. 755, 758 (E.D.N.Y. 1997).
83. *Id.* at 758–59.
84. *Gigante*, 166 F.3d at 81.
85. *Gigante*, 971 F. Supp. at 757.
86. *Gigante*, 166 F.3d at 81–82.
87. United States v. Yates, 438 F.3d 1307, 1312 (11th Cir. 2004).
88. *Id.* at 1310.
89. *Id.*
90. *Id.* at 1316.
91. *Id.* at 1324.

option to conduct a Rule 15 deposition in its place, which would have afforded the defendants the right of in-person confrontation.[92] In so holding, the Eleventh Circuit explicitly challenged the Second Circuit's jurisprudence in *Gigante* in two ways.[93]

First, the court opined that the *Gigante* court should have applied the *Craig* test in its analysis, even though *Craig* considered one-way video testimony and *Gigante* dealt with two-way video testimony.[94] Had the *Gigante* court applied this test, *Yates* argued that the testimony in *Gigante* would have likely met *Craig*'s necessary standard anyway, as ensuring the health and safety of the witness and the defendant in that case were both sufficiently strong public policy reasons to warrant the use of video testimony in that case.[95]

Next, the *Yates* court applied *Craig*, expressly rejecting the government's argument that two-way videoconferencing is superior to Rule 15 depositions and thus should be admissible whenever a Rule 15 deposition would be permissible.[96] The court noted that Rule 15 depositions, unlike two-way videoconferencing, provide "an opportunity for physical face-to-face confrontation."[97] Further, the court rejected the government's assertion that trial courts have the inherent power to permit video testimony without explicit authorization in the Federal Rules of Criminal Procedure.[98] The Eleventh Circuit noted that, in fact, the Supreme Court expressly rejected a revision to Federal Rule of Criminal Procedure 26 that would have allowed two-way video testimony.[99] In so holding, the *Yates* court asserted that "[t]he simple truth is that confrontation through a video monitor is not the same as physical face-to-face confrontation . . . the two are not constitutionally equivalent. The Sixth Amendment's guarantee of the right to confront one's accuser is most certainly compromised when the confrontation occurs through an electronic medium."[100] Interestingly, while the *Yates* court focused on the first prong of the test outlined in *Craig* (the inquiry into necessity), it did not substantively consider its second prong—the reliability of such testimony.

A New Mexico Supreme Court case illustrates the last of three different approaches courts have taken in analyzing *Craig.* In *State v. Thomas*, the New Mexico Supreme Court held that the prosecution's use of two-way video testimony did not meet the necessity requirement of *Craig*.[101] In the case, the trial court judge permitted a forensic analyst who had moved out of state to testify

92. *Id.* at 1316–17.
93. *See id.* at 1313.
94. *Id.*
95. *Id.*
96. *Id.* at 1314.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. 376 P.3d 184, 195 (N.M. 2016).

at trial via Skype.[102] While the jury could see the witness's computer image, the analyst herself was only able to see the attorney questioning her, not the defendant, the jury, or the district court judge.[103] Further, the district court did not hold an evidentiary hearing to ascertain whether allowing this video testimony was truly necessary to advance an important public policy, as required by *Craig*.[104] In so finding, the *Thomas* court held that "[i]nconvenience to the witness is not sufficient reason to dispense with [physical confrontation]."[105] While it purportedly applied *Craig*, the *Thomas* court nonetheless questioned the applicability of *Craig*'s reliability analysis post-*Crawford*.[106] The New Mexico Supreme Court relied strictly on a necessity analysis in this case and barely discussed the video testimony's reliability.[107]

These three cases provide three different perspectives on virtual confrontation. *Gigante* focuses on the reliability of the proffered testimony and inquires into whether the use of video testimony was in the "interest of justice." On the other hand, *Yates* rejects the *Gigante* approach and forbids the use of video testimony for prosecutorial convenience. Lastly, *Thomas* concurs with *Yates* in that mere inconvenience does not equate to necessity under *Craig*, but goes further by questioning *Craig*'s precedential weight post-*Crawford*. While by no means an exhaustive review of the case law, an overview of just three decisions demonstrates how divided courts are with respect to when—and whether—virtual confrontation is constitutionally permissible.

While the use of this technology in criminal trials is rare, the COVID-19 pandemic has renewed the government's interest in expanding its use to meet our socially distant reality. As such, courts need to consider how virtual confrontation could play a role in criminal trials in the wake of the pandemic.

III.
PROPOSALS

No constitutional right is absolute. It is an oft-cited maxim that one's rights end where another's begin.[108] The First Amendment's guarantee of free speech

102. *Id.* at 188.
103. *Id.* at 189.
104. *Id.* at 195.
105. *Id.*
106. *Id.* at 193 (positing that while "*Crawford* did not overrule *Craig*," as the former did not discuss face-to-face confrontation, "*Crawford* may call into question the prior holding in *Craig* to the extent that *Craig* relied on the reliability of the video testimony"). Importantly, the New Mexico Supreme Court analyzed the alleged confrontation violation through the lens of the United States Constitution, not its New Mexico analogue. *Id.* at 191 (declaring that the court first considers "whether the United States Constitution provides Defendant relief before determining whether it is necessary to address a counterpart protection under the New Mexico Constitution").
107. *See id.* at 195–96.
108. *See, e.g.*, Zechariah Chafee Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 957 (1919) (positing that "[y]our right to swing your arms ends just where the other man's nose begins").

does not permit one to falsely yell "Fire!" in a movie theater.[109] And the Second Amendment right to bear arms does not allow for a personal arsenal of anti-aircraft missiles.[110] But while there may be a need to allow virtual confrontation in some cases, the Court's erosion of a defendant's Sixth Amendment right to confrontation in *Craig* goes too far.

Even many prosecutors agree. In 1999, Gail Goodman conducted a nationwide survey of prosecutors to learn how *Craig* impacted their use of video technology for child witnesses.[111] Concerned about the constitutional legitimacy of this technology, only three of the 134 respondents had used video testimony for an accusatory child witness after *Craig*.[112] The fact that prosecutors hesitated to take advantage of *Craig*'s explicit holding that allowed child witnesses to testify via remote testimony, even before the Court revolutionized its Confrontation Clause jurisprudence, lays bare *Craig*'s "dubious merit"[113] in a post-*Crawford* landscape.

As trials resume during the pandemic and continue thereafter, courts will have to reconsider the role of video testimony as they grapple with the significant backlog of cases as well as public health concerns for the foreseeable future. A rigid insistence on in-person testimony could be an impenetrable roadblock that may, above all else, deleteriously affect the rare defendant against whom some form of out-of-court testimony was offered. Just as the Sixth Amendment guarantees the right to confrontation, it also ensures the right to a speedy trial. Delaying a trial to guarantee in-person testimony may be acceptable for a defendant who is granted bail, but elongating a defendant's incarceration in pre-trial detention to ensure in-person confrontation is untenable.

In this Section, I argue that Rule 15 depositions, not video testimony, should be a court's primary alternative to in-person testimony. *Craig* itself made clear that the Confrontation Clause is ordinarily designed to compel accusers to make their claims in the defendant's presence.[114] But criminal defendants are not afforded this opportunity when witnesses offer testimony via videoconference. I propose that trial courts should not read *Craig* to permit such testimony when

109. This adage is a popular, albeit slightly inaccurate, paraphrasing from Justice Oliver Wendell Holmes's opinion in Schenck v. United States, 249 U.S. 47, 52 (1919) (arguing that even "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic").

110. *See* District of Columbia v. Heller, 554 U.S. 570, 627 (2008) (positing that the Second Amendment does not curtail limitations on carrying "dangerous and unusual weapons").

111. Josephine Bulkley, Gail S. Goodman, Jodi A. Quas & Cheryl Shapiro, *Innovations for Child Witnesses: A National Survey*, 5 PSYCH. PUB. POL'Y & L. 255, 270 (1999).

112. *Id.* at 273.

113. *See* Friedman, *supra* note 27, at 706.

114. Maryland v. Craig, 497 U.S. 836, 846–47 (1990); *see also* Order of the Supreme Court, 207 F.R.D. 89, 94 (2002) (in which Justice Scalia notes that "a purpose of the Confrontation Clause is ordinarily to compel accusers to make their accusations *in the defendant's presence*—which is not equivalent to making them in a room that contains a television set beaming electrons that portray the defendant's image") (emphasis in original).

alternatives exist. For example, if a witness cannot come to court due to infirmity, then the court should permit the witness to offer testimony via a recorded Rule 15 deposition conducted in the defendant's physical presence. Normatively, I contend that the Supreme Court should amend its dubious *Craig* decision by abandoning its reliability analysis. I also argue that the Court should limit *Craig*'s necessity prong to a "hierarchy of methods" approach, allowing video testimony only when in-court testimony and a Rule 15 deposition would be impractical for non-pecuniary reasons.

A. The Problems with Video Testimony

There are myriad problems inherent in video testimony. For one, even with the prevalence of smartphones, the digital divide persists: the FCC estimated in 2019 that over twenty-one million Americans still lack access to broadband Internet.[115] This internet access discrepancy particularly affects poor urban and rural communities.[116] Indeed, this exclusion has already created "strange bedfellows," with both prosecutors and defense attorneys criticizing virtual grand juries for potentially excluding people without reliable Internet access.[117]

Video testimony also presents the problem of a non-courtroom setting. While video testimony offered in open court does not suffer from the secrecy defects of, say, a virtual grand jury, courts struggle to ensure witnesses log in from a court-like setting. Would courts be able to guarantee that the witness is free from external influences while providing testimony, or instill the solemnity of the proceedings to jurors?[118] In the words of the Advisory Committee to the Federal Rules of Civil Procedure, "The very ceremony of trial . . . may exert a powerful force for truthtelling."[119]

Virtual trials pose potential security issues as well. "Zoom bombing," a phenomenon in which hackers sign onto videoconferences to disrupt meetings using pornographic, hateful, or threatening language, has been a prevalent issue since the country went remote in March 2020.[120] For example, a federal court

115. *See* Nicol Turner Lee, *What the Coronavirus Reveals About the Digital Divide Between Schools and Communities*, BROOKINGS INST. (Mar. 17, 2020), https://www.brookings.edu/blog/techtank/2020/03/17/what-the-coronavirus-reveals-about-the-digital-divide-between-schools-and-communities/ [https://perma.cc/5KY9-GDGV].

116. *See* Emily A. Vogels, *Some Digital Divides Persist Between Rural, Urban and Suburban America*, PEW RSCH. CTR. (Aug. 19, 2021), https://www.pewresearch.org/fact-tank/2019/05/31/digital-gap-between-rural-and-nonrural-america-persists/ [https://perma.cc/B37M-ZLXC] (showing that suburban Americans report having the highest rates of home broadband access, with rural Americans seven percent less likely than suburban Americans to report having home broadband and urban Americans two percent less likely).

117. Ramey, *supra* note 17.

118. *See id.* (quoting a concerned judge who stated, "I don't know where [witnesses are] phoning in from, whether someone is exerting influence over them").

119. Fed. R. Civ. P. 43 (Advisory Committee Notes to 1996 Amendments).

120. *See* Chen, *supra* note 25 ("The issues with basic security practices culminated with 'Zoombombing,' in which trolls crashed people's video meetings and bombarded them with inappropriate material like pornography.").

hearing held on Zoom during the height of the pandemic was disrupted by an intruder who displayed images of 9/11, pornography, and ISIS.[121] After unidentified individuals dialed into two Massachusetts-based schools yelling profanity and displaying a swastika tattoo, the FBI's Boston Division issued a warning to highlight the threat of cyberhacking.[122] Even The New York Times fell victim to "Zoombombers."[123] While Zoom's chief executive publicly apologized and committed the company to fix its security issues,[124] consumers sued the company for allegedly falsely promising that the company uses end-to-end encryption to protect its users from unwanted third-party intrusion.[125] Privacy issues mar Zoom's competitors in the videoconferencing space as well, including Google, Facebook, and Microsoft.[126]

Connectivity issues also pose a serious problem. Consider a small technical glitch that causes video testimony to lag at the crucial moment in which a virtual witness is offering damning—or exonerating—evidence. This could impair the jury's ability to observe the witness's demeanor.[127]

Even without technical issues, jurors may be unable to cognize visual cues[128] and perceive a witness's credibility as well as they could have if the

---

121. Leah Asmelash, *A Federal Hearing Was Interrupted with Images of 9/11 and Pornography*, CNN (Sept. 14, 2020), https://www.cnn.com/2020/09/14/us/georgia-hearing-zoom-bomb-trnd/index.html [https://perma.cc/8ZU5-R32J].

122. Kristen Setera, *FBI Warns of Teleconferencing and Online Classroom Hijacking During COVID-19 Pandemic*, FBI (Mar. 30, 2020), https://www.fbi.gov/contact-us/field-offices/boston/news/press-releases/fbi-warns-of-teleconferencing-and-online-classroom-hijacking-during-covid-19-pandemic [https://perma.cc/4ETE-RABG].

123. Taylor Lorenz, *'Zoombombing': When Video Conferences Go Wrong*, N.Y. TIMES (Mar. 20, 2020), https://www.nytimes.com/2020/03/20/style/zoombombing-zoom-trolling.html [https://perma.cc/Y938-69M9] ("[T]he journalists Kara Swisher (a contributing writer for the Opinion section of The New York Times) and Jessica Lessin . . . were forced to abruptly end the event after just 15 minutes of conversation because a participant began broadcasting the shock video '2 Girls 1 Cup.' 'Our video call was just attacked by someone who kept sharing pornography + switching between different user accounts so we could not block them,' Ms. Lessin tweeted, adding that she and Ms. Swisher would reschedule an audio-only version of the event.").

124. Eric S. Yuan, *A Message to Our Users*, ZOOM BLOG (Apr. 1, 2020), https://blog.zoom.us/a-message-to-our-users/ [https://perma.cc/3URH-N9E2].

125. Complaint of Plaintiff Consumer Watchdog at 1, Consumer Watchdog v. Zoom Video Commc'ns, Inc., No. 1:20-cv-02526 (D.D.C. Sept. 9, 2020), https://www.consumerwatchdog.org/sites/default/files/2020-08/Zoom%20Complaint.pdf [https://perma.cc/R78W-WC24]. End-to-end encryption allows only the sender and intended recipient to access the communicated data. *Id.* at 2.

126. Editorial Board, *Privacy Cannot Be a Casualty of the Coronavirus*, N.Y. TIMES (Apr. 7, 2020), https://www.nytimes.com/2020/04/07/opinion/digital-privacy-coronavirus.html [https://perma.cc/2PL3-XQYK].

127. *See* Harrell v. State, 709 So. 2d 1364, 1367, 1372 (Fla. 1998) (noting several problems with the testimony of a remote government witness, including that the witness's "testimony was not simultaneous with the audio, causing a split-second delay between what was said and what was seen").

128. *See* Kate Murphy, *Why Zoom Is Terrible*, N.Y. TIMES (Apr. 29, 2020), https://www.nytimes.com/2020/04/29/sunday-review/zoom-video-conference.html [https://perma.cc/PRQ7-X89K] ("The problem is that the way the video images are digitally encoded and decoded, altered and adjusted, patched and synthesized introduces all kinds of artifacts: blocking,

witness testified in person (which is already demonstrably weak).[129] For one, research demonstrates that spatial distortions, such as camera angles, during video chats may inhibit trust formation between viewers and speakers. Communications over video often do not transfer the non-verbal signals that are of "extreme importance" in interpersonal communications.[130] Some experts even argue that "no facial cues are better than faulty ones."[131] Even the president of the National District Attorneys Association admitted that he does "not see how [jurors] can fully assess credibility if we are not all in the same room."[132] As one public defender noted, "Once you distance people, the ability to have empathy diminishes greatly."[133]

B. The Advantages of Rule 15 Depositions

A recorded, videotaped Rule 15 deposition has at least three benefits over live, two-way video testimony: (1) it allows the defendant to be in the witness's presence; (2) it reduces the likelihood of technical errors that may befall live video testimony; and (3) it eliminates the security risks associated with live video testimony.

The biggest benefit of a Rule 15 deposition is that it permits the defendant to come into physical proximity with the accusatory witness. This proximity "place[s] the witness under the . . . hostile glare of the defendant,"[134] which provides a more realistic feel for courtroom testimony than does videoconference. For centuries, confrontation was understood to mean a face-to-face encounter between the accused and their accuser.[135] In the words of the Supreme Court, "[i]t is always more difficult to tell a lie about a person 'to his

freezing, blurring, jerkiness and out-of-sync audio. These disruptions, some below our conscious awareness, confound perception and scramble subtle social cues.").

129. *See* Graham Davies, *The Impact of Television on the Presentation and Reception of Children's Testimony*, 22 INT'L J.L. & PSYCHIATRY 241, 244 (1999) (citing literature that indicates that untrained adults detect deception at about the rate of chance).

130. Pio Enrico Ricci Bitti & Pier Luigi Garotti, *Nonverbal Communication and Cultural Differences: Issues for Face-to-Face Communication over the Internet*, *in* FACE-TO-FACE COMMUNICATION OVER THE INTERNET: EMOTIONS IN A WEB OF CULTURE, LANGUAGE AND TECHNOLOGY 81 (Arvid Kappas & Nicole C. Krämer eds., 2011) (finding that "[t]he technologies for communication over the internet do not always allow access to 'kinesic' behaviors through the visual channel or to vocal-intonational modulations of speech through the auditory channel; [those communicating over the internet] therefore cannot count on a wide range of nonverbal signals that are of extreme importance for certain communicative processes").

131. Murphy, *supra* note 128 (finding that "[t]he absence of visual input might even heighten people's sensitivity to what's being said").

132. *See* Scigliano, *supra* note 18.

133. *Id.*

134. Maryland v. Craig, 497 U.S. 836, 866 (1990) (Scalia, J., dissenting).

135. Order of the Supreme Court, 207 F.R.D. 89, 94 (2002); *see also* Mattox v. United States, 156 U.S. 237, 244 (1895) ("The substance of the [Confrontation Clause] is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination. This, the law says, he shall under no circumstances be deprived of.").

face' than 'behind his back.'"[136] The Eighth Circuit has made a similar observation.[137] Of course, the Founders did not have access to videoconference technology when they drafted the Sixth Amendment. Still, the procedural reliability—the goal of the Confrontation Clause[138]— of in-person confrontation cannot be replicated over a computer screen. In the words of Justice Scalia: "Virtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones."[139]

A Rule 15 deposition also removes the risk of technical issues over the Internet. An in-person deposition is not prone to the digital lag-time, image blurring, and other disruptions over video call that even users with high-speed broadband connection may experience, because Rule 15 depositions would be recorded offline. This glitch-free environment would allow for uninterrupted proceedings and would mimic an actual cross-examination in the courthouse. While the jury would have to view both forms of testimony on video, at least the counsel for both prosecution and defense would be able to engage with the witness in a physical setting. Again, I do not argue that a Rule 15 deposition is the preferred method of procuring adverse witness testimony—surely that is through in-person testimony offered in a courthouse—but I do contend that it should be preferred in comparison with testimony obtained through videoconference.

A videotaped Rule 15 deposition does not suffer from the security risks of live video testimony. Such a deposition completely eliminates the threat of "Zoom bombing" because it would be conducted in-person (albeit outside the courthouse) instead of over the Internet. Requiring the witness's physical presence with all counsel present in a presumptively secure environment would also remove the possibility that the witness is under undue influence from someone outside of the video camera's view.

To be sure, virtual confrontation has its benefits. For one, it might improve access to the courts. Video testimony may permit some prospective witnesses, for whom the distance and cost to reach the courthouse would prove a barrier, to offer testimony. One observer noted that "Zoom" court has led to as much as a 20 percent increase in criminal defendants attending their hearings.[140] Some jurisdictions now provide mobile hot-spots, laptops, and other devices to

136. Coy v. Iowa, 487 U.S. 1012, 1019 (1988).

137. *See* United States v. Bordeaux, 400 F.3d 548, 554 (8th Cir. 2005) (noting that "[t]he virtual 'confrontations' offered by closed-circuit television systems fall short of the face-to-face standard because they do not produce the same truth-inducing effect").

138. *See* Crawford v. Washington, 541 U.S. 36, 61 (2004) (finding that the Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence . . . but about how reliability can best be determined").

139. Order of the Supreme Court, 207 F.R.D. at 94.

140. *See* Scigliano, *supra* note 18.

ameliorate accessibility issues.[141] But a criminal defendant choosing to participate in their trial virtually is categorically different than having the choice made for them. One may waive one's constitutional right to confront their accuser much the same as one may waive their right to a trial altogether by taking a plea bargain. And mere convenience to witnesses should not be enough to trump a defendant's constitutional safeguards.

C. Craig *Should Not Permit Two-Way Video Testimony When Alternatives Exist*

Until and unless the Court amends *Craig*, this case permits child victims of sexual trauma to testify via one-way videoconference against their alleged abuser. But *Craig* should not be read any broader than its narrow holding, especially when Rule 15 depositions present a more constitutional alternative, in that they permit defendants to confront their accusers in-person. Even a once-in-a-century pandemic should not provide courts the opportunity to unnecessarily erode constitutional protections. As long as less constitutionally offensive measures exist to obtain an accusatory witness's testimony, courts should not permit video testimony.

Many lower courts have agreed with this assessment and narrowly interpret *Craig*. In a recent decision holding that two-way video testimony violated the Confrontation Clause, the Supreme Court of Michigan stated that it would only apply *Craig* in the case where a child victim who needs special protection testifies against his alleged abuser.[142] Since the witness in the case was neither a victim nor a child, the court declined to extend *Craig*.[143]

Courts may be tempted to justify the use of video testimony as "necessary to further an important public policy"[144] of lessening the backlog of criminal cases due to pandemic-related court closures. If key witnesses to the government's case-in-chief would not provide testimony at trial, these courts would allow video testimony in its place to resume trials.

But this would be a grave error. The American criminal legal system was severely backlogged even before the pandemic.[145] Expanding *Craig* to justify expeditiously moving through the criminal docket now would create harmful

141. *See id.* (noting that "[c]ourthouses have addressed the digital divide by setting up Zoom kiosks and, in Texas, lending tablets to jurors").

142. People v. Jemison, 505 Mich. 352, 365 (2020).

143. *Id.*

144. Maryland v. Craig, 497 U.S. 836, 850 (1990).

145. *See* William Glaberson, *Faltering Courts, Mired in Delays*, N.Y. TIMES (Apr. 13, 2013), http://www.nytimes.com/2013/04/14/nyregion/justice-denied-bronx-court-system-mired-in-delays.html [https://perma.cc/V2BX-KXQL] ("Concerns about an overburdened, underfinanced court system have nagged with increasing urgency across New York City. The number of felony cases citywide that exceed the courts' own guidelines for excessive delay—180 days in most felony cases—has more than doubled since 2000, even as the total number of felony cases has dropped by nearly a quarter.").

precedent, rendering the Confrontation Clause toothless in the long-term. The Eleventh Circuit recognized as much in *Yates* when it denied the government's request for video testimony based on its "need" to expeditiously resolve cases.[146] The *Yates* court understood that if it permitted the government to use videoconferencing in that case, then every prosecutor could argue to use it to "provid[e] crucial evidence and resolv[e] . . . case[s] expeditiously."[147] Courts that choose to expand *Craig*'s holding, like the Second Circuit in *Gigante* "in the interest of justice,"[148] would in fact be committing a severe—and unnecessary—injustice against criminal defendants.

As noted above, a defendant can waive their right to confrontation at any point.[149] In that scenario, the judge could theoretically permit the witness to testify via videoconference anyway. And courts have allowed some defense witnesses to testify over remote, two-way videoconference.[150] But if a trial is to be held during and after the pandemic, then a defendant must be afforded the entire catalog of rights, as required by the Constitution, if they so insist. If courts cannot create conditions that would satisfy constitutional demands, then they cannot host trials.

I am not unsympathetic to witnesses who do not feel comfortable attending a packed courthouse for health reasons; COVID will never truly be eradicated. But a Rule 15 deposition—my preferred solution and one recommended by the Eleventh Circuit—would not require them to do so.[151] At a deposition, the witness can maintain the appropriate social distance from all parties involved, while still being in the presence of the defendant. A large conference room with quality air circulation and protective barriers may be an appropriate forum in which to conduct these depositions. Though Rule 15 depositions are rare, I contend that their use should increase if the need arises during the pandemic.

D. The Court Should Remove Craig*'s Reliability Analysis and Adopt a "Hierarchy of Methods" Approach to Adverse Witness Testimony*

By permitting a witness to testify via one-way videoconference, the *Craig* Court abandoned its own interpretation that inherent in the Confrontation Clause is the "literal right to 'confront' the witness at the time of trial."[152] A 5-4 decision of "dubious merit,"[153] *Craig* goes too far in attempting to shape the Confrontation Clause to fit twenty-first century realities. The Supreme Court has

146. United States v. Yates, 438 F.3d 1307, 1316 (11th Cir. 2006).

147. *Id.* at 1324 n.6.

148. United States v. Gigante, 166 F.3d 75, 81 (2d Cir. 1999).

149. *See* Scigliano, *supra* note 18 (noting that "Texas will conduct remote jury trials for crimes carrying jail time only if defendants waive their right to an in-person trial—and so far, none has").

150. *See* Mulkey, *supra* note 22, at 478.

151. *See Yates*, 438 F.3d at 1316 (finding that there "simply is no necessity" for video testimony when a Rule 15 deposition is an alternative).

152. California v. Green, 399 U.S. 149, 157 (1970).

153. *See* Friedman, *supra* note 27, at 706.

already indicated its willingness to grant certiorari to resolve questions left unanswered by *Craig*.[154] In this Section, I argue that it should do so to overrule *Craig*'s reliability analysis and amend its necessity prong.

1. Reliability Analysis

Craig permitted a child witness to testify via one-way video testimony in a trial against their alleged abuser as long as the procedure for introducing such testimony "ensures the reliability of the evidence."[155] However, *Crawford* explicitly held that the prosecution may only introduce testimonial statements from an out-of-court declarant if they are unavailable and the defendant had a prior opportunity to confront her.[156] *Crawford* also forbade lower courts from allowing the jury to "hear evidence . . . based on a mere judicial determination of reliability."[157] Therein, there appears to be a conflict between these two cases.

This conflict can be resolved by overruling *Craig*'s reliability analysis. I am not alone in recognizing the incongruence between these two cases.[158] In the words of the Michigan Supreme Court, *Crawford* "took out [*Craig*'s] legs."[159] That court noted that *Craig* "envisions the possibility of open-ended exceptions to the confrontation requirement that has since been rejected in *Crawford*."[160] In *Thomas*, the New Mexico Supreme Court questioned the applicability of *Craig*'s reliability analysis post-*Crawford*.[161] The court relied strictly on a necessity analysis in that case and barely discussed the video testimony's reliability.[162] Even proponents of expanding video testimony recognize that the discrepancies

154. *See generally* People v. Wrotten, 923 N.E.2d 1099 (N.Y. 2009), *cert. denied sub nom.* Wrotten v. New York, 560 U.S. 959 (2010) (rejecting a petition for certiorari to resolve the constitutionality of remote testimony because the case had "an interlocutory posture," but noting that "[t]he question is an important one, and it is not obviously answered by *Maryland v. Craig*").

155. Maryland v. Craig, 497 U.S. 836, 857 (1990) (concluding that "where necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate, the Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation").

156. Crawford v. Washington, 541 U.S. 36, 59 (2004).

157. *Id.* at 62.

158. *See, e.g.*, State v. Thomas, 376 P.3d 184, 193 (N.M. 2016) (noting that "*Crawford* may call into question the prior holding in *Craig* to the extent that *Craig* relied on the reliability of the video testimony"); United States v. Carter, 907 F.3d 1199, 1206 n.3 (9th Cir. 2018) (positing that "[t]he vitality of *Craig* itself is questionable in light of the Supreme Court's later decision in *Crawford*"); State v. Smith, 636 S.W.3d 576, 585–86 (Mo. 2022) ("When *Crawford* overruled *Roberts*, it put *Craig*'s reliability focused rule into serious doubt.").

159. People v. Jemison, 505 Mich. 352, 356 (2020).

160. *Id.* at 365 n.7 (citing *Crawford*, 541 U.S. at 54 that "[t]he text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts").

161. *Thomas*, 376 P.3d. at 193 (positing that while "*Crawford* did not overrule *Craig*" as the former did not discuss face-to-face confrontation, "*Crawford* may call into question the prior holding in *Craig* to the extent that *Craig* relied on the reliability of the video testimony").

162. *See id.* at 195–96.

between *Craig* and *Crawford* have led lower courts to reach "inconsistent decisions and a plethora of conflicting tests" and "exactly what *Crawford* did not want: individual judicial determinations of whether video testimony is permitted."[163] And even without applying *Crawford*, the Eighth Circuit has questioned whether two-way video testimony reliably "capture[d] the essence of the face-to-face confrontation" and stated that video testimony relied too heavily on impractical logistical questions, such as the size of the monitor displaying the witness, the monitor's location, and the location of the camera facing the defendant.[164]

2. Public Policy Analysis

The Court should also amend *Craig*'s necessity prong by removing judicial discretion to ascertain "important" public policies that would warrant the use of video testimony. Instead, the Court should adopt a "hierarchy of methods" approach, requiring a showing that (1) in-court testimony and a Rule 15 deposition would be impractical, (2) the witness's testimony is necessary for the government's case-in-chief, and (3) such testimony is unattainable by (a) any witness who could testify in-court or (b) a Rule 15 deposition. To quote *Crawford*, "The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the court."[165]

The "hierarchy of methods" approach is rigid enough to secure defendants' inalienable right to confrontation, while being flexible enough to allow for virtual testimony on rare occasion. Even the facts of *Gigante* could arguably fit this test. Though the trial court in that case noted that two-way live video testimony affords defendants greater protection of confrontation rights than a Rule 15 deposition (a conclusion I dispute), it first came to the conclusion that a deposition was not appropriate due to the poor health of both the witness and the defendant, and the witness's secret location.[166] While I disagree with the trial court and Second Circuit's reasoning in *Gigante*, my proposed test arrives at the same conclusion for two reasons. First, the witness was "crucial" to the prosecution's case-in-chief: the defendant was being tried for partaking in a conspiracy to murder the witness, who had been an associate of the defendant's family for many years. Since the witness was in poor health and in hiding, he was arguably unable to present his testimony in the courtroom. And since the *defendant* could not attend a Rule 15 deposition due to his own health issues, a

163. Brooks, *supra* note 23, at 201. In their Note, Brooks argues that two-way video testimony is constitutional. *Id.* at 186.

164. *See* United States v. Bordeaux, 400 F.3d 548, 555 (8th Cir. 2005) (finding that the "hard logistical questions [regarding two-way video testimony] . . . would render the theoretical promise of the two-way system practically unattainable").

165. *Crawford*, 541 U.S. at 54.

166. *See* United States v. Gigante, 166 F.3d 75, 81 (2d Cir. 1999).

Rule 15 deposition may have also been impractical. In this rare occasion, testimony via two-way video may meet the hierarchy of methods test.

The hierarchy of methods test that I propose would also be in cohesion with the foreign witness exception in Rule 15.[167] A key witness in a foreign country is beyond the subpoena power of any prosecutor, and the nation in which the witness resides may decline to accept custody of the defendant for an in-person Rule 15 deposition. Congress envisioned this exact scenario in Rule 15(c)(3). So long as the "defendant can meaningfully participate in the deposition through reasonable means," this Rule permits the government to depose a foreign witness without the defendant's physical presence.[168] A trial court exercising this authority must make "case specific findings" that, among other things, the witness's testimony could provide "substantial proof of a material fact in a felony prosecution,"[169] there is a "substantial likelihood" the witness cannot be compelled to attend the trial in-person,[170] and the defendant cannot be present because the country in which the witness is located will not permit the witness to attend the deposition.[171]

The circumstances in which a Rule 15 deposition may be allowed fit neatly into the hierarchy of methods analysis. For example, where the prosecution is unable to compel an integral government witness to provide testimony in court, and a foreign government is reticent to accept the defendant, the prosecution is unable to arrange an in-person deposition. Thus, the only possible method of obtaining this key witness's testimony would be using "reasonable means" through which the defendant can "meaningfully participate": two-way videoconference.

Finally, the Court should not look to cost concerns when determining if it would be impractical for a witness to testify in-court or through a Rule 15 deposition. The Supreme Court has repeatedly held that constitutional rights are not "up for sale" and cannot be auctioned away simply due to efficiency arguments.[172] The *Yates* court correctly identified that permitting the government to use video testimony out of expediency would lead to every prosecutor arguing for its use to "provid[e] crucial evidence and resolv[e] the case expeditiously."[173] Nearly every state supreme court concurs that cost concerns alone are

167. *See* Fed. R. Crim. P. 15(c)(3).

168. Fed. R. Crim. P. 15(c)(3)(E).

169. Fed. R. Crim. P. 15(c)(3)(A).

170. Fed. R. Crim. P. 15(c)(3)(B).

171. Fed. R. Crim. P. 15(c)(3)(D)(i).

172. *See* Melendez-Diaz v. Massachusetts, 557 U.S. 305, 325 (2009) (writing that the "Confrontation Clause . . . is binding, and we may not disregard it at our convenience"). This view is also strongly supported by the Court's jurisprudence on other constitutional issues. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645, 656 (1972) (finding that "[t]he Constitution recognizes higher values than speed and efficiency"); Bowen v. Gilliard, 483 U.S. 587, 629 (1987) (holding that efficiency may not be used "as a basis for infringing . . . constitutional rights").

173. United States v. Yates, 438 U.S. 1307, 1324 n.6 (11th Cir. 2006).

insufficient for alleging impracticality.[174] Montana is the only state court to establish a test that allows two-way video testimony due to distance or expense.[175] However, the facts of the Montana case—a misdemeanor in which the out-of-state witness would have had to travel for three separate trials—should limit its persuasiveness on a larger scale.[176] The jury process, from voir dire to verdict, is time-consuming and costly.[177] Allowing one part of the Sixth Amendment to be traded away for financial reasons would invite an erosion of criminal defendants' rights wholesale.[178]

CONCLUSION

Technological innovation should not lead to constitutional degradation. Criminal trials are not *Judge Judy*: the prosecution's interest in expeditiously introducing testimony from an accusatory witness over two-way video conference, pandemic or not, cannot override the defendant's constitutional protections to confront their accuser face-to-face. The Court's *Craig* opinion unnecessarily deprives defendants of this historical right when a less constitutionally offensive measure exists—videotaped Rule 15 depositions. The Court should remove *Craig*'s reliability and public policy analyses and permit two-way video testimony only when both in-court appearance and a Rule 15 deposition are impractical.

174. *See, e.g.*, People v. Jemison, 505 Mich. 352, 364 (2020) ("[E]xpense is not a justification for a constitutional shortcut. This is especially true where the prosecution elects to use an out-of-state laboratory for its analysis. Such a rule would have perverse consequences: the prosecution could deprive a criminal defendant of confrontation rights by using out-of-state analysts to save money and then cite cost-savings as a justification for not providing face-to-face testimony."); State v. Rogerson, 855 N.W.2d 495 (Iowa 2014) (finding that the state's justification of distance, cost, and inefficiency could not overcome a defendant's confrontation rights); State v. Thomas, 376 P.3d 184, 195 (N.M. 2016) (holding that a defendant's confrontation rights were violated when the trial court permitted an out-of-state forensic analyst to testify using two-way video in order to avoid inconveniencing the witness); Lipsitz v. State, 442 P.3d 138, 140 (Nev. 2019) (ruling that it was necessary to use two-way video technology for a witness who was medically unavailable due to being admitted to an out-of-state residential treatment center); Bush v. State, 193 P.3d 203, 214–16 (Wyo. 2008) (finding no confrontation violation when a witness testified over two-way video where his physician warned against traveling and he gave testimony after being sworn in by a district court judge).

175. Missoula v. Duane, 355 P.3d 729, 731, 734 (Mont. 2015).

176. *See id.*

177. *See* Stephanie E. Levin, Chilling the Right to a Jury Trial: The Unconstitutionality of Jury Costs (May 4, 2017) (Undergraduate Honors Theses Paper) (W&M Scholar Works), https://scholarworks.wm.edu/honorstheses/1021 [https://perma.cc/KGC7-8SEU] (documenting the variety of costs in a typical criminal trial in Virginia).

178. *See* Melendez-Diaz v. Massachusetts, 557 U.S. 305, 325 (2009) (arguing that while the "Confrontation Clause may make the prosecution of criminals more burdensome . . . that is equally true of the right to trial by jury and the privilege against self-incrimination").