

# MR. CRAWFORD GETS COVID: COURTS’ STRUGGLE TO PRESERVE THE CONFRONTATION CLAUSE DURING COVID AND WHAT IT TEACHES US ABOUT THE UNDERLYING RIGHTS

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*One of the things courts across the nation struggled with throughout the COVID-19 pandemic was the conflict between preserving defendants’ rights under the Confrontation Clause of the Sixth Amendment and implementing the safest public health measures. Measures like masking or virtual testimony recommended by public health officials threatened to abridge defendants’ rights. This Note has two primary contentions. First, it will argue that the wide variation in the ways courts chose to resolve this tension revealed a fundamental issue in our Confrontation Clause jurisprudence: Courts have never actually defined the underlying right. In fact, this Note will argue, that the “confrontation right” is more appropriately understood as a bundle of distinct rights which must be carefully prioritized. Second, this Note will argue that the standards used to adopt these modifications were insufficiently rigorous. It proposes, therefore, that it is time for the legislature to intervene as they have in other situations involving modified confrontation, and to provide courts with a structured procedure for authorizing modified witness testimony during times of emergency.*

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## INTRODUCTION

If you walked into any federal criminal jury trial in the Eastern District of New York in 2021, you would see the effects of the ongoing COVID-19 pandemic.<sup>1</sup> Absent was the traditional courtroom testimony you would be familiar with from television. Instead, the testifying witness sat in the jury box, the jury in the gallery, and the public in a separate room, linked by video.<sup>2</sup> Almost everyone wore masks: the judge, the jury, the advocates, the clerks<sup>3</sup>—all except the witnesses.<sup>4</sup> A testifying witness in the Eastern District of New York was not permitted to wear a mask, but instead had to don a plastic face shield so that the jury could see their nose and mouth.<sup>5</sup> Although the decision to remove witnesses' masks may have been risky for the health and safety of the trial participants, it was, in the eyes of the Eastern District, necessary to preserve the defendant's constitutional rights under the Confrontation Clause of the Sixth Amendment.<sup>6</sup> In other words, although it might be dangerous, without it, the trial just would not be fair.<sup>7</sup>

<sup>1</sup> UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, PLAN FOR RESUMPTION OF JURY TRIALS (2021) [hereinafter E.D.N.Y. PLAN FOR RESUMPTION], <https://img.nyed.uscourts.gov/files/pub-news/Plan%20for%20Resumption%20of%20Jury%20Trials.pdf> [https://perma.cc/FT5F-BDS9].

<sup>2</sup> *Id.* at 2–3.

<sup>3</sup> *Id.* at 2.

<sup>4</sup> *Id.* at 3.

<sup>5</sup> *Id.*

<sup>6</sup> *United States v. Cohn*, 481 F. Supp. 3d 122, 126 (E.D.N.Y. 2020) (“Jury trials, particularly in criminal cases, present singular obstacles: effective credibility evaluation (and perhaps the Confrontation Clause) requires that witnesses testify without traditional masks.”).

<sup>7</sup> See David Oscar Markus, *Judge Jed Rakoff, For the Defense with David Oscar Markus*, at 08:40 (Apr. 13, 2021), <https://www.forthedefensepodcast.com/episode/judge-jed-rakoff> [https://perma.cc/ZV49-Q8TS] (explaining the same rationale for allowing witnesses to testify without masks in the Southern District of New York).

To someone used to such a courtroom, it might be jarring to enter a courtroom in the Middle District of Georgia during the same time period. District courts in that jurisdiction decided that masks for witnesses were fine.<sup>8</sup> In an even stronger move, the Southern District of New York, sitting just across the East River from the Eastern District discussed above, permitted testimony via videoconference for witnesses with health concerns.<sup>9</sup> As this Note will explore, the different procedures undertaken by courts represent fundamentally conflicting views on the nature and scope of the Confrontation Clause.

In ordinary times, a criminal defendant's rights under the Confrontation Clause are outlined by the Supreme Court's landmark decision in *Crawford v. Washington*.<sup>10</sup> A defendant has a right to confront those who will give testimony against them.<sup>11</sup> This primarily means that the prosecution cannot use testimonial statements (i.e., statements offered for their truth and made for the primary purpose of law enforcement or prosecution) from non-testifying witnesses.<sup>12</sup> But it also means that the defendant has the right to a traditional conception of testimony against them: testimony given in open court where the jury can see the witness and the witness can see the defendant.<sup>13</sup> This right to traditional testimony is, of course, not without exceptions. In *Maryland v. Craig*, the Court outlined the basic framework used to determine whether exceptions are appropriate: The alternative to traditional testimony must be reliable, and its use must be necessary to prevent harm.<sup>14</sup>

But pandemic times were not ordinary times. The pandemic forced unprecedented<sup>15</sup> shifts to the basic model of witness testi-

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<sup>8</sup> See *United States v. Crittenden*, No. 4:20-CR-7, 2020 U.S. Dist. LEXIS 151950, at \*13–22 (M.D. Ga. Aug. 21, 2020) (holding that the Confrontation Clause is not violated by requiring witnesses to wear masks).

<sup>9</sup> See generally *United States v. Donziger*, No. 19-CR-561, 2020 U.S. Dist. LEXIS 157797 (S.D.N.Y. Aug. 21, 2020) (allowing a seventy-two-year-old witness with undisclosed medical issues to testify via video from his hometown of Dallas); *United States v. Akhavan*, 523 F. Supp. 3d 443 (S.D.N.Y. 2021) (allowing a fifty-seven-year-old with hypertension and atrial fibrillation to testify by video).

<sup>10</sup> 541 U.S. 36 (2004).

<sup>11</sup> *Id.* at 51.

<sup>12</sup> See *Davis v. Washington*, 547 U.S. 813, 822 (2006) (establishing the standard for “testimonial” statements).

<sup>13</sup> See *Coy v. Iowa*, 487 U.S. 1012 (1998) (finding it unconstitutional for child witnesses to testify with a screen between them and the defendant such that they could not see the defendant and the defendant could only dimly make them out).

<sup>14</sup> 497 U.S. 836 (1990).

<sup>15</sup> For a discussion of the differences in scale between the pandemic modifications to testimony and any modifications that had been used in the past, see *infra* Section II.B.

mony.<sup>16</sup> Simply halting all criminal trials for years was not an option. That would create a backlog in the courts, disrupting the criminal legal system nationwide (to say nothing of its effects on the defendants' Sixth Amendment speedy trial rights).<sup>17</sup> Thus, courts had to either expect witnesses to take risks with a deadly virus<sup>18</sup> in order to comply with the traditional model of testimony or limit a defendant's constitutional rights. Different courts and court systems adopted very different tactics for resolving this issue. Some permitted masks<sup>19</sup> or other forms of personal protective equipment (PPE).<sup>20</sup> Others permitted protective equipment in the courtroom short of PPE.<sup>21</sup> In rare cases, individual judges even permitted remote, two-way video testimony.<sup>22</sup> On the other hand, some court systems and judges demanded the traditional model, regardless of its public health implications.<sup>23</sup>

This Note has two primary contentions. First, it will argue that the wide variation in the ways courts modified witness testimony during the pandemic reflects a fundamental tension in Confrontation Clause jurisprudence: Courts have never actually defined the underlying right to confrontation. This Note will then argue that the "confrontation right" should be understood as a bundle of associated rights: the right to cross-examine the witness; the right to have the witness in the same room as the defendant; the right to have the defendant in the same room as the jury; the right to have testimony occur in the courtroom; and the right to have the jury observe the witness's demeanor. This Note contends that attempts to adapt to the pandemic placed these

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<sup>16</sup> See Jessica A. Roth, *The Constitution Is on Pause in America's Courtrooms*, THE ATLANTIC (Oct. 10, 2020), <https://www.theatlantic.com/ideas/archive/2020/10/constitution-pause-americas-courtrooms/616633> [<https://perma.cc/CC7N-DTBB>] (discussing the variety of ways American courts are dealing with the effects of the pandemic).

<sup>17</sup> *Id.*

<sup>18</sup> See WHO Coronavirus (COVID-19) Dashboard, WORLD HEALTH ORGANIZATION, <https://covid19.who.int> [<https://perma.cc/4Z25-SDAT>] (showing worldwide deaths from the COVID-19 pandemic in the millions).

<sup>19</sup> See *e.g.*, *United States v. Crittenden*, No. 4:20-CR-7, 2020 U.S. Dist. LEXIS 151950 (M.D. Ga. Aug. 21, 2020); *United States v. Clemons*, No. RBD-19-0438, 2020 U.S. Dist. LEXIS 206221 (D. Md. Nov. 4, 2020).

<sup>20</sup> See E.D.N.Y. PLAN FOR RESUMPTION, *supra* note 1, at 3 (describing the use of PPE).

<sup>21</sup> See *id.* at 3; *United States v. Petit*, 496 F. Supp. 3d 825, 827 (S.D.N.Y. 2020).

<sup>22</sup> See, *e.g.*, *United States v. Donziger*, No. 19-CR-561, 2020 U.S. Dist. LEXIS 157797 (S.D.N.Y. Aug. 31, 2020); *United States v. Akhavan*, 523 F. Supp. 3d 443, 451–56 (S.D.N.Y. 2021).

<sup>23</sup> See *generally* *United States v. Casher*, No. CR 19-65-BLG, 2020 U.S. Dist. LEXIS 106293 (D. Mont. June 17, 2020) (finding that testimony by videoconference is not a viable alternative to live testimony); see also *In re Authorizing Limitation Of Court Operations During A Public Health Emergency And Transition To Resumption Of Certain Operations*, Administrative Order No. 2020-79, 4 (Ariz. May 20, 2020) [hereinafter *Ariz. Limitation Order*], <https://www.azcourts.gov/Portals/22/admorder/Orders20/2020-79.pdf?ver=2020-05-21-120117-320> [<https://perma.cc/NWX7-KWEP>].

rights in competition with one another, forcing courts to choose among them in ways they have not been required to do in the past. It then argues that, to effectively determine which modifications are appropriate in the future, courts must prioritize these separate rights, rather than treat them as a conglomerate.

Second, this Note will argue that, regardless of which modifications various courts chose to adopt, the standards used to adopt them were insufficiently rigorous. One would hope that these decisions were being made based on rigorous scientific evidence—evidence that had been tested for fairness and accuracy. Unfortunately, the administrative orders authorizing such decisions often cited only one piece of Centers for Disease Control and Prevention (CDC) or state health department guidance and then identified a preferred form/level of PPE.<sup>24</sup> Judges reviewing the constitutionality of such orders have too often simply cited similar guidance and signed off.<sup>25</sup>

This perfunctory approach to assessing scientific necessity poses a major problem. It is now clear that the CDC made mistakes in some of its guidance in the early stages of the pandemic.<sup>26</sup> Some guidance proposed measures that were insufficient.<sup>27</sup> Other guidance proposed measures that were unnecessary.<sup>28</sup> As time progresses, it is also becoming clear that, in some cases, the CDC guidance did not even reflect the best available science.<sup>29</sup> It is one thing to say that a defendant should be forced to give up some of their confrontation rights for a medically necessary measure, but it is another to say that a defendant should be forced to give up their rights for a measure that turned out to provide little protection.<sup>30</sup> This Note proposes, therefore, that it is time for state and federal legislatures to intervene as they have in other cases involving the confrontation rights,<sup>31</sup> and to provide the

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<sup>24</sup> See e.g., *Ariz. Limitation Order*, *supra* note 23; *In Re Coronavirus/Covid-19 Pandemic, Eighth Authorization to Continue the Use of Videoconferencing or Teleconferencing in Criminal Matters*, Administrative Order No. 2022-05 (E.D.N.Y. 2022), <https://img.nyed.uscourts.gov/files/general-ordres/AdminOrder2022-05.pdf> [<https://perma.cc/6AGA-4UUW>].

<sup>25</sup> See *infra* note 161 and accompanying text.

<sup>26</sup> See Deborah Netburn, *A Timeline of the CDC's Advice on Facemasks*, L.A. TIMES (July 27, 2021, 4:47 PM), <https://www.latimes.com/science/story/2021-07-27/timeline-cdc-mask-guidance-during-covid-19-pandemic> [<https://perma.cc/5BQL-7LV4>] (laying out a number of occasions in which the CDC itself has admitted that its earlier guidance was simply incorrect); see also *infra* Section III.B.

<sup>27</sup> See *infra* Section III.B.

<sup>28</sup> See *infra* Section III.B.

<sup>29</sup> See *infra* Section III.B.

<sup>30</sup> For a discussion of measures taken by courts that may have been counterproductive from a COVID-19 standpoint, see *infra* Section III.B.

<sup>31</sup> See *infra* Section IV.B.

courts with more rigorous procedures for authorizing, via administrative orders, modified witness testimony.

This Note will proceed in four parts. Part I will situate the reader in the history of the Confrontation Clause and the exceptions that courts have made to serve the public interest. Part II will explore the approaches courts have taken to reconcile the Confrontation Clause with the necessities of COVID-19, and in doing so reveal the disagreements between courts as to what “the right to confrontation” actually means. Part III will argue that the decision-making used to adopt these approaches has been deeply flawed. Part IV will propose steps legislatures could take to prepare in advance for future crises and a procedure for courts to use in determining whether modifications to the traditional confrontation model are appropriate.

## I

### THE PRE-COVID CONFRONTATION CLAUSE

The twenty-first century has been a time of significant development in our Confrontation Clause doctrine.<sup>32</sup> The result is that, to date, the question of what specific modifications or exceptions to the requirement of traditional in-person, face-to-face testimony are acceptable is relatively open. This is further complicated by the fact that the historical origins of the Confrontation Clause are unclear, meaning that courts have been kept guessing as to what the original purpose of the clause was even supposed to be.<sup>33</sup>

It is, therefore, important to understand the historical values that are generally cited as giving rise to the Confrontation Clause doctrine. These conflicting values give rise to many of the controversies in its application today.<sup>34</sup> This Part will examine the history of the Confrontation Clause and its exceptions leading up to the pandemic. Section A will discuss the historical precursors to the right to confrontation and the various values embodied in those precursors—values that are, in turn, often read into the Confrontation Clause. Section B will discuss the development of early Confrontation Clause doctrine in the U.S. and the issues created by that development. Section C will discuss the modern confrontation rule. Section D will discuss the mechanism by which courts grant exceptions to that rule. And Section E will discuss ways in which courts applied that mechanism prior to the pandemic.

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<sup>32</sup> Compare *Crawford v. Washington*, 541 U.S. 36, 50–51 (2004) (creating a new conception of the Confrontation Clause in 2004), with *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (providing the standard for Confrontation Clause cases before 2004).

<sup>33</sup> See *infra* Section I.B.

<sup>34</sup> See *infra* Section III.A.

### A. *The Historical Right to Confrontation*

The ideals behind the Confrontation Clause date back at least to the Old Testament, and even the ancient versions of the right to confrontation still have force in modern jurisprudence. The Book of Deuteronomy describes a requirement that an accuser and an accused stand together before God and give testimony before priests and judges so that their credibility can be assessed.<sup>35</sup> The Romans also valued confrontation; oft cited is the description of Roman law in the New Testament's recounting of the trial of Paul.<sup>36</sup> But commitment to confrontation is also visible in Cicero's Verrine Orations which discuss the right of the accused to have the accuser present at his trial as a safeguard against unjust conviction.<sup>37</sup> Roman imperial law likewise provided that the defendant had a right to personally be present while his trial was taking place.<sup>38</sup> Some of these ideals were carried into the Middle Ages in proceedings by the Catholic Church, even as secular courts often abandoned them in favor of trial by ordeal.<sup>39</sup>

Beginning in the fifteenth century, these rights fell out of fashion in much of continental Europe. Instead, witnesses were examined behind closed doors.<sup>40</sup> They would then sign affidavits which would, in turn, be used against the defendant as part of the inquisitorial process.<sup>41</sup> The theory behind this procedure was that witnesses were more likely to be coached or improperly influenced if they were forced to give their testimony in the open and that they were, therefore, better off giving their testimony in secret where there would be less fear of retaliation.<sup>42</sup>

The early modern English simply could not settle on which system they preferred. Multiple English judges, writing in the fifteenth

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<sup>35</sup> Deut. 19:16–21 (King James). (“If a false witness rises against any man to testify against him that which is wrong; then both men . . . shall stand before the Lord, before the priests and the judges, which shall be in those days. And the judges shall make dilligent inquisition . . .”).

<sup>36</sup> Acts 25:16 (King James) (“It is not the manner of the Romans to deliver any man to die, before that he which is accused have the accusers face to face, and have license to answer for himself concerning the crime laid against him.”).

<sup>37</sup> Frank R. Herrmann & Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 VA. J. INT'L L. 481, 486 (1994) (describing Cicero's prosecution of Verres for convicting a man in the absence of his accuser).

<sup>38</sup> *Id.* at 486–87.

<sup>39</sup> *Id.* at 500.

<sup>40</sup> Richard D. Friedman, *The Confrontation Clause Re-Rooted and Transformed*, 2003 CATO SUP. CT. REV. 439, 443–44 (2004) (describing the use of testimony by affidavit in Continental Europe).

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

<sup>42</sup> *Id.*

to eighteenth centuries, praised the availability of confrontation in English courts and the resulting “altercation” between witnesses and the accused as a contrast to the continental system.<sup>43</sup> They also emphasized the importance of cross-examination and oral testimony in judging credibility.<sup>44</sup> Yet, during the same period, there were numerous instances where the right to face one’s accuser was abridged, curtailed, or simply disregarded.<sup>45</sup> Unsurprisingly, this was common in highly politically charged environments: the Starr Chamber, the reign of Queen Mary, and the treason trials of Tudor and Stuart England.<sup>46</sup> Most famously, in the trial of Sir Walter Raleigh for plotting to overthrow the crown, the principal witness to his alleged treason never testified in person.<sup>47</sup> In the colonies, in order to prevent colonial juries from simply refusing to convict for violations of the Sugar Act, the Stamp Act, and the Townshend Acts, Parliament permitted claims of violation to be heard in vice-admiralty courts.<sup>48</sup> These courts typically used testimony by deposition.<sup>49</sup>

From these historical sources, modern courts have traditionally extracted several distinct values of a confrontation system.<sup>50</sup> Confrontation ensures the transparency of the system to the judge, the public, and the jury.<sup>51</sup> It forces the witness to accuse the defendant to their face in a formal setting (which is, at least in theory, a more daunting prospect than lying to a third party).<sup>52</sup> Further, even once a baseline of reliability has been established, confrontation permits the jury to evaluate the *degree* of reliability above that baseline. It has long been believed that a jury can assess veracity by observing the witness’s demeanor during testimony.<sup>53</sup> By insisting that testimony occurs live, confrontation also forces the jury to be in the same room as the defendant to watch the defendant react to the evidence. Some argue this

<sup>43</sup> *Id.* at 444.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 444–45.

<sup>46</sup> *Id.*

<sup>47</sup> W. Jeremy Counsellor & Shannon Rickett, *The Confrontation Clause After Crawford v. Washington: Smaller Mouth, Bigger Teeth*, 57 BAYLOR L. REV. 1, 7–8 (2005) (describing the trial of Raleigh).

<sup>48</sup> Daniel H. Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381, 396–97 (1959) (arguing that pushback against these acts led naturally into the adoption of precursors of the Confrontation Clause into state constitutions).

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

<sup>50</sup> See *Crawford v. Washington*, 541 U.S. 36, 43–50 (2004) (describing the historical development of the right to confrontation).

<sup>51</sup> Friedman, *supra* note 40, at 441–42 (setting out the values behind confrontation).

<sup>52</sup> See *Coy v. Iowa*, 487 U.S. 1012, 1018–19 (1988) (“The phrase still persists, ‘Look me in the eye and say that.’ . . . It is always more difficult to tell a lie about a person ‘to his face’ than ‘behind his back.’”).

<sup>53</sup> See Friedman, *supra* note 40, at 442 (explaining the value of demeanor as evidence).



prevents the prosecution from dehumanizing the defendant and impresses upon the jury the import of their actions.<sup>54</sup> Live confrontation in front of the jury likewise allows the defendant to fully explore the witness's testimony and its attendant weaknesses and uncertainties through cross-examination.<sup>55</sup>

### B. *The American Confrontation Clause*

The Sixth Amendment to the United States Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”<sup>56</sup> But precisely how the founders came to ratify this Confrontation Clause is, as courts have lamented, unclear.<sup>57</sup> Some academics argue that the true catalyst was the lingering concern over events like the trial of Sir Walter Raleigh.<sup>58</sup> Others argue it was a reaction to the use of admiralty courts in the colonies.<sup>59</sup> Still others argue it was part of a broader shift in the American legal system, a shift that sought to grant a defendant the right to advocate for themselves and to test the prosecution.<sup>60</sup>

It is, therefore, unclear which historical value (or values) the framers were trying to codify. Was it the biblical notion of credibility judgment by the discerning eye? Was it a concern that a witness's identity should be known so as to distance society from trials like that of Sir Walter Raleigh? Was it a backlash against the lack of transparency regarding how testimony had been obtained in continental and admiralty courts? Was it a concern that the witness needed to be present to satisfy the American ideal of testing the prosecution? Courts have sidestepped these questions and allowed the Confrontation Clause to serve as a catchall for the various values described above.

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<sup>54</sup> See Dubin Research & Consulting, *COVID-19's Next Victim? The Rights of the Accused*, 44 CHAMPION 22, 30 (2020).

<sup>55</sup> Friedman, *supra* note 40, at 441–42 (explaining the value of adversarial cross examination).

<sup>56</sup> U.S. CONST. amend VI.

<sup>57</sup> *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) (“[T]he Confrontation Clause comes to us on faded parchment.”).

<sup>58</sup> See Daniel Shaviro, *The Supreme Court's Bifurcated Interpretation of the Confrontation Clause*, 17 HASTINGS CONST. L.Q. 383, 384 (1990) (arguing that the inclusion of the Confrontation Clause in the Constitution reflects the “common-law abhorrence of the Tudor and Stuart practice of trial by affidavit”).

<sup>59</sup> See Pollitt, *supra* note 48, at 396–99 (arguing that the use of admiralty courts was the catalyst for a renewed commitment to a confrontation right in the colonies).

<sup>60</sup> See Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77, 81 (1995) (arguing that the Confrontation Clause was an outgrowth of a more confrontational American legal system).

As early as 1895, the Supreme Court described the Confrontation Clause as a sort of aggregation of benefits rather than a single right:

The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.<sup>61</sup>

For much of the twentieth century, however, the precise contours of the Confrontation Clause's application were still hazy.

The Supreme Court took a stab at clarifying these issues in *Ohio v. Roberts*.<sup>62</sup> The Court in *Roberts* focused primarily on the concern that testimony by affidavit was unreliable. It therefore fashioned a test designed to avoid that unreliability by promoting in-court testimony subject to cross-examination.<sup>63</sup> Yet the Court also noted the importance of reconciling the competing interests of effective law enforcement. As a general rule then, the Court found that only face-to-face oral testimony should be admitted, but that exceptions can apply provided that there are sufficient indicia of reliability to permit the conclusion that there has not been a significant departure from the right.<sup>64</sup> An out-of-court statement had sufficient indicia of reliability if it fell within a "firmly rooted hearsay exception" or had other "particularized guarantees of trustworthiness."<sup>65</sup>

This standard was not well received.<sup>66</sup> For one thing, because it effectively reduced the right to confrontation down to the hearsay rule, many professors and jurists complained that this amounted to handing control of a constitutional issue over to the whims of the legislature.<sup>67</sup> It also opened the door to a wide variety of statements that

<sup>61</sup> *Mattox v. United States*, 156 U.S. 237, 242–43 (1895).

<sup>62</sup> *Ohio v. Roberts*, 448 U.S. 56, 63–64 (1980).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 65.

<sup>65</sup> *Id.* at 66.

<sup>66</sup> *Crawford v. Washington*, 541 U.S. 36, 60–61 (2004) (noting the urging the court has received from its own membership and from various academics to retool the *Roberts* standard and collecting a list of cases and articles which criticize *Roberts*).

<sup>67</sup> See e.g., *Lilly v. Virginia*, 527 U.S. 116, 141–42 (1999) (Breyer, J., concurring) (arguing that the hearsay-based Confrontation Clause interpretation allows constitutional rights to be determined by the "fortuity" of falling under a legislatively created hearsay exception); Richard Friedman, *Confrontation: The Search for Basic Principles*, 68 *GEORGE L.J.* 1011, 1014 (1998) (same).

could be offered against the defendant without giving the defendant a chance to cross-examine the witness making the statement.<sup>68</sup>

A rule that made confrontation synonymous with hearsay would have at least been relatively predictable. But in practice, academics and jurists complained that courts were reading “particularized guarantees of trustworthiness” so broadly that a vague sense of reliability became the name of the game.<sup>69</sup> The *Roberts* test allowed trial judges to make arbitrary (and often inconsistent) judgments about what was and was not reliable, often depriving defendants of the opportunity to cross-examine key witnesses.<sup>70</sup>

### C. *The Crawford Standard*

In a series of cases around the turn of the millennium, the Supreme Court revisited, shored up, and ultimately overruled the *Roberts* test and replaced it with a new one under *Crawford v. Washington*.<sup>71</sup> This transition began with *Coy v. Iowa*, in which the Court held that it was impermissible for the victim of a crime to testify behind a screen that would protect them from seeing the defendant.<sup>72</sup> In that case, two young girls had allegedly been sexually abused by the defendant in their backyard.<sup>73</sup> Concerned about the victims having to testify from a place where they could see the defendant, the trial court set up a translucent screen between the defendant and the two children.<sup>74</sup> Using a clever set of lights, it arranged the courtroom so that the victims could not see through the screen but the defendant could make out the victims’ silhouette while they were testifying.<sup>75</sup> Thus, the jury could see the witness, the defendant could see the witnesses, and the witnesses could see the jury, but the witnesses could not see the defendant.<sup>76</sup>

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<sup>68</sup> Friedman, *supra* note 67, at 1018; *see also* AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE, 130–31 (2008) (worrying that the *Roberts* reading of the Confrontation Clause will allow the prosecution to “can” testimony which cannot then be cross-examined).

<sup>69</sup> *Cf.* Counseller & Rickett, *supra* note 47, at 10–11 (“The *Roberts* Confrontation Clause analysis leaves no doubt that the evil at which the *Roberts* court believed the Clause was aimed was the reliability of the hearsay statement itself.”).

<sup>70</sup> *See* Friedman, *supra* note 40, at 448–50 (describing the application of this test as “amorphous and manipulable”).

<sup>71</sup> *Coy v. Iowa*, 487 U.S. 1012, 1021 (1998); *Crawford*, 541 U.S. at 68–69; *Davis v. Washington*, 547 U.S. 813, 821 (2006).

<sup>72</sup> *Coy*, 487 U.S. at 1020–21.

<sup>73</sup> *Id.* at 1014.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 1014–15.

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

Notably, under the pure *Roberts* standard, this probably would have been acceptable. In-court testimony that is under oath and subject to cross-examination<sup>77</sup> is emphatically not hearsay, and, thus, a standard that essentially boils confrontation down to a hearsay issue should permit it.<sup>78</sup> Yet the Supreme Court found that this separation between the witness and the defendant fundamentally undermined the defendant's right to confrontation, thereby suggesting a new conception of the meaning of the Confrontation Clause.<sup>79</sup>

This conception was formalized in *Crawford v. Washington*, which explicitly overruled *Roberts*.<sup>80</sup> The decision to overrule *Roberts* may have been spurred by the facts in *Crawford* which highlighted the key problem with the *Roberts* standard—that the court was likely to consider “reliable” some of the most damning statements against the defendant, statements which the defendant had the greatest interest in undermining through cross-examination.<sup>81</sup> Michael Crawford was accused of stabbing Kenneth Lee.<sup>82</sup> Crawford admitted to the stabbing but claimed self-defense.<sup>83</sup> In court, Crawford's wife, Sylvia, refused to testify against him, but the prosecution was permitted to introduce her stationhouse statement to the police in which she described the circumstances of the stabbing differently from her husband, implying a lack of self-defense.<sup>84</sup>

The trial court admitted the statements under Federal Rule of Evidence 804(b)(3) on the grounds that they were reliable because they were against Sylvia's penal interest and made to a police officer in a formal setting.<sup>85</sup> In other words, the factors the court used to determine that the testimony was reliable are also the factors that made the situation similar to the secretive processes used in continental inquisitions.<sup>86</sup> In response to these concerns, the Supreme Court adopted a new rule: Any “testimonial” statement offered against the defendant for the truth of the matter asserted must be made in court, through traditional oral testimony, without exception

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

<sup>78</sup> See FED. R. EVID. 801 (defining hearsay).

<sup>79</sup> *Coy*, 487 U.S. at 1020.

<sup>80</sup> *Crawford v. Washington*, 541 U.S. 36, 68–69 (2004).

<sup>81</sup> See *id.* at 65 (“To add insult to injury, some of the courts that admit untested testimonial statements find reliability in the very factors that make the statements testimonial. As noted earlier, one court relied on the fact that the witness's statement was made to police while in custody on pending charges.”).

<sup>82</sup> *Id.* at 38.

<sup>83</sup> *Id.* at 40.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 40–41.

<sup>86</sup> See *supra* Section I.A.

for reliability.<sup>87</sup> The Court then clarified two years later in *Davis v. Washington* that a testimonial statement is one made with the primary purpose of prosecution<sup>88</sup>: That is, one where a reasonable person in the speaker's position would have, as their primary motive for making the statement, the punishment or prosecution of the defendant.<sup>89</sup>

The Supreme Court's revisit of the Confrontation Clause clarified a key facet of the right to confrontation therein. The right is not simply a substantive right to reliable testimony,<sup>90</sup> nor is it a flexible standard requiring courts to use their judgment to ensure reliability.<sup>91</sup> It is a set of procedural guarantees that the founders (allegedly) believed would promote truthfulness.<sup>92</sup> These guarantees are satisfied when a witness takes the stand physically, faces the defendant in front of the jury, and testifies.

#### D. Exceptions Under Craig

One might think, based on *Crawford*, that the right to confrontation had become absolute. But it remains a qualified right. The leading case on such qualifications is *Maryland v. Craig*.<sup>93</sup> In that case, the Court was asked to consider whether a Maryland law which permitted child victims of sexual abuse to testify via one-way closed-circuit video was permitted by the Confrontation Clause.<sup>94</sup> The law permitted child victims to be withdrawn to a separate room where they could be questioned by both the prosecutor and defense counsel and required the jury, judge, and defendant to remain in the courtroom and watch the child on the screen.<sup>95</sup> This was only permitted

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<sup>87</sup> *Crawford*, 541 U.S. at 68.

<sup>88</sup> *Davis v. Washington*, 547 U.S. 813, 822 (2006) (“Statements are . . . testimonial when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”).

<sup>89</sup> *Michigan v. Bryant*, 562 U.S. 344 (2011) (“[T]he relevant inquiry into the parties’ statements and actions is not the subjective or actual purpose of the particular parties, but the purpose that reasonable participants would have had, as ascertained from the parties’ statements and actions and the circumstances in which the encounter occurred.”).

<sup>90</sup> *See Crawford*, 541 U.S. at 61 (“[T]he Clause’s ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. . . . The Clause thus reflects a judgment, not only about the desirability of reliable evidence . . . but about how reliability can best be determined.”).

<sup>91</sup> *Cf. id.* at 63 (contrasting *Crawford*’s approach with that of *Roberts*, noting that under *Roberts*, “[w]hether a statement is deemed reliable depends heavily on the factors the judge considers and how much weight he accords each of them”).

<sup>92</sup> *See id.* at 62 (“The legacy of *Roberts* in other courts vindicates the Framers’ wisdom in rejecting a general reliability exception.”).

<sup>93</sup> *Maryland v. Craig*, 497 U.S. 836 (1990).

<sup>94</sup> *Id.* at 840.

<sup>95</sup> *Id.* at 841–42.

when the judge in a particular case determined that the child in question would undergo significant emotional distress if forced to testify in the courtroom such that they would be unable to reasonably communicate.<sup>96</sup> Craig, a preschool teacher, was convicted of sexually abusing a six-year-old at a jury trial in which the six-year-old was permitted to testify via video.<sup>97</sup>

The Court was not willing to stick to a hardline face-to-face communication rule. Reasoning that the right to confrontation must sometimes give way to public policy, the Court concluded that there was a compelling state interest in protecting the child victims of sexual assault from the trauma of testimony in front of their abuser.<sup>98</sup> Relying on past cases which had found that the physical and psychological wellbeing of a minor was worth restricting other constitutional rights, the Court found that the high risk of trauma for the victim justified curtailing the right to confrontation.<sup>99</sup>

Yet, even in such a case, the Court found it important to preserve as much of the right to confrontation as possible without inducing trauma. Thus, the Maryland statute was permissible only because it preserved as much of the right to confrontation as was possible without having the victim in the same room as the defendant: It provided for live examination in which the jury could watch the child's demeanor and behavior, cross-examination, and the right of the defendant to watch the testimony.<sup>100</sup>

From these concerns, the Court designed a test for modified forms of testimony: A modification of confrontation is permissible if and only if "denial of such confrontation is necessary to further an important public policy" and "the reliability of the testimony is otherwise assured."<sup>101</sup> The public policy reason must be evaluated on a particularized, case-by-case basis—i.e., there must be particularized

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<sup>96</sup> *Id.* at 841.

<sup>97</sup> *Id.* at 843.

<sup>98</sup> *Id.* at 855 (refusing to "second-guess the Maryland Legislature regarding the importance of its interest in protecting child abuse victims from the emotional trauma of testifying").

<sup>99</sup> *Id.* (holding that "if the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of" modified confrontation); *id.* ("The trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify.") (citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607–09 (1982)).

<sup>100</sup> *Id.* at 852.

<sup>101</sup> *Id.* at 850.

necessity.<sup>102</sup> It would not, for instance, be permissible for a state to issue a blanket rule that any victim of child sexual abuse may testify via closed-circuit television.<sup>103</sup> Instead, there must be a broad public policy reason that is determined to be necessarily applicable to the case at hand.<sup>104</sup>

The wrinkle in interpreting *Craig* is that it is a pre-*Crawford* case (as might be obvious from its heavy reliance on reliability), but it was decided after the Court shifted its focus to face-to-face confrontation in *Coy*. There is, accordingly, considerable debate as to whether *Craig* is good law, and, if so, how good it is and how it should be modified based on *Crawford*.<sup>105</sup> Fundamentally, *Craig* still treats the right as a substantive right to reliability. It is not entirely clear how the *Craig* test should be modified to reflect a procedural guarantee as opposed to a substantive one, in order to align it with *Crawford*. Despite this uncertainty, most federal circuits, along with several state high courts, have continued to use *Craig* and adapted its two-part test as a framework for determining which exceptions to the Confrontation Clause are appropriate.<sup>106</sup> The Second Circuit, for example, has cabined *Craig* to circumstances involving one-way video and used this cabining as an excuse to develop its own test for the necessary use of confrontation methods it deems reliable, a test which mirrors *Craig* but is more

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<sup>102</sup> *Id.* at 860 (finding that “the Confrontation Clause does not prohibit a State from using” modified confrontation as in *Craig* “[s]o long as a trial court makes such a case-specific finding of necessity”).

<sup>103</sup> *Id.* (declining to “establish . . . any such categorical evidentiary prerequisites for the use of the one-way television procedure”).

<sup>104</sup> *Id.* at 845 (“[A]ny exception to the right ‘would surely be allowed only when necessary to further an important public policy.’”) (quoting *Coy v. Iowa*, 487 U.S. 1012, 1021 (1988)).

<sup>105</sup> See Amy Ljungdahl, *Maryland v. Craig: Public Policy Trumps Constitutional Guarantees*, 515 J. CONTEMP. LEGAL ISSUES 515, 522 n.30 (2004) (“The extent to which *Crawford* casts doubt on *Maryland v. Craig* currently is unknown, but lawyers prosecuting and defending parties in child-abuse proceedings—not to mention the judges who are put to ruling on the motions to accord special treatment to child witnesses—should proceed with caution.”).

<sup>106</sup> See, e.g., *United States v. Bordeaux*, 400 F.3d 548, 554 (8th Cir. 2005) (applying *Craig*’s test); *United States v. Carter*, 907 F.3d 1199, 1206 (9th Cir. 2018) (same); *United States v. Yates*, 438 F.3d 1307, 1313 (11th Cir. 2006) (same); *State v. Rogerson*, 855 N.W.2d 495, 502–03 (Iowa 2014) (cataloguing appellate cases in numerous states where *Craig* was applied, and joining those courts in applying it as well).

permissive.<sup>107</sup> Michigan, on the other hand, has simply rejected *Craig* altogether, claiming that it was overruled by *Crawford*.<sup>108</sup>

### E. Pre-COVID Attempts to Handle Exceptions

Even before the COVID-19 pandemic, courts had already found ways to permit both testimony by video and testimony with face coverings. Judges have noted on multiple occasions that two-way video is more reliable than other forms of modified confrontation.<sup>109</sup> Unlike one-way video, which restricts the interactivity between those in court and those in the remote locations where the witness is testifying, many judges and practitioners have marveled at the degree to which two-way video makes it feel like the witness is in the room.<sup>110</sup> Yet they also acknowledge that two-way video can never entirely equal in-person testimony.<sup>111</sup>

Thus, two-way video was frequently used before the pandemic in much the same cases as it was used during the pandemic. Different courts developed different tests for its use.<sup>112</sup> But the outcome followed a general pattern. Two-way video could not be used to avoid expense or inconvenience;<sup>113</sup> it could only be used to set the witness at ease if they were so fearful of the defendant that they could not testify in the same room without significant trauma,<sup>114</sup> or if the witness was ill or too medically compromised to move.<sup>115</sup>

Face coverings were more contentious. Unlike with two-way video, courts that permitted face coverings were quite open about the

<sup>107</sup> *United States v. Gigante*, 166 F.3d 75, 81 (2d Cir. 1998) (establishing the Second Circuit’s standard for the admissibility of an absent witness’s testimony via two-way video); *see also* *State v. Tate*, 969 N.W.2d 378, 385 (Minn. Ct. App. 2022) (describing the Second Circuit’s test as an outlier which “too easily dispens[ed] with personal confrontation”).

<sup>108</sup> *People v. Jemison*, 952 N.W.2d 394, 400–01 (Mich. 2020) (choosing to apply *Crawford* and declining to extend *Craig* beyond “the specific facts it decided” on grounds that it was overruled by *Crawford*).

<sup>109</sup> *See, e.g., Gigante*, 166 F.3d at 80–81 (finding that two-way closed-circuit testimony was more protective of defendant’s rights than alternatives, such as a Rule 15 deposition, because it enabled a jury to better scrutinize a witness’s credibility and demeanor, and permitted defense counsel to assess the effect of the witness’s testimony on a jury).

<sup>110</sup> Frederic Lederer, *The Legality and Practicality of Remote Witness Testimony*, PRAC. LITIGATOR, Sept. 2009, at 19, 20 (“Very high end ‘telepresence’ solutions . . . are very close to science fiction in terms of technology permitting one to feel in the same room as the remote party.”).

<sup>111</sup> *See, e.g., Gigante*, 166 F.3d at 81.

<sup>112</sup> *Compare id.* (requiring only “a finding of exceptional circumstances” before a trial court allows witness testimony by two-way video), *with United States v. Yates*, 438 F.3d 1307, 1313 (11th Cir. 2006) (following *Craig*).

<sup>113</sup> *See, e.g., Yates*, 438 F.3d at 1316.

<sup>114</sup> *See, e.g., United States v. Bordeaux*, 400 F.3d 548, 553 (8th Cir. 2005).

<sup>115</sup> *See, e.g., Horn v. Quarterman*, 508 F.3d 306, 317–18 (5th Cir. 2007).



loss of demeanor evidence it caused.<sup>116</sup> They generally conceded that the jury was losing something valuable due to their inability to see the witness's face.<sup>117</sup> Some courts would draw the line there. The jury had lost something, and that was unacceptable.<sup>118</sup> The Texas Court of Criminal Appeals, for example, held that a disguise that covered the witness's face—designed to prevent the witness from retaliation—was unacceptable because it “remove[d] the ‘face’ from ‘face-to-face confrontation.’”<sup>119</sup>

Other courts would acknowledge the loss and then describe it as inconsequential. Courts seeking to permit a witness to testify with a covered face would often use descriptions of the face coverings which suggested they had only minor impact.<sup>120</sup> A woman wearing a religious face covering designed to show only her eyes would be described, for example, as “no different as if a male had a full face beard.”<sup>121</sup> Courts could then argue that the reliability factor of *Craig* was still met and that public policy dictated the permission of face coverings.<sup>122</sup> Such arguments were used to allow undercover informants to testify in organized crime cases<sup>123</sup> and to allow women to continue wearing their religious face coverings.<sup>124</sup>

It might seem, therefore, that the courts had already built a strong foundation for handling the kinds of issues that would crop up during the pandemic. Although there was disagreement between circuits and districts, there was at least precedent for both face coverings and video that courts could point to when the pandemic hit. There are, however, several key areas that these decisions did not reach. First,

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<sup>116</sup> *Romero v. State*, 173 S.W.3d 502, 505–06 (Tex. Crim. App. 2005) (“[Seeing the witness’s covered face] cannot by any stretch of the imagination be considered an adequate substitute for the jurors’ ability to view a witness’s face, the most expressive part of the body and something that is traditionally regarded as one of the most important factors in assessing credibility.”).

<sup>117</sup> *See id.* at 505 (finding that, in a trial where a witness testified with much of his face obscured because of his fear of the defendant, “accountability was compromised because the witness was permitted to hide behind his disguise”).

<sup>118</sup> *Cf. id.* at 505–06 (“The trier of fact was deprived of the ability to observe [the witness’s] eyes and facial expression . . . . To hold otherwise is to remove the ‘face’ from ‘face-to-face confrontation.’”).

<sup>119</sup> *Id.* at 506.

<sup>120</sup> *People v. Ketchens*, No. B282486, 2019 Cal. App. Unpub. LEXIS 3920, at \*14 (Cal. Ct. App. June 7, 2019) (deeming a witness’s religious face covering only a “minimal intrusion” with the right to confrontation).

<sup>121</sup> *Id.* at 13.

<sup>122</sup> *United States v. De Jesus-Casteneda*, 705 F.3d 1117, 1121 (9th Cir. 2013) (enumerating reasons why the reliability was assured when a witness needed to testify in disguise for security reasons).

<sup>123</sup> *Id.* at 1120.

<sup>124</sup> *Ketchens*, 2019 Cal. App. Unpub. LEXIS 3920, at \*14.

courts did not have to decide which method best satisfied the right to confrontation—video testimony or face coverings—because in the above cases neither was a solution to the problem that the other solves. Allowing witnesses to testify via two-way video does not help if they have a non-medical reason for wanting their faces to be covered. A woman cannot take off her religious facial covering on video any more than she can in court, and a witness in fear of recognition by the defendant will likely have the same fear on video. On the other hand, a witness who, pre-pandemic, was too ill to come to court was likely to be so ill that they could not come even with their face masked. A witness too fearful of the defendant to testify in their presence is not likely to have their fear assuaged by a face mask. Thus, courts were not required to weigh modification methods against one another. This would become an issue in deciding between modifications during the pandemic.<sup>125</sup>

Second, courts were not required to handle blanket permissions for modified confrontation. The exceptions cited above were particular—for individual medically compromised witnesses, or individual traumatized children, or individual informants who needed to keep their faces covered. It is one thing to apply a particularized necessity standard as in *Craig* to such cases, and quite another to authorize a blanket rule modifying testimony for all witnesses. In the former situation, the judge can carefully consider the tradeoffs for the individual witness—their needs, their ability to testify, and the precise way that the modification will affect both them and the defendant they are testifying against. In the latter case, such particularized determinations would be impractical. And this all came to a head during the COVID-19 pandemic.

## II

### CONFRONTATION DURING THE COVID-19 PANDEMIC

The COVID-19 pandemic threw courts a curve ball, one they had to deal with immediately.<sup>126</sup> From a procedural standpoint, court sys-

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<sup>125</sup> See *infra* Section III.A.

<sup>126</sup> In December of 2019, a novel respiratory virus appeared in Wuhan, China. *CDC Museum Covid-19 Timeline*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 16, 2022), <https://www.cdc.gov/museum/timeline/covid19.html> [<https://perma.cc/AS2X-QAXV>]. By March of 2020, it had achieved near-global spread, leading to lockdowns and public health mandates worldwide. *Id.* United States courts shut down, deeming it unsafe to continue proceedings. *Id.* At the time, it was expected that these disruptions to daily life might last only a few weeks so that the country could “flatten the curve.” Siobhan Roberts, *Flattening the Coronavirus Curve*, N.Y. TIMES (Mar. 27, 2020), <https://www.nytimes.com/article/flatten-curve-coronavirus.html> [<https://perma.cc/T9YR-P2LM>]. But it soon became clear that they would stretch for months if not years. *CDC Museum Covid-19 Timeline*,

tems generally issued blanket administrative orders laying out COVID-19 guidelines for the entire district or state.<sup>127</sup> Individual judges could then follow these orders in their own courtrooms, using their discretionary authority to control proceedings under Rule 611(a).<sup>128</sup> Thus, while the court systems were creating their policies, individual judges were tasked with evaluating those policies for constitutionality and appropriateness.<sup>129</sup> If defendants believed these policies violated their confrontation rights (and some did), they could challenge the use of the modifications, at which point their respective judges would be forced to analyze the constitutionality of whatever restrictions they had adopted.<sup>130</sup>

This Part will explore the wide array of modifications that courts permitted between 2020 and 2022. Section A will lay out those methods and the ways in which they reflect different conceptions of the right to confrontation. Section B will explore the scientific inquiry (or lack thereof) that courts used to determine whether those methods were necessary and/or appropriate.

### A. *The Multitude of Methods*

During the pandemic, courts across jurisdictions made wildly different decisions regarding what constitutes safe courtroom behavior and what violates the Confrontation Clause. Some courts took a hardline stance: Come to court and take off your mask, or do not testify. In Ohio, for instance, some judges developed plans in which everyone in the courtroom, including the jury, defendant, and counsel,

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*supra*. In late 2020 and stretching into 2021, courts began to reopen under heavily restrictive conditions and to develop re-opening plans so as to accommodate new public health guidance while maintaining some semblance of a traditional jury trial. *See, e.g.,* COMM'N TO REIMAGINE THE FUTURE OF N.Y.'S CTS., GOALS AND CHECKLIST FOR RESTARTING IN-PERSON GRAND JURIES, JURY TRIALS AND RELATED PROCEEDINGS (July 2020), <https://history.nycourts.gov/wp-content/uploads/2020/08/Commission-on-Future-Report.pdf> [<https://perma.cc/83PB-QWBY>]; E.D.N.Y. PLAN FOR RESUMPTION, *supra* note 1; Ariz. Limitation Order, *supra* note 23.

<sup>127</sup> *See, e.g.,* Ariz. Limitation Order, *supra* note 23, at 1; *In Re: Coronavirus/COVID-19 Pandemic, Eighth Authorization to Continue the Use of Videoconferencing or Teleconferencing in Criminal Matters*, Administrative Order No. 2022-05, at 5 (E.D.N.Y. 2022), <https://img.nyed.uscourts.gov/files/general-ordres/AdminOrder2022-05.pdf> [<https://perma.cc/B7QQ-FPPK>].

<sup>128</sup> *See* THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON THE FEDERAL RULES OF EVIDENCE, MINUTES OF THE MEETING OF APRIL 30, 2021, 15–16 (2021), [https://www.uscourts.gov/sites/default/files/ev\\_minutes\\_spring\\_2021\\_0.pdf](https://www.uscourts.gov/sites/default/files/ev_minutes_spring_2021_0.pdf) [<https://perma.cc/47UR-NQYN>].

<sup>129</sup> *See id.*

<sup>130</sup> *See, e.g.,* United States v. Crittenden, No. 4:20-CR-7, 2020 U.S. Dist. LEXIS 151950, at \*13–14 (M.D. Ga. Aug. 21, 2020); United States v. Clemons, No. RDB-19-0438, 2020 U.S. Dist. LEXIS 206221, at \*11 (D. Md. Nov. 4, 2020).

would wear masks, but required that witnesses take off their masks before testifying.<sup>131</sup> The arguments in favor of this approach are similar to those used to justify forcing witnesses to take off disguises or religious face coverings: Any restriction on the jury's ability to see the witness's face is inappropriate.<sup>132</sup>

In some jurisdictions, courts required or allowed witnesses to take off masks, but they permitted witnesses to use other forms of PPE, often provided by the court. In the Eastern District of New York, for instance, witnesses wore face shields in lieu of masks.<sup>133</sup> And in the Southern District of New York, the witness stand was surrounded by a plexiglass barrier so that the court could have witnesses remove their masks.<sup>134</sup> These kinds of policies, courts argued, preserved most of the demeanor evidence one might get in an ordinary trial while providing some level of protection.<sup>135</sup>

Other jurisdictions simply bit the bullet and allowed masks for testifying witnesses.<sup>136</sup> These jurisdictions took an approach similar to that used in disguise cases. Opinions approving these orders generally began by minimizing the effect of the mask on the jury's ability to perceive demeanor, pointing out that the jury could still see the expressions on the top halves of witness's faces, their eye movements, and their body language.<sup>137</sup> They then proceeded to point out the public health crisis as a public policy justification for permitting the allegedly minor abridgment of defendants' rights.<sup>138</sup>

Still other jurisdictions simply allowed testimony to go virtual if necessary.<sup>139</sup> Opinions adopting these orders as constitutional focused on the reliability of two-way video, as previous video conferencing

<sup>131</sup> *State v. Lynam*, 163 N.E.3d 609, 610 (Ohio 2020) (“[A]ll persons in his courtroom will wear masks, except he will remove his mask when seated on the bench, witnesses *will* remove their masks when they testify, and attorneys *may* lower their masks . . . and anyone uncomfortable with the requirements will be permitted to leave . . .”).

<sup>132</sup> *See United States v. Casher*, No. CR 19-65-BLG, 2020 U.S. Dist. LEXIS 106293, at \*4, \*9 (D. Mont. June 17, 2020).

<sup>133</sup> E.D.N.Y. PLAN FOR RESUMPTION, *supra* note 1, at 3.

<sup>134</sup> *Markus*, *supra* note 7, at 05:45 (describing creating a plexiglass box around the witness stand so that they could have witnesses remove their masks). E.D.N.Y. PLAN FOR RESUMPTION, *supra* note 1, at 3.

<sup>135</sup> *United States v. Petit*, 496 F. Supp. 3d 825, 828–29 (S.D.N.Y. 2020).

<sup>136</sup> *United States v. Crittenden*, No. 4:20-CR-7, 2020 U.S. Dist. LEXIS 151950, at \*13–22 (M.D. Ga. Aug. 21, 2020).

<sup>137</sup> *Id.* at \*20–21 (“They can observe the witnesses from head to toe. They will be able to see how the witnesses move . . . ; how the witnesses hesitate; how fast the witnesses speak. They will be able to see the witnesses blink or roll their eyes, make furtive glances, and tilt their heads.”).

<sup>138</sup> *Id.* at \*22.

<sup>139</sup> *State v. Tate*, 969 N.W.2d 378, 391 (Minn. Ct. App. 2022), *cert. granted*, 2022 Minn. LEXIS 97 (2022).

decisions had done.<sup>140</sup> Two-way video, the courts argued, allowed the jury to see the witness up close on a big screen and allowed attorneys to question the witness as though they were in the same room.<sup>141</sup> They then argued that the compelling public policy reasons the pandemic provided for keeping everyone inside their own homes justified whatever small lapses in reliability might be induced by holding trial virtually.<sup>142</sup>

### B. *The Stark Difference Between Pandemic Standards and Ordinary Standards for Science*

In the ordinary course of events, before someone is deprived of their constitutional rights (including their confrontation rights), the entity seeking to deprive them of their rights must show some sort of government interest in doing so.<sup>143</sup> In cases where a government actor seeks to justify measures that would deprive a citizen of a constitutional right or infringe upon that right, the court is supposed to probe into the weight of the governmental interest in doing so.<sup>144</sup> Specifically, the court is not supposed to simply take the government's word that such measures are necessary; rather, traditionally, when the interest the government claims rests on necessity, the court requires evidence in the record supporting that claimed necessity.<sup>145</sup> If the necessity is scientific in nature, scientific evidence is needed.<sup>146</sup> Scientific facts cannot be admitted into the record except through expert witnesses.<sup>147</sup> Expert witnesses, in turn, cannot offer conclusions until the court has heard testimony regarding the reliability of their methods.<sup>148</sup> Only once that has happened can the court ascertain whether the expert is trustworthy, based on either the *Frye* standard

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<sup>140</sup> *Id.* at 390.

<sup>141</sup> *Id.*

<sup>142</sup> *See id.* at 389–90 (applying the *Craig* public policy exception and arguing that the dangers of the pandemic justified modification).

<sup>143</sup> *Maryland v. Craig*, 497 U.S. 836, 845 (1990) (“[A]ny exception to the right ‘would surely be allowed only when necessary to further an important public policy’ . . . .” (quoting *Coy v. Iowa*, 487 U.S. 1012 (1988))).

<sup>144</sup> *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 68 (2020) (“Before allowing this to occur, we have a duty to conduct a serious examination of the need for such a drastic measure.”); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 529, 538–39 (1993) (noting that the lower court had to find a legitimate public health reason for an ordinance before upholding it and eventually striking down that same ordinance on grounds that there were no “persuasive indications” that the law as written was in fact necessary).

<sup>145</sup> *See Church of Lukumi Babalu Aye*, 508 U.S. at 539.

<sup>146</sup> *See Roman Catholic Diocese*, 141 S. Ct. at 68.

<sup>147</sup> *See* FED. R. EVID. 701, 702.

<sup>148</sup> *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592–95 (1993).

(in many state courts) or the *Daubert* standard (in other state courts and in all federal courts).

The *Frye* standard was developed by the D.C. Circuit in 1923 in the case of *Frye v. United States*.<sup>149</sup> This standard requires courts to examine whether an expert's conclusion is based on a methodology that is generally accepted in that expert's field.<sup>150</sup> It was adopted by the majority of federal and state courts until the Supreme Court instituted the *Daubert* standard for federal courts in 1993.<sup>151</sup> Many state courts, however, still use the *Frye* standard as their primary test of expert methodology.<sup>152</sup>

The *Daubert* standard was developed by the Supreme Court to handle methods that might be newer than the *Frye* standard would permit, but which might still be reliable.<sup>153</sup> According to this standard, the court should inquire into whether the methodology is generally accepted in the field, but they should also inquire into whether the methodology has been subject to peer review, whether the methodology *can* be tested for accuracy, whether it *has* been tested for accuracy, whether it has a known error rate, and whether there is research demonstrating its reliability.<sup>154</sup> Thus, even if the method is too novel to meet one of these factors, the other factors might balance it out.

Whether the expert's methodology is being evaluated on general acceptance or on a series of other factors, both of these tests commit the court to only accepting as science that which has been tested and is in accordance with scientific norms. Some circuits have gone so far as to say that the standards for *Daubert* can be relaxed still further in cases where the judge will be the fact finder (as would be the case if courts held factual hearings about the necessity of COVID-19 precautions).<sup>155</sup> But even these circuits require some inquiry into reliability.<sup>156</sup> No test of general applicability for the admission of scientific evidence permits the court to unquestioningly accept scientific conclusions from a source or expert simply because that source has been reliable in the past. In each case, with each scientific issue, the court must decide whether the method accords with the expectations of good scientific methodology.

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<sup>149</sup> *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

<sup>150</sup> *Id.*

<sup>151</sup> *Daubert*, 509 U.S. at 585.

<sup>152</sup> *See, e.g.*, *People v. Wesley*, 633 N.E.2d 451, 453–54, 454 n.2 (N.Y. 1994) (applying the *Frye* standard and not the *Daubert* one).

<sup>153</sup> *See Daubert*, 509 U.S. at 588–9.

<sup>154</sup> *Id.* at 592–95.

<sup>155</sup> *United States v. Brown*, 415 F.3d 1257, 1268–69 (11th Cir. 2005).

<sup>156</sup> *See id.* at 1268.

The Supreme Court followed just such a procedure when state governments tried to violate citizens' First Amendment rights on the basis of the same public health concerns at issue here.<sup>157</sup> When New York issued restrictions on the occupancy of religious services so as to prevent the spread of COVID-19, several religious organizations challenged those restrictions' constitutionality.<sup>158</sup> The Court conceded that stemming the spread of COVID-19 was a compelling state interest, but required the government to demonstrate through reliable scientific evidence (rather than simple governmental assertion) that these particular restrictions were necessary to prevent the spread of COVID-19, reasoning that "even in a pandemic, the Constitution cannot be put away and forgotten."<sup>159</sup>

From this procedure used by the Court when another branch of government abridged an individual's constitutional right, it is possible to extrapolate some important norms. If the government infringes upon an individual's constitutional right in the interest of public safety, the government must present proof in the form of expert testimony that the infringement is actually necessary (or at least helpful) from a scientific standpoint. In turn, that expert testimony must be subject to at least a basic test of reliability.

Court action is government action, and a decision by the courts to infringe upon a citizen's rights is no less a violation than when other branches of government do it.<sup>160</sup> Thus, courts ought to hold themselves to the same standard to which the Court has held the other branches: Do not abridge an individual's constitutional rights on the basis of necessity unless it can be assured that the methods are actually necessary based on reliable science. One can imagine what a determination of necessity under *Craig* might look like for COVID-19 restrictions if courts were actually following such a policy. Even if courts were not willing to conduct a thorough review of scientific necessity before adopting a mask mandate or permitting virtual testimony, they would need to do so once such procedures had been challenged. As soon as a defendant challenged them, courts would hold their own policies to the same evidentiary bar they hold other branches of government to; they would require experts. Thus, they would call in a representative of the CDC, a local health department, or a medical or public health research facility. That witness would be

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<sup>157</sup> See generally *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (temporarily enjoining New York Governor Cuomo from enforcing his executive order placing occupancy limits on religious places of worship during COVID-19).

<sup>158</sup> *Id.* at 65–66.

<sup>159</sup> *Id.* at 67–68.

<sup>160</sup> *Shelley v. Kraemer*, 334 U.S. 1, 14–15 (1948).

subject to voir dire and cross-examination. The court would permit the parties to inquire into the scientific basis for CDC guidance, and whether, for instance, there was science suggesting that the CDC guidance was inappropriate, outdated, or bowing to political rather than merely scientific pressures. The court would then make a determination as to whether the methodology behind the CDC guidance was sufficiently reliable, and, if so, rule on the basis of the opinions the health official dispensed.

The above, however, is pure fantasy. Courts did not call in health department officials and cross-examine them. Instead, they simply cited and adopted whatever recommendations the CDC (or their own state executive branch) was promulgating.<sup>161</sup> These opinions show no attempt to inquire into whether the relevant health departments were using the most up to date methodology and data when they formed their guidance. In other words, these opinions do not meet the standards one would expect from scientific evidence in any other context.

One reason for this disconnect may be that the judges who ultimately approved these decisions were not the ones who initially made them. In past cases where judges have abridged the right to confrontation, a specific prosecution would request a modification for a case-specific reason (e.g., a specific traumatized child or a specific woman in a niqab).<sup>162</sup> The judge would weigh the evidence of necessity in that specific case, including scientific evidence where relevant, and then come to a determination about the constitutionality of the requested

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<sup>161</sup> See, e.g., *United States v. Crittenden*, No. 4:20-CR-7, 2020 U.S. Dist. LEXIS 151950, at \*15 (M.D. Ga. Aug. 21, 2020) (citing *Considerations for Wearing Masks*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 7, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-guidance.html> [<https://perma.cc/5LC3-CN32>]); *United States v. Clemons*, No. RDB-19-0438, 2020 U.S. Dist. LEXIS 206221, at \*5 (D. Md. Nov. 4, 2020) (citing M. Shayne Gallaway, Jessica Rigler, Susan Robinson, Kristen Herrick, Eugene Livar, Kenneth K. Komatsu, Shane Brady, Jennifer Cunico & Cara M. Christ, *Trends in COVID-19 Incidence After Implementation of Mitigation Measures—Arizona, January 22–August 7, 2020*, CTRS. FOR DISEASE CONTROL & PREVENTION (Oct. 9, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6940e3.htm> [<https://perma.cc/B5J2-79WL>]); *United States v. Donziger*, No. 19-CR-561, 2020 U.S. Dist. LEXIS 157797, at \*3 (S.D.N.Y. Aug. 31, 2020) (citing Exec. Order No. 205.1, *Quarantine Restrictions on Travelers Arriving in New York* (Sept. 28, 2020), [https://www.governor.ny.gov/sites/default/files/atoms/files/EO\\_205.1.pdf](https://www.governor.ny.gov/sites/default/files/atoms/files/EO_205.1.pdf) [<https://perma.cc/B4FX-2G4M>]); *United States v. Akhavan*, 523 F. Supp. 3d 443, 452, 452 n.9 (S.D.N.Y. 2021) (citing *Domestic Travel During COVID-19*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 24, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-during-covid19.html> [<https://perma.cc/LG2Z-643T>]); *State v. Tate*, 969 N.W.2d 378, 387–88 (Minn. Ct. App. 2022) (citing Order Governing the Continuing Operations of the Minn. Jud. Branch Under Emergency Exec. Ord. 20-48, No. ADM20-8001, at 2 (May 1, 2020)).

<sup>162</sup> See, e.g., *Maryland v. Craig*, 497 U.S. 836, 855 (1990).



modification.<sup>163</sup> As described above, pandemic modifications were largely conducted by administrative order.<sup>164</sup> Thus, any determinations regarding the constitutionality of the modification were largely post-hoc. Any post-hoc decision that an order had been unconstitutional would run the risk of affecting not just one trial, but every trial that had been subject to the administrative order. In short, a judge who found that the decision to adopt modifications was problematic could find themselves forcing dozens (if not hundreds) of criminal trials to be redone.

### III

#### QUICK FIXES LEAD TO INCONSISTENT AND ILL-FOUNDED SOLUTIONS

Given the level of uncertainty the entire nation felt about how to proceed in the early days of the pandemic, it is perhaps unsurprising that there are things the court system could have done better. This Part will explore two ways in which courts' modifications of the right to confrontation fell short. Section A will explore the uncertainty the pandemic revealed as to what the right to confrontation actually means. It will argue that this uncertainty makes it impossible for courts to coherently pick which modifications of the right are appropriate. Section B will argue that, in light of the CDC's early failures in identifying the efficacy or lack thereof of various forms of PPE, courts' reliance on the CDC led them astray.

#### *A. Picking the Right Poison: Courts' Decisions About How to Abridge the Right to Confrontation Reveal a Lack of Certainty About Which Confrontation Rights to Prioritize*

The fact that different districts took different approaches to modifying the Confrontation Clause may simply seem like just another way in which different areas of the country differed in their approach to the pandemic. After all, some states had mask mandates for restaurants while other states did not.<sup>165</sup> Some states had vaccine mandates

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<sup>163</sup> *Id.*; see also *United States v. Weekley*, 130 F.3d 747, 753 (6th Cir. 1997) (considering clinical psychological testimony about an individual traumatized child); *United States v. Rouse*, 111 F.3d 561, 568 (8th Cir. 1997) (same).

<sup>164</sup> See, e.g., *Ariz. Limitation Order*, *supra* note 23; *In Re: Coronavirus/COVID-19 Pandemic, Eighth Authorization to Continue the Use of Videoconferencing or Teleconferencing in Criminal Matters*, Administrative Order No. 2022-05 (E.D.N.Y. 2022), <https://img.nyed.uscourts.gov/files/general-ordres/AdminOrder2022-05.pdf> [<https://perma.cc/B7QQ-FPPK>].

<sup>165</sup> See *State-Level Mask Requirements in Response to the Coronavirus (COVID-19) Pandemic, 2020–2022*, BALLOTPEdia, [https://ballotpedia.org/State-level\\_mask\\_](https://ballotpedia.org/State-level_mask_)

for public officers while others did not.<sup>166</sup> Thus, the different approaches to public health in the courtroom might seem like a simple extension of these regional variations. After all, a court system made up of people with a high level of fear about the pandemic is unlikely to opt for a solution in which witnesses testify with no protection whatsoever.

But more fundamentally, these differences in method and the arguments used to justify them also represent key distinctions in what courts think the right to confrontation is ultimately about. Before the pandemic, when there was not a need to pick between methods, it was reasonable to follow the lead of courts stretching back to the nineteenth century and refuse to decide which version of the historical right to confrontation the American founders codified.<sup>167</sup> It was reasonable to say that confrontation is about the power of the physical courtroom, and the power of having to face the defendant, and the power of having the jury observe the witness. But, in a pandemic context, when the right must necessarily be restricted in some way, those different rationales for confrontation will be affected differently by different restrictions, and picking which restrictions to impose will require choosing between them.

A decision to opt for masks or other forms of PPE preserves the right to have testimony occur in the courtroom, the right to have the witness in the same room as the defendant, and the right of the defendant to be in the same room as the jury. It does not preserve the full range of demeanor evidence.<sup>168</sup> Virtual trials, on the other hand, preserve more facial demeanor evidence, but they take the witness out of the physical space and limit the contact between the defendant, the witness, and the jury. As a result, the choice between these methods is not simply a choice about how much one values the right to confrontation relative to pandemic safety. It is also a choice about which of the values underlying the right to confrontation are most important.

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requirements\_in\_response\_to\_the\_coronavirus\_(COVID-19)\_pandemic,\_2020-2022 [https://perma.cc/48SS-92AT].

<sup>166</sup> See *State Government Policies About Vaccine Requirements (Vaccine Passports)*, BALLOTPEDIA, [https://ballotpedia.org/State\\_government\\_policies\\_about\\_vaccine\\_requirements\\_\(vaccine\\_passports\)](https://ballotpedia.org/State_government_policies_about_vaccine_requirements_(vaccine_passports)) [https://perma.cc/972Y-AWJZ].

<sup>167</sup> See *supra* Section II.B.

<sup>168</sup> The extent of the disruption will depend on the PPE. Face shields limit the visual obstruction to light reflecting off the shield, but are less protective. See Lisa Lockerd Maragakis, *Coronavirus Face Masks FAQs*, HOPKINS MED. (Jan. 27, 2022), <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/coronavirus-face-masks-what-you-need-to-know> [https://perma.cc/MHV5-SQXF]. Surgical masks cover more of the face, but are more effective. *Id.* One could imagine a situation in which a future pandemic would result in widespread use of hazmat suits which would be more protective still, but nearly impossible to observe a witness through.

This picking and choosing between which rights to emphasize is apparent in the decisions to adopt various pandemic modifications. In the Middle District of Georgia, where masked trials were considered the most appropriate method of balancing the needs of confrontation and pandemic safety, the court began its analysis by focusing not on demeanor (the part of the right affected by masked trials), but on physical presence, arguing:

[T]he plain language of the Confrontation Clause ‘guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.’ This guarantee ‘enhances the accuracy of factfinding by . . . requiring adverse witnesses at trial to testify in the accused’s presence.’ After all, ‘[i]t is always more difficult to tell a lie about a person “to his face” than “behind his back” and ‘even if the lie is told, it will often be told less convincingly.’ . . . [T]he masks will in no way prohibit the Defendant and witnesses from directly looking upon each other in person during the testimony while in the presence of the jury. There is no reason to believe that it is any less difficult to tell a lie to a person’s face just because the liar’s nose and mouth are covered.<sup>169</sup>

While the court did briefly discuss demeanor evidence (and downplay it),<sup>170</sup> its early emphasis on the physical presence requirement—despite physical presence not being at all disputed—suggests that the court prioritized the physical presence version of the right to confrontation.

By contrast, when courts have accepted two-way video, these concerns about presence vanish into thin air. Instead, the court focuses on the jury’s ability to observe demeanor.<sup>171</sup> For instance, in Minnesota, where the court permitted virtual testimony, once the court ensured that cross-examination was possible via two-way video, the only other consideration the court mentioned in its opinion was demeanor evidence, which it described as follows:

Nothing in the transcript demonstrates that anyone in the courtroom had difficulty seeing or hearing the witness, or observing his demeanor. And at the beginning of cross-examination, the defense attorney asked the special agent if he could ‘see and hear’ properly. The special agent responded that he could. This situation is similar . . . [to one where] the defendant argued that remote technology prevented the defense from using body language cues or demeanor

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<sup>169</sup> United States v. Crittenden, No. 4:20-CR-7, 2020 U.S. Dist. LEXIS 151950, at \*18–19 (M.D. Ga. Aug. 21, 2020) (citations omitted).

<sup>170</sup> See *id.* at \*18.

<sup>171</sup> See *State v. Tate*, 969 N.W.2d 378, 390–91 (Minn. Ct. App. 2022).

clues when cross-examining the witness. The . . . court rejected that argument.<sup>172</sup>

In short, outside the question of cross-examination, the court reduced confrontation exclusively to a demeanor inquiry. That is a very different right than the one emphasized by the Georgia court.

Thus, during the pandemic, the judiciary did not just abridge the right to confrontation (necessarily or otherwise); it split the “confrontation right” into several separate “confrontation rights” that have traditionally been bundled together:

- (1) The right to cross-examine the witness;
- (2) The right to have the witness in the same room as the defendant;
- (3) The right to have the defendant in the same room as the jury;
- (4) The right to have testimony occur in a courtroom; and
- (5) The right to have the jury observe the witness’s demeanor.

These rights can no longer be bundled when courts choose between them. As a result, the strain of the pandemic brought to light a fundamental problem in confrontation jurisprudence: Nobody actually knows what the underlying right really is.

That matters. The mandate in *Craig* was not just to abide by some baseline level of reliability. It was, in essence, to get as close as possible to the reliability of ordinary in-court testimony.<sup>173</sup> Any version of *Craig* viewed through the lens of *Crawford*, therefore, needs to look for the procedures that are maximally similar to traditional testimony in terms of confrontation. But in order to optimize the modified system so as to maximize the preservation of the confrontation right, courts must know which of the confrontation rights they are supposed to be maximizing. If either a virtual trial (which preserves facial demeanor) or a masked trial (which preserves in-person contact with the defendant) are available options, courts need to know which is the closest to the true right to confrontation. Right now, they do not.

### *B. When the Government Fails Us: Modifications Which Did Not Help*

Even assuming that courts knew which modifications were most “reliable” for the purposes of confrontation, they would still need to decide, under *Craig*, that such modifications were “necessary” to protect trial participants from a public health emergency. This is where

<sup>172</sup> *Id.* (citing *State v. Sewell*, 595 N.W.2d 207, 213 (Minn. Ct. App. 1999)).

<sup>173</sup> *See supra* Section I.D.

courts' reliance on executive branch public health officials comes in. The problem is that executive branch public health officials were not always accurate during the pandemic. There has already been extensive public discourse regarding how often the CDC was forced to update guidelines during the pandemic when it became clear that their previous set had been factually inaccurate (about everything from the way the virus was being spread to the efficacy of various forms of PPE).<sup>174</sup>

Moreover, it is increasingly clear that the policy changes on public health issues were not always occurring immediately after the scientific discoveries that precipitated them.<sup>175</sup> CDC guidance often failed to reflect the most up-to-date science in the interest of other public policy concerns. At the beginning of the pandemic, for instance, despite credible evidence that masking was at least somewhat effective, the CDC told people that healthy people wearing masks did not help, so as to prevent citizens from hoarding masks that hospital workers needed more.<sup>176</sup> Similarly, in late 2021 and early 2022, the CDC played down the idea that cloth masks (which had previously been believed to be effective) weren't working out of fear that the public would give up on mask-wearing altogether.<sup>177</sup> This creates issues for any court relying on CDC guidance.

If public health guidance from the CDC and local health departments did not comport with the scientific literature available at the time, then it was not sufficiently reliable to be admitted in court, and it

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<sup>174</sup> See Netburn, *supra* note 26 (documenting numerous times when the CDC changed its guidance).

<sup>175</sup> See Kristen Rogers, *Why You Should Upgrade Your Mask as the Omicron Variant Spreads*, CNN (Dec. 24, 2021, 11:28 AM), <https://www.cnn.com/2021/12/24/health/cloth-mask-omicron-variant-wellness/index.html> [<https://perma.cc/M4HH-CNE3>] (quoting Dr. Leana Wen, Professor of Health Policy and Management at the George Washington University Milken Institute School of Public Health, as saying “[t]his is what scientists and public health officials have been saying for months, many months, in fact” with regard to recent updates to CDC guidance on masks).

<sup>176</sup> See Megan Molteni & Adam Rogers, *How Masks Went From Don't-Wear to Must-Have*, WIRED (July 2, 2020, 4:11 PM), <https://www.wired.com/story/how-masks-went-from-dont-wear-to-must-have> [<https://perma.cc/XF84-PF6Q>] (describing CDC efforts to stop healthy people from buying masks by claiming that they would not help to preserve masks for healthcare workers despite there being evidence that they did help and despite medical personnel from other countries ramping up production of masks).

<sup>177</sup> Shannon Pettypiece, *Biden Officials Divided on Message Over N95 Masks for All*, NBC NEWS (Jan. 14, 2022, 5:58 PM), <https://www.nbcnews.com/politics/white-house/biden-officials-divided-message-over-n95-masks-all-n1287443> [<https://perma.cc/NQX2-7LNY>] (describing a disagreement between the Surgeon General, who believed that mass distribution of the N95 masks was necessary, and the CDC, which continued to emphasize wearing any mask you could wear consistently); Rogers, *supra* note 175 (quoting medical professional saying “[c]loth masks are little more than facial decorations” at the same time the CDC was making the decision not to recommend against their use).

does not meet the standard to justify testimony modification under *Craig*. Take the issue of quarantining, for instance. In Minnesota, an appeals court held that if a witness was in quarantine because of potential COVID-19 exposure, then their testimony could be shifted to two-way video as a matter of medical necessity.<sup>178</sup> But the CDC has repeatedly changed its recommendations regarding how long one needs to quarantine (shortening it each time) after new science came out supporting a shorter period.<sup>179</sup> Suppose, therefore, a vaccinated witness was scheduled to testify in a Minnesota trial on December 26, 2021, and suppose that date was also the tenth day of their quarantine period. Based on the CDC guidance at the time, it was necessary for them to testify over videoconference.<sup>180</sup> But based on the science that was already available, and is now reflected in updated CDC guidance, it was not.<sup>181</sup> Thus, a defendant in that trial would have been deprived of their confrontation rights for something that was not, in fact, necessary.

Even worse, consider the use of plexiglass barriers around the witness stands. Defendants complain that they are often reflective and make the witness hard to see.<sup>182</sup> This is not a particularly onerous abridgment of the right to confrontation, but it abridges the right nonetheless. It would almost certainly be justified if the use of plexiglass barriers did anything to help prevent the spread of COVID-19. There is now evidence, however, that such barriers may actually increase the risk of COVID-19 transmission.<sup>183</sup> Thus, a defendant would have had their confrontation rights abridged for something that cut against the very public policy used to justify it in the first place.

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<sup>178</sup> See generally *State v. Tate*, 969 N.W.2d 378, 390–91 (Minn. Ct. App. 2022).

<sup>179</sup> See Jeremy Diamond, *CDC Will Decrease Coronavirus Quarantine Time from 14 to 7–10 Days*, CNN (Dec. 2, 2020, 6:59 AM), <https://www.cnn.com/2020/12/01/health/cdc-changing-quarantine-guidelines/index.html> [<https://perma.cc/Y68R-8FAM>]; *CDC Updates and Shortens Recommended Isolation and Quarantine Period for General Population*, CDC NEWSROOM (Dec. 27, 2021) [hereinafter *CDC Updates*], <https://www.cdc.gov/media/releases/2021/s1227-isolation-quarantine-guidance.html> [<https://perma.cc/P5BU-B8XF>] (reducing the quarantine time from 7–10 days to 5 days).

<sup>180</sup> See Diamond, *supra* note 179.

<sup>181</sup> See *CDC Updates*, *supra* note 179.

<sup>182</sup> *United States v. Petit*, 496 F. Supp. 3d 825, 828–29 (S.D.N.Y. 2020).

<sup>183</sup> Tara Parker-Pope, *Those Anti-Covid Plastic Barriers Probably Don't Help and May Make Things Worse*, N.Y. TIMES (Aug. 19, 2021), <https://www.nytimes.com/2021/08/19/well/live/coronavirus-restaurants-classrooms-salons.html> [<https://perma.cc/55QC-QPZR>] (describing recent findings regarding plexiglass barriers); see generally Justin Lessler, M. Kate Grabowski, Kyra H. Grantz, Elena Badillo-Goicoechea, C. Jessica E. Metcalf, Carly Lupton-Smith, Andrew S. Azman, Elizabeth A. Stuart, *Household COVID-19 Risk and In-Person Schooling*, 372 SCIENCE 1092, 1094 fig.3, 1095 (2021) (finding that plexiglass barriers correlated with an increase in illnesses like COVID-19).

Furthermore, if the CDC was issuing guidance on a basis other than “here are the things that will protect you best,” courts using that guidance may have inadvertently applied the wrong standard. Exceptions under *Craig* are supposed to be for case-specific necessity—to protect the participants in that trial—not to further broad public policy goals.<sup>184</sup> It may very well be beneficial to the country for the CDC to take into account other policy goals (e.g., whether people in everyday settings will actually follow more restrictive guidance).<sup>185</sup> But courts may have believed they were following guidelines designed to protect individual participants in trials when, in fact, they were following guidelines designed to balance widespread policy interests that were public-health-related but were nonetheless not strictly optimized to prevent courtroom spread.

Consider masking with cloth masks (as opposed to surgical masks, N95 masks, or KN95 masks). Once the CDC got over its initial hesitation about masks,<sup>186</sup> it promulgated guidance suggesting that masks were critical to preventing the spread of COVID-19.<sup>187</sup> The CDC guidance often made no effort to differentiate between cloth masks and N95 masks or KN95 masks.<sup>188</sup> Thus, courtroom mask policies that applied to witnesses made no effort to differentiate between cloth masks and N95 masks or KN95 masks.<sup>189</sup> It is now clear that cloth masks are “little more than facial decorations,” but the CDC did not make this public for a long time after they were aware of it for policy reasons.<sup>190</sup> As a result, any abridgment of the defendants’ confrontation rights that occurred because of the use of cloth masks was done for the sake of very little health benefit to the actual trial participants. Regardless of how many public health purposes the CDC guidance served outside the courtroom, the fact remains that they were

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<sup>184</sup> See *Maryland v. Craig*, 497 U.S. 836, 855 (1990) (“The requisite finding of necessity must of course be a case-specific one: The trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify.”).

<sup>185</sup> A matter on which this author takes no position.

<sup>186</sup> See *supra* note 176.

<sup>187</sup> See Pettypiece, *supra* note 177 (quoting the CDC as saying publicly that one should wear a mask without committing to a specific type of mask); see also *CDC Updates Consumer Mask Website to Emphasize Protection, Fit, and Comfort*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Jan. 14, 2022), <https://www.cdc.gov/media/releases/2022/s-0114-mask-protection-fit.html> [<https://perma.cc/2LZ7-NJHM>].

<sup>188</sup> See *id.* (quoting the CDC’s January 2022 guidance stating that the agency “continues to recommend that you wear the most protective mask you can that fits you well and that you will wear consistently”).

<sup>189</sup> See, e.g., E.D.N.Y. PLAN FOR RESUMPTION, *supra* note 1.

<sup>190</sup> Rogers, *supra* note 175; Pettypiece, *supra* note 177.

ill-tailored for determining what was necessary for confrontation inside the courtroom.

Of course, some mistakes in this area were probably inevitable. This Note does not seek to demonize public health officials who were put in an impossible position. But, in cases where the CDC guidelines were not, in fact, based on the best science available, a little more rigor in evaluating that science in the courts could have prevented needless harm to defendants.

#### IV

#### WHAT TO CHANGE GOING FORWARD

This pandemic has not been the first major health crisis to affect our court system, and it probably will not be the last.<sup>191</sup> But the next crisis, and perhaps even the next pandemic, may not involve the same precise set of restrictions as the current one. Perhaps next time it really will be necessary to wipe everything down with disinfectant. Perhaps we will be faced with toxic fumes. Perhaps travel of any sort will be perilous. Perhaps the country will face a type of danger not yet imagined. When faced with a new and uncertain situation, courts need to be able to do the best they can to protect both the health and safety of the participants in a trial and the defendant's rights. And the public must have more confidence than it did this time that the choices courts make are based on reliable science and on the correct confrontation principles.

This Part will explore steps that can be taken now to ensure that courts are better prepared to make decisions about modified testimony should a new crisis arise. Section A will discuss means of prioritizing the various confrontation rights. Section B will explore restrictions on administrative orders designed to prevent over-reliance on executive branch public health guidance.

##### *A. Preparation for the Next Pandemic*

The clear first step courts can take in preparation for the next pandemic is deciding what the right to confrontation actually entails. Out of the list of rights enumerated in Section III.A, courts need to determine which ones are most important. This is not to say that the lower-ranked rights should not be preserved wherever possible. But courts need to know, when the various confrontation rights come into conflict, which ones to preserve.

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<sup>191</sup> See Clare Cushman, *Epidemics and the Supreme Court*, SUP. CT. HIST. SOC'Y (Jan. 7, 2021), <https://supremecourthistory.org/scotus-scoops/epidemics-and-the-supreme-court> [<https://perma.cc/5S27-6SLM>] (describing the Court's response to past public health crises).



This Section proposes an ordering based on the underlying values of the Confrontation Clause espoused by the Supreme Court in the *Crawford* line of cases. For some of these rights, the Court has already assigned varying degrees of importance. When such value judgments have not been explicitly delineated by the Court, this Section will take the Court at its word when it says that the primary purpose of the right is to establish procedural guarantees of reliability.<sup>192</sup> This Section will then explore both the historical grounding for each right and the pre-existing scientific literature regarding which rights best further this purpose. Thus, when possible, this Section will preserve the relative order expressed by the Court. When not possible, this Section will rely on scientific literature regarding reliability followed by historical grounding.

(1) *The right to cross-examine the witness.* This is the clear victor in terms of a right that should trump all other confrontation rights. The Court in *Crawford* described the right to cross-examine as a necessary prerequisite to the admission of any testimonial statement.<sup>193</sup> This right is “dispositive, and not merely one of several ways to establish reliability.”<sup>194</sup> Thus, any emergency modification which would eliminate the right to cross-examination is a clear constitutional violation. Once a modification permits cross-examination, the Court has recognized that the other benefits of face-to-face confrontation (i.e., the benefits provided by all of the rights enumerated below) are not the *sine qua non* of the right to confrontation.<sup>195</sup> They are strongly preferred, but not absolutely required.<sup>196</sup>

(2) *The right to have the witness in the same room as the defendant.* Once one moves beyond the requirement of cross-examination and into the territory of “preferred” rights, adjustments can be made on the basis of the *Craig* reliability standard. Thus, the next set of rights (rights (2) through (4)) will be those that the scientific literature supports as being beneficial for ensuring that defendants are not wrongfully convicted.

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<sup>192</sup> *Crawford v. Washington*, 541 U.S. 36, 61 (2004) (“[T]he Clause’s ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee.”).

<sup>193</sup> *Id.* at 55 (“We do not read the historical sources to say that a prior opportunity to cross-examine was merely a sufficient, rather than a necessary, condition for admissibility of testimonial statements.”).

<sup>194</sup> *Id.* at 55–56.

<sup>195</sup> *Maryland v. Craig*, 497 U.S. 836, 847 (1990).

<sup>196</sup> *Id.* at 849 (stating that the Court’s precedents establish that “the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial” that “must occasionally give way to considerations of public policy and the necessities of the case” (quoting *Ohio v. Roberts*, 448 U.S. 56, 63 (1980) and *Mattox v. United States*, 156 U.S. 237, 243 (1895))).

The theory behind the right to have the witness confront the defendant face-to-face is that it is more difficult to tell a lie to someone's face than it is to tell a lie about someone who is not there. This theory finds empirical support in studies suggesting that the feeling of being watched (particularly by an interested party) reduces someone's willingness to engage in socially unacceptable behavior.<sup>197</sup> Proximity to an individual can also make someone less willing to engage in harmful behavior directed towards that individual.<sup>198</sup> The combined result of these two effects is that the less an individual can see of the person their lies will affect, the more likely they are to be able to psychologically distance themselves from the lie.<sup>199</sup> Even when the potential liar can see their subject, they are more likely to lie if they are using technology to communicate than if they are speaking face to face.<sup>200</sup> For testimony to be as reliable as possible, then, court procedures should prioritize keeping the witness in the same room as the defendant.

Out of the “preferred” rights, this one ranks highly, given its scientific support, firm historical grounding, and heavy presence in modern jurisprudence. As discussed in Section I.A, this right dates back to the Romans who could prosecute a prosecutor for failing to uphold it. This right is also clear from the common law commitment to the “altercation” between witnesses.<sup>201</sup> It is also discussed extensively in most landmark Confrontation Clause decisions.<sup>202</sup> Thus, insofar as there is a core of the right to confrontation, this seems close to it.

(3) *The right to have the defendant in the same room as the jury.* The judiciary has historically been more willing to abridge this right than it has right (2). Federal Rule of Criminal Procedure 15 allows depositions at which both the government and defendant are present to stand in the place of live testimony in court so long as cross-exami-

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<sup>197</sup> See Mark Spottswood, *Truth, Lies, and the Confrontation Clause*, 89 COLO. L. REV. 565, 583 (2018) (collecting studies suggesting that people behaved more generously to others when they felt watched).

<sup>198</sup> Stanley Milgram, *Some Conditions of Obedience and Disobedience to Authority*, 18 HUM. RELS. 57, 62 (1965) (finding that participants were far less willing to intentionally harm another person when they were in close proximity to that person than when they could cause harm without observing the results).

<sup>199</sup> See Mattitiyahu Zimler & Robert S. Feldman, *Liar, Liar, Hard Drive on Fire: How Media Context Affects Lying Behavior*, 41 J. APPLIED SOC. PSYCH. 2492 (2011) (finding people lie less when speaking face-to-face than via instant messenger or email).

<sup>200</sup> David M. Markowitz, *Revisiting the Relationship Between Deception and Design: A Replication and Extension of Hancock et al. (2004)*, 48 HUM. COMMUN RSCH. 158 (2022) (finding subjects less likely to lie face-to-face than over video conferencing platforms).

<sup>201</sup> See *supra* Section I.A.

<sup>202</sup> See *supra* Section I.C.

nation is preserved.<sup>203</sup> This stand-in is permissible provided that the witness whose testimony is being offered is unavailable due to “exceptional circumstances,” which is a much lower standard than the “necessity” required by *Craig*.<sup>204</sup> Given that the jury is not present for a Rule 15 deposition, the acceptance of Rule 15 implicitly ranks right (3) behind right (2).

Nonetheless, the right for the jury to be in the same room as the defendant is empirically important for preventing false convictions. The increased proximity between the jury and the defendant can promote empathy for the defendant.<sup>205</sup> This makes it less likely that the jury will convict out of prejudice or animosity. By contrast, if the defendant is not afforded this right, they are likely to face any number of circumstances that can destroy empathy.<sup>206</sup> Their backdrop may make it obvious that they are in custody, because they are likely to need to be in an institutional setting when not in the courtroom.<sup>207</sup> They may have increased difficulty understanding the proceeding without their lawyer by their side, leading to erratic or confusing behavior.<sup>208</sup> Even otherwise sympathetic defendants (like children) seem to lose some of their appeal when they are remote.<sup>209</sup> Thus, the inability to be physically present can subtly but negatively affect the way the jury perceives the defendant—in particular, hindering the jury’s ability to humanize the defendant.

This is also a right with historical grounding. As discussed in Section I.A, this right dates to the Romans, who guaranteed a defendant the right to be present with the jury.<sup>210</sup> Thus, while it must rate below right (2), it remains a high priority right.

(4) *The right to have testimony occur in a courtroom.* As with right (3), this right can be abridged by Rule 15 depositions, so it must rank behind right (2). As with right (3), there is also scientific literature supporting its importance. The courtroom is a powerful space. If

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<sup>203</sup> FED. R. EVID. 804(b)(1); FED. R. CRIM. P. 15(a)(1).

<sup>204</sup> FED. R. CRIM. P. 15(a)(1).

<sup>205</sup> See Susan A. Bandes & Neal Feigenson, *Virtual Trials: Necessity, Invention, and the Evolution of the Courtroom*, 68 BUFF. L. REV. 1275, 1293 n.48 (2020) (explaining a number of ways in which having the defendant physically close to the jury can promote empathy); Dubin Research & Consulting, *supra* note 54, at 30 (arguing that proximity to the defendant during in-person proceedings “helps humanize the defendant to the jury”).

<sup>206</sup> See Bandes & Feigenson, *supra* note 205, at 1293 n.48.

<sup>207</sup> See *id.* (noting the “stigmatizing” effect of defendants appearing “clothed in prison outfits and seen behind locked doors”).

<sup>208</sup> See *id.* (“Their sense of isolation and alienation from the courtroom may be exacerbated by the absence of their lawyers from their side. . . . Juvenile or mentally challenged defendants may find it especially difficult to understand what’s going on.”).

<sup>209</sup> *Id.*

<sup>210</sup> See *supra* Section I.A.

used correctly, it can influence testimony. Courthouses are set apart as sites of justice, which may impress upon jurors the importance of the endeavor they are undertaking.<sup>211</sup> Their set-up and iconography are designed to impress upon participants the importance of fairness, balance, and impartiality.<sup>212</sup> By contrast, recent empirical and anecdotal evidence suggests that many of the alternatives to courtroom testimony can feel informal and ephemeral to participants, causing the proceedings to be taken less seriously.<sup>213</sup>

Unlike right (3), however, the historical evidence for this right is questionable. Many of the historical circumstances the Confrontation Clause was designed to prevent (e.g., the trial of Sir Walter Raleigh or the abuses of the colonial admiralty courts) occurred in courtrooms, and many it was designed to emulate did not (e.g., trials in the Roman Senate).<sup>214</sup> Thus, the lack of historical grounding forces this right behind right (3).

(5) *The right to have the jury observe the witness's demeanor.* This right is complex. It has a longstanding historical grounding,<sup>215</sup> with concerns about demeanor evaluation dating back to the Old Testament.<sup>216</sup> Concerns about demeanor and credibility judgments were also clearly present at common law.<sup>217</sup> If this were simply a ranking of historical significance, demeanor evidence would likely stand at the top of the list.

But this right should rank last, because upholding it is counterproductive based on the scientific evidence currently available.<sup>218</sup> People are, on the whole, less able to judge credibility than they think they are. Behavioral cues like head motions, fidgeting, “shifty eyes,”

<sup>211</sup> See Bandes & Feigenson, *supra* note 205, at 1316 (describing how the architecture and symbolism of the courtroom “reinforce participants’ sense that they have entered a special place to engage in a special sort of activity”).

<sup>212</sup> See *id.* (explaining that courthouses and courtrooms through Western history “have employed a variety of iconography to convey each society’s vision of how justice should be performed and what goals it should strive to achieve,” including fairness, public processes, and equality of access and treatment).

<sup>213</sup> See *id.* at 317 (noting the “ephemeral” nature of the virtual courtroom).

<sup>214</sup> See *supra* Section I.A.

<sup>215</sup> See Bandes & Feigenson, *supra* note 205, at 1284–85 (discussing historical reliance on demeanor); Julia Simon-Kerr, *Unmasking Demeanor*, 88 GEO. WASH. L. REV. ARGUENDO 158, 165–66 (2020) (same); *Mattox v. United States*, 156 U.S. 237, 242–43 (1895) (“The primary object of the constitutional provision . . . [was to compel] him to stand face to face with the jury . . . [so] that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.”).

<sup>216</sup> See *supra* Section I.A.

<sup>217</sup> See *id.*

<sup>218</sup> See Simon-Kerr, *supra* note 215, at 166–67 (finding that demeanor evidence can actually lead to juries being more likely to be deceived by lies).

gaze aversion, and facial expressions which people associate with lying do not, in fact, correlate with lying.<sup>219</sup> Instead they correlate with nervousness, which is sufficiently ill-correlated with lying that it tends to serve as nothing but a distraction.<sup>220</sup>

Studies consistently suggest that mock jurors are no better than chance at using demeanor to detect lies.<sup>221</sup> In fact, using demeanor makes fact finders less accurate than they otherwise would be. Jurors reviewing transcripts are more accurate than those presented with demeanor cues.<sup>222</sup> Similarly, jurors who are deprived of demeanor evidence by having the witness wear a face-covering show improved ability to detect lies, because they are more attentive in listening for logical inconsistencies.<sup>223</sup> There is likewise strong evidence to suggest that mediums one might think would preserve demeanor evidence (e.g., video testimony where one can see the witness's entire face) only exacerbate the problem.<sup>224</sup> Thus, if the court's goal is to protect reliability, courts should not preserve demeanor at the expense of any other right.

Once these rights are properly ordered, it becomes easier to determine which rights should be preserved from a confrontation perspective. Given the option between virtual testimony and masked testimony, courts should opt for masked testimony as it preserves right (2) at the cost of right (5). Given the option of virtual testimony where everyone is present on a videoconferencing platform versus virtual testimony where only the witness appears on a screen (with everyone else in court), courts should opt for the latter to preserve right (3)

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<sup>219</sup> Robert Fisher, *The Demeanor Fallacy*, 2014 N.Z. L. REV. 575, 578–79 (2014).

<sup>220</sup> *Id.*

<sup>221</sup> *See id.* (summarizing social science research on the subject); Max Minzner, *Detecting Lies Using Demeanor, Bias, and Context*, 29 CARDOZO L. REV. 2557, 2561–62 (2008) (same); Jeremy A. Blumenthal, *A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 NEB. L. REV. 1157, 1159 (1993) (same).

<sup>222</sup> *See* Fisher, *supra* note 219, at 580 (citing an American commentator summarizing the experimental evidence and concluding that “subjects who receive transcript [sic] consistently perform as well as or better than subjects who receive recordings of the respondent’s voice” (quoting Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1080 (1991))).

<sup>223</sup> *See generally* Amy-May Leach, Nawal Ammar, D. Nicole England, Laura M. Remigio, Bennett Kleinberg & Bruno J. Verschuere, *Less is More? Detecting Lies in Veiled Witnesses*, 40 L. & HUM. BEHAV. 401 (2016) (finding that juries could not detect lies in witnesses with uncovered faces but improved by above chance levels when witnesses wore face coverings).

<sup>224</sup> *See* Bandes & Feigenson, *supra* note 205, at 1292–97 (discussing the additional difficulties that arise when relying on demeanor in online proceedings).

over right (5). This delineation, therefore, would aid in accurate decision-making across jurisdictions.<sup>225</sup>

### B. *Preparing to Be Unprepared*

Even with this delineation, however, courts will still need to decide whether accommodations are necessary in the first place. If so, the court will need to decide whether a preferred modification based on the above system is acceptable for public health reasons or whether the court must adopt a modification which is less preferred from a confrontation standpoint but more protective from a public health standpoint out of necessity. That is a decision that fundamentally cannot be made before the precise circumstances of the next crisis are known. Nonetheless, procedures can be established for *how* those decisions should be made to ensure that defendants' rights are safeguarded and scientific standards upheld.

The kneejerk solution to the problems this pandemic has presented would be to require expert testimony about COVID-19 modifications in every single criminal trial unless the defendant chooses to waive it. This solution is, in some ways, appealing. After all, the Court in *Craig* did say that decisions about abridging the defendant's confrontation rights on grounds of public policy should be made on a case-by-case basis.<sup>226</sup> Making public health emergency modifications decisions on a case-by-case basis would permit the judge to be sensitive to issues like the relative vaccination status of participants, the lighting in the courtroom, and the witnesses' Wi-Fi connection.

On the other hand, such a case-by-case approach would be completely impractical. If every trial required a complete inquiry along with a *Daubert* hearing into the necessity of pandemic modifications, inquiring into the reliability of the science being used to form conclusions, hours or even days could be added to every trial, which would

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<sup>225</sup> Note that the preferences expressed above are preferences based solely on confrontation. If a modification method which would preserve a higher ranked right is insufficient for public health purposes but a modification method which would preserve a lower ranked right is sufficient, then the court could apply the *Craig* necessity logic to use the method worse for confrontation. In short, the court should go down this list of rights and preserve the highest ranked one it can without significantly endangering trial participants. Thus, while, from a confrontation standpoint, masked testimony is preferable to virtual testimony, there may be times when courts still adopt virtual testimony because even masked testimony is not sufficient for public health purposes.

<sup>226</sup> *Maryland v. Craig*, 497 U.S. 836, 857–58 (1990) (“[A]lthough face-to-face confrontation is not an absolute constitutional requirement, it may be abridged only where there is a ‘case-specific finding of necessity’” (quoting *Craig v. State*, 316 Md. 551, 564 (1989))).

hamper judicial efficiency. It would also mean that the court or prosecutors' offices would need to have a public health official on hand for every trial, which would put increased strain on an already strained public health system at precisely the time when that system needs to focus elsewhere.<sup>227</sup>

Yet this does not mean that courts should go to the opposite extreme and simply take public health officials at their word. Instead, it means that a more comprehensive inquiry into the reliability of the science is needed at the administrative order stage. The current stance of the Advisory Committee on the Federal Rules of Evidence is that no changes need to be made because courts can already make discretionary decisions under Rule 611(a).<sup>228</sup> But this requires reliance either on individual judges to make scientifically informed decisions in every case (running into the same practical problems as above) or on court systems to make blanket decisions based on scientific evidence at the administrative order stage. However, as noted in Part II, courts, when not given guidance on how they should make these discretionary decisions, have a shortage of evidence at the administrative order stage.<sup>229</sup> Thus, it is not enough for courts to have the power and discretion to control pandemic modifications under the rules of evidence.

Similarly, in theory, the Rule 611(a) discretion that judges already have could be curtailed to require further scientific inquiry before the rule is invoked to order confrontation modifications.<sup>230</sup> But because Rule 611(a) applies to individual judges in individual trials,<sup>231</sup> it would require inquiries into the scientific legitimacy of pandemic modifications to be made at the individual trial level. This would pose the familiar issues of either requiring untenable delays in individual courtrooms or permitting the kind of questionable science this Note has described. Thus, alternative legislative intervention is warranted

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<sup>227</sup> Geoffrey French, Mary Hulse, Debbie Nguyen, Katharine Sobotka, Kaitlyn Webster, Josh Corman, Brago Aboagye-Nyame, Marc Dion, Moira Johnson, Benjamin Zalinger & Maria Ewing, *Impact of Hospital Strain on Excess Deaths During the COVID-19 Pandemic—United States, July 2020–July 2021*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 19, 2021), <https://www.cdc.gov/mmwr/volumes/70/wr/mm7046a5.htm> [<https://perma.cc/PB7P-FJEL>] (estimating that the strain on the hospital system led to thousands of preventable deaths).

<sup>228</sup> JUDICIAL CONFERENCE ADVISORY COMMITTEE ON THE FEDERAL RULES OF EVIDENCE, *supra* note 128, at 18 (“[The reporter] further explained that Rule 611(a) gives trial judges broad discretion to control the ‘mode of examination’ and that many federal judges have utilized that authority during the pandemic to authorize virtual testimony.”).

<sup>229</sup> *See supra* Part II.

<sup>230</sup> FED. R. EVID. 611(a).

<sup>231</sup> FED. R. EVID. 101.

to facilitate blanket decisions while ensuring that those blanket decisions are made with sufficient scientific grounding.

The goal, then, is to create legislation that will instruct courts to make blanket testimony modifications at the administrative order level, but to do so with more scientific rigor than they are currently using. Procedurally speaking, the appointment of expert witnesses to assist courts in making scientific decisions is not unheard of. Rule 706 permits courts to appoint expert witnesses rather than forcing them to accept the traditional adversarial presentation of witnesses by parties to a particular case.<sup>232</sup> These witnesses are held to the same scientific standards as adversarially presented witnesses, but they serve at the pleasure of a court.<sup>233</sup> Ideally, then, the court would appoint an expert and treat that expert just as an individual judge would treat a Rule 706 witness before it makes testimony modifications.<sup>234</sup>

There is also precedent for Congress to regulate the procedures courts use to modify confrontation issues. Since *Craig*, for instance, Congress has responded to the Supreme Court's permission to modify confrontation in child sexual abuse cases by codifying a procedure in 18 U.S.C. § 3509 to permit children to testify remotely.<sup>235</sup> That statute permits either the government or a representative of the child to petition the court to have the child testify by two-way closed circuit television, instructing that a court should only grant such a petition if "there is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying."<sup>236</sup> It also requires that the court "support a ruling on the child's inability to testify with findings on the record."<sup>237</sup>

Prior to 18 U.S.C. § 3509, there was no law banning courts from using two-way video under these circumstances. So, in theory, individual judges could have struck out on their own after hearing the Supreme Court approve of such methods in *Craig*, permitting video testimony in their courtrooms under Rule 611(a) (just as courts can

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<sup>232</sup> FED. R. EVID. 706.

<sup>233</sup> See *Daubert v. Merrell Dow Pharms. Inc.*, 509 U.S. 579, 595 (1993) (describing Rule 706 experts as part of the general framework of expert testimony anticipated under the *Daubert* test).

<sup>234</sup> I note here the possibility that this was already happening off the record. Some courts may have consulted with or hired experts to help them adapt their pandemic modifications. If that is the case, then the only change that would be required in these jurisdictions is for the court to formalize their consultation. They could hold a hearing with their hired/consulting expert, question that expert on the record, and have that expert make formal conclusions as to necessity.

<sup>235</sup> 18 U.S.C. § 3509.

<sup>236</sup> § 3509(b)(1)(B)(ii).

<sup>237</sup> § 3509(b)(1)(C).



now for COVID-19).<sup>238</sup> The value of 18 U.S.C. § 3509, then, is in explicitly authorizing a specific way of modifying testimony and creating a uniform procedure for making a reasoned determination about a child's ability to testify in person and in drawing attention to the need for expert testimony.<sup>239</sup>

This pandemic has highlighted the need for the legislature to take similar action with regard to modified testimony amid a public health or other emergency.<sup>240</sup> Modeling after 18 U.S.C. § 3509, the legislature could provide that:

(1) Modified testimony in the case of a public health emergency or natural disaster<sup>241</sup>:

(A) Should a public health emergency or natural disaster which disrupts the court's ability to hold proceedings safely for more than a week occur within a court's jurisdiction, the chief judge in each district may authorize by administrative order any of the following modifications to the form of witness testimony:

(i) The use of personal protective equipment while testifying.

(I) Any authorized personal protective equipment should be of a form selected to create as minimal an obstruction of the witness's ability to see other participants in a trial and other participants' ability to see the witness as is reasonably possible while satisfying the needs of public health and safety.

(ii) The use of remote witness testimony via two-way video projected into the courtroom.

(iii) The use of fully remote proceedings via two-way video.

(B) The chief judge may issue such an order only if the court finds that there is a substantial likelihood, established by expert testimony, that failure to adopt modifications as provided in subparagraph (A) would result in a substantial risk to the health or safety of one or more trial participants. The court shall support such an administrative order with facts on the record from a hearing.

(C) The chief judge shall refrain from using the modifications in Sections (A)(ii) and (A)(iii) unless there is a substantial likelihood, established by expert testimony, that the modification in Section

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<sup>238</sup> JUDICIAL CONFERENCE ADVISORY COMMITTEE ON THE FEDERAL RULES OF EVIDENCE, *supra* note 128, at 16.

<sup>239</sup> § 3509(b)(1)(B)(ii).

<sup>240</sup> Since modifications to witness testimony occur in both state and federal courts, such legislation would need to occur piecemeal with each state adopting something like the statute that follows and the federal government doing likewise.

<sup>241</sup> This text clearly leaves out definitions for "public health emergency," "natural disaster," etc. Should the proposed language be adopted it would need to be prefaced with such definitions just as the analogous portion of 18 U.S.C. § 3509 is.

(A)(i) will not suffice to prevent a substantial risk to the health or safety of one or more trial participants. The chief judge shall refrain from using the modifications in Section (A)(iii) unless there is a substantial likelihood, established by expert testimony, that the modification in Section (A)(ii) will not suffice to prevent a substantial risk to the health or safety of one or more trial participants.

This provision would give courts a procedure for issuing administrative orders authorizing judges within their jurisdiction to use alternative forms of testimony, including testimony using PPE (medical or otherwise) or testimony using two-way video. It would rank the order in which courts should adopt such measures in accordance with the values explained in Section IV.A. It would, however, constrain courts—just as the statute permitting two-way video by child witnesses did—by demanding that such orders only be issued if “[t]here is a substantial likelihood, established by expert testimony, that failure to adopt modifications . . . would result in a substantial risk to public health or safety.” Then, once the inquiry has been made at the administrative level, individual judges would have a real record to work with when formally approving testimony modifications in their own courtrooms under Rule 611(a), and there would not be a persistent issue of individual judges simply signing off quickly.

In some ways, this law would simply codify what has already been happening. Judges have already been authorizing themselves to use modified testimony during the pandemic.<sup>242</sup> But the same could also have been said prior to the enactment of 18 U.S.C. § 3509. As in that case, the value of this provision would lie in creating a standardized national means of modifying testimony, a definitive set of instructions regarding which means of modification to choose, and, most importantly, a requirement that courts make use of a competent expert in reaching their determinations.

## CONCLUSION

As the masks slowly come off, public gatherings cautiously resume, and the number of hours spent on Zoom gradually subsides to tolerable levels, it is time to evaluate what courts did right and wrong during the pandemic. More importantly, it is time to look towards adding guardrails that might prevent similar mistakes in future crises. The way we handle confrontation is one of those instances where guardrails are appropriate. Courts were too trusting of the CDC and state health departments in making decisions that had the potential to affect the fairness of trials and, in turn, the fairness of

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<sup>242</sup> See *supra* Section II.A.

the justice system. Thus, it is prudent for courts to look to Congress to codify procedures, as it has in the past, to ensure that public policy needs can be met without rushing into scientifically suspect decisions.