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Confronting Confrontation in a FaceTime Generation: A Substantial Public Policy Standard to Determine the Constitutionality of Two-Way Live Video Testimony in Criminal Trials

*“Got a problem with me, say it to my face, to my face, to my face”*¹

INTRODUCTION

The judge asks the prosecution to call its next witness against the criminal defendant. The judge and jury watch as the bailiff administers the oath to the witness, who swears to “tell the truth, the whole truth, and nothing but the truth.”² Then, the testimony begins—but the witness stand is empty. This is because the witness is testifying via two-way live video. His image appears on a large screen in the courtroom, visible to everyone—judge, jury, attorneys, defendant, and spectators.³ The witness likewise has his own screen on which he can see the entire courtroom.⁴ The testimony proceeds normally: direct examination and then cross-examination. With the exception of the witness’s physical absence, the two-way live video testimony seems completely ordinary; and yet, the technological advancements that make this seemingly ordinary witness testimony possible present serious constitutional issues unforeseen by the Framers.

This Comment addresses whether two-way live video testimony in criminal trials violates the Confrontation Clause of the Sixth Amendment, which ensures that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”⁵ The Supreme Court in *Maryland v. Craig* upheld one-way live video testimony in the context of child abuse cases to protect child victims from the presence of the

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1. LUDACRIS, *Say It to My Face*, on 1.21 GIGAWATTS: BACK TO THE FIRST TIME (Self-released 2011).

2. See, e.g., Aidan C. O’Brien, *Nothing but the Truth*, THEGUARDIAN (May 22, 2012, 9:01 AM), available at <http://www.theguardian.com/law/belief/2012/may/22/abolish-oaths-court>, archived at <http://perma.cc/P2NH-SDMV>.

3. See, e.g., *United States v. Yates*, 438 F.3d 1307, 1310 (11th Cir. 2006) (en banc) (describing how people in the courtroom could see the witness on the screen).

4. See *id.* (“[T]he witnesses could see the temporary courtroom in the U.S. Attorney’s conference room.”). This view, however, is not always immune from technical difficulties. See *id.* n.2 (noting “some technical difficulties that impacted the abilities of the witnesses”).

5. U.S. CONST. amend. VI.

defendant, based on the “important public policy” of protecting child abuse victims from further traumatization.⁶ But courts and scholars have disagreed about whether and how to apply *Craig* to two-way live video testimony in contexts other than child abuse cases where there is no similarly important public policy.⁷ The Court’s subsequent upheaval of Confrontation Clause jurisprudence in *Crawford v. Washington* especially complicates these disagreements because the Court rejected the concept of “reliability” that undergirded the *Craig* decision.⁸ Additionally, the Court’s Confrontation Clause decisions following *Crawford* have obscured the extent of *Crawford*’s holding, insomuch that scholars have described the decisions as “vague[], uncertain, unpredictable, a mess, almost arbitrary, incoherent, and an exercise in fiction.”⁹ Amidst this unrest, prosecutors continue to use two-way live video testimony and defendants continue to challenge its use.¹⁰ As the popularity of such testimony grows,¹¹ and the technological ease of

6. See *Maryland v. Craig*, 497 U.S. 836, 859–60 (1990); see also discussion *infra* Part I.B.2.

7. See discussion *infra* Part II.

8. See *Crawford v. Washington*, 541 U.S. 36 (2004); see also discussion *infra* Part I.B.3.

9. Dylan O. Keenan, Note, *Confronting Crawford v. Washington in the Lower Courts*, 122 YALE L.J. 782, 786 (2012) (citations omitted) (internal quotation marks omitted). Indeed, the disagreements surrounding *Crawford* are illustrated—and perhaps, complicated—by the Roberts Court’s willingness to hear Confrontation Clause cases nearly every term since *Crawford*. See *Williams v. Illinois*, 132 S. Ct. 2221 (2012); *Hardy v. Cross*, 132 S. Ct. 490 (2011); *Greene v. Fisher*, 132 S. Ct. 38 (2011); *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011); *Michigan v. Bryant*, 131 S. Ct. 1143 (2011); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); *Giles v. California*, 554 U.S. 353 (2008); *Whorton v. Bockting*, 549 U.S. 406 (2007); *Davis v. Washington*, 547 U.S. 813 (2006); *Mayle v. Felix*, 545 U.S. 644 (2005).

10. Since 2012, the constitutionality of two-way live video testimony in criminal trials has been litigated dozens of times in state and federal courts. See, e.g., *Collins v. Cain*, No. 13–0251, 2013 WL 4891923 (E.D. La. Sept. 11, 2013); *People v. Novak*, 971 N.Y.S.2d 197 (Cnty. Ct. 2013); *State v. Seelig*, 738 S.E.2d 427 (N.C. Ct. App. 2013); *State v. Smith*, 308 P.3d 135 (N.M. Ct. App. 2013); *People v. Lujan*, 150 Cal. Rptr. 3d 727 (Ct. App. 2012) (modified on rehearing on other grounds); *United States v. Sapse*, No. 2:10–CR–00370–KJD, 2012 WL 5334630 (D. Nev. Oct. 26, 2012); *Rivera v. State*, 381 S.W.3d 710 (Tex. App. 2012); *Paul v. State*, No. 12–10–00280–CR, 2012 WL 3101743 (Tex. App. July 31, 2012); *People v. Buie*, 817 N.W.2d 33 (Mich. 2012); *Kramer v. State*, 277 P.3d 88 (Wyo. 2012); *United States v. Rosenau*, 870 F. Supp. 2d 1109 (W.D. Wash. 2012).

11. In perhaps one of the most recent, infamous uses of live video testimony, the State of Florida attempted to introduce a professor’s testimony via Skype in George Zimmerman’s criminal trial for the shooting of Trayvon Martin. Suzanne Choney, *Skype Pranksters Interrupt Zimmerman Witness Testimony*, NBC NEWS (July 3, 2013, 5:35 PM), <http://www.nbcnews.com/technology/skype-pranksters->

using it increases, a workable and doctrinally sound constitutional standard for two-way live video testimony must be developed.

This Comment argues that the Supreme Court should adopt a substantial public policy standard to determine the constitutionality of two-way live video testimony. This proposal primarily emphasizes that two-way video requires witnesses to do something that one-way video, such as the system used in *Craig*, does not: it requires witnesses to see the defendant and testify to the defendant's face. Because of two-way video's better approximation of true physical confrontation, this proposal lowers the bar that prosecutors must meet to use two-way live video testimony by replacing *Craig*'s important public policy test with a substantial public policy standard. This standard would allow prosecutors to use two-way live video testimony in cases where the use of such testimony would advance public policies that, although not as important as protecting child abuse victims, are substantial enough to further the administration of justice. The substantial public policy standard would be doctrinally sound, grounded in reasoning that follows *a fortiori* from *Craig*. Moreover, the standard would be workable in practice, utilizing as guideposts lower courts' decisions to provide a framework for determining the circumstances in which two-way live video testimony is constitutional under the Confrontation Clause. In an era where astounding technological advances are commonplace, two-way live video will only become faster, better, and easier. The proposed substantial public policy standard embraces this reality and embodies a pragmatic solution—a solution for confrontation in a FaceTime generation.¹²

interrupt-zimmerman-witness-testimony-6C10528962, archived at <http://perma.cc/8LS3-2QCY>. The trial was streaming live on national television, and as a result, the general public could see the prosecutor's Skype screen name. *Id.* Within seconds of the commencement of the testimony, dozens of people began to call the prosecutor, creating annoying "beeps" within the courtroom that signaled incoming calls. *Id.* The less-than-amused judge immediately discontinued the video testimony. *Id.*

12. FaceTime is a software service developed by Apple that allows users with Apple products to make two-way video calls to each other. *See* Daniel Eran Dilger, *Inside iPhone 4: FaceTime Video Calling*, APPLE INSIDER (June 8, 2010, 6:00 PM), http://appleinsider.com/articles/10/06/08/inside_iphone_4_facetime_video_calling.html, archived at <http://perma.cc/J9VS-WELP>. The ease of videoconferencing via technology like FaceTime seems destined to become a hallmark of many aspects of life. *See, e.g.,* Amit Jain, *Visualize FaceTime as a Videowall—That Is What Next-Generation Video Conferencing Looks Like*, BUSINESS 2 COMMUNITY (Sept. 19, 2013), <http://www.business2community.com/business-innovation/visualize-facetime-videowall-next-generation-video-conferencing-looks-like-0620630#!tbkn7>, archived at <http://perma.cc/B7C8-KC62>.

Part I of this Comment provides an overview of the historical origins of confrontation and the Court's evolving interpretations of the Confrontation Clause. Part II turns to the difficulties surrounding two-way live video testimony and collects judicial answers to the question of when such testimony violates the Confrontation Clause. By doing so, the analysis reveals that lower courts, in fact, mostly agree that *Craig* applies to two-way live video testimony; nonetheless, courts disagree about *how* the *Craig* test applies. Part II then takes the novel step of outlining scholars' proposals addressing two-way live video testimony. This examination subsequently describes the various counterarguments to these proposals, revealing the deep disagreements illustrative of the general confusion surrounding the constitutionality of two-way live video testimony. To resolve this disagreement, Part III proposes a standard that allows the use of two-way live video testimony that advances both important public policies and public policies that are less important than *Craig*'s articulated policy of protecting child abuse victims. Recognizing two-way live video's superior replication of true physical confrontation, this proposal argues that prosecutors should not have to meet *Craig*'s important public policy requirement because a defendant's rights under the Confrontation Clause are better protected by two-way live video than by one-way live video. This proposal thus presents the Court with the best means of preserving *Craig*, reconciling differing judicial and scholarly opinions, and addressing the increasingly prevalent use of two-way live video testimony in criminal trials.

I. THE BACKGROUND AND EVOLUTION OF CONFRONTATION

The Confrontation Clause lacks any legislative history that might indicate its sources, justifications, or purposes.¹³ References

13. See U.S. CONST. amend. VI; see also *California v. Green*, 399 U.S. 149, 176 n.8 (1970) (Harlan, J., concurring) (“[T]he usual primary sources and digests of the early debates contain no informative material on the confrontation right”); ALFREDO GARCIA, *THE SIXTH AMENDMENT IN MODERN AMERICAN JURISPRUDENCE* 73 (1992) (noting that the “origins of confrontation are obscure”); FRANCIS H. HELLER, *THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION OF THE UNITED STATES* 33 (1951) (stating that the development of the right to confrontation cannot be definitively traced); Matthew J. Tokson, Comment, *Virtual Confrontation: Is Videoconference Testimony by an Unavailable Witness Constitutional?*, 74 U. CHI. L. REV. 1581, 1585 (2007) (“There is virtually no traditional legislative history on the Sixth Amendment’s Confrontation Clause.”); Jessica Brooks, Note, *Two-Way Video Testimony and the Confrontation Clause: Protecting Vulnerable Victims After Crawford*, 8 STAN. J. C.R. & C.L. 183, 187 (2012) (“There is a virtual lack of legislative history pertaining to the adoption of the Confrontation Clause into the Sixth Amendment.”).

to the right to confrontation, however, have existed since Biblical times under Hebrew and Roman law in that both traditions required witnesses to testify in person in the defendant's presence.¹⁴ For example, when chief priests and elders of the Jews called for the apostle Paul's death, Roman governor Festus replied: "It is not the custom of the Romans to deliver any man to destruction before the accused meets the accusers face to face."¹⁵ Yet, although the Church initially adhered to this right to confrontation after the legal establishment of Christianity in the Roman Empire,¹⁶ ecclesiastical and secular courts soon crippled that right, giving way to private examinations outside the presence of the defendant.¹⁷ A similar absence of the right to confrontation

14. See, e.g., *Lilly v. Virginia*, 527 U.S. 116, 140 (1999) (Breyer, J., concurring) ("The right of an accused to meet his accusers face-to-face is mentioned in, among other things, the Bible" (citing *Acts* 25:16)); Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1202 (2002) ("The ancient Hebrews required accusing witnesses to give their testimony in front of the accused"); Norman W. Spaulding, *The Enclosure of Justice: Courthouse Architecture, Due Process, and the Dead Metaphor of Trial*, 24 YALE J.L. & HUMAN. 311, 330 (2012) ("Recent research reveals that the right of confrontation and cross-examination of witnesses . . . [has] roots in . . . Hebrew law"). Roman criminal law utilized an accusatorial model of criminal procedure that entailed a "viva voce requirement." See Frank R. Herrmann & Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 VA. J. INT'L L. 481, 484 (1994) ("Roman criminal procedure . . . was accusatorial."). This requirement demanded that witnesses appear in person and testify orally before the trier of fact. *Id.* at 485–89; Frank R. Herrmann, *The Establishment of a Rule Against Hearsay in Romano-Canonical Procedure*, 36 VA. J. INT'L L. 1, 42 (1995) ("Witnesses are said to be [those] who say those things in person [viva voce]").

15. *Acts* 25:16 (New King James Version).

16. Herrmann & Speer, *supra* note 14, at 494 (noting that the Church prioritized having the accused and accuser simultaneously present in an adjudicatory forum).

17. *Id.* at 515. Legal scholars contended that private examinations prevented parties from telling their own witnesses what other witnesses had said, thereby enabling the best means of obtaining truthful testimony. *Id.* at 516. This procedure came to be known as the "Daniel and Susanna" procedure. *Id.* at 518. The name of the procedure comes from a biblical narrative concerning Susanna, a woman who spurned the advances of two men. *Daniel* 13:1–63. In revenge, the two men falsely accused Susanna of committing adultery with a young man in an orchard. *Id.* An assembly of the people conducted a trial of Susanna and initially believed the men, condemning her to death. *Id.* Daniel was moved by the spirit of God at this point and intervened. *Id.* He examined each of the men separately and out of the other's presence. *Id.* He then asked each man to name the tree under which the man allegedly saw Susanna with a lover. *Id.* One man said it was a mastic tree. *Id.* The other man said it was an oak tree. *Id.* The glaring discrepancy convinced the assembly that the men were lying, and Susanna was acquitted. *Id.*

existed in England at the time of the formation of the colonies.¹⁸ Indeed, the use of *ex parte* examinations effectively denied defendants the right to confront the witnesses against them.¹⁹ It is this abuse of the right to confrontation in England that likely influenced the drafters of state constitutions and the United States Constitution to support and implement confrontation clauses.²⁰ Therefore, this Part provides a summary of the history of confrontation that preceded the adoption of the Confrontation Clause, beginning in England and concluding with the adoption of the Sixth Amendment. It then discusses the Supreme Court's interpretations of the Confrontation Clause.

A. The Historical Foundations of Confrontation: From England to the United States

In the seventeenth century, English courts did not require the production of witnesses or their examinations in court.²¹ As a result, prosecutors routinely introduced depositions in lieu of live courtroom testimony over the defendants' requests for face-to-face confrontation.²² Sir Walter Raleigh's trial for treason in 1603 popularly serves as one of the most frequently cited examples of these abuses.²³ Accused of plotting to assassinate James VI of Scotland, Raleigh attempted to defend against written accusations.²⁴

18. See discussion *infra* Part I.A.

19. See *id.*

20. See *infra* note 23 and accompanying text.

21. Penny J. White, *Rescuing the Confrontation Clause*, 54 S.C. L. REV. 537, 543 (2003). To be sure, witnesses *did* testify before juries in England at this time; nevertheless, the prosecution largely decided whether they were called to testify or whether they testified by deposition. *Id.* n.21.

22. See, e.g., Crawford v. Washington, 541 U.S. 36, 43 (2004) (1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 326 (London, MacMillan & Co. 1883)).

23. E.g., Charles R. Nesson & Yochai Benkler, *Constitutional Hearsay: Requiring Foundational Testing and Corroboration Under the Confrontation Clause*, 81 VA. L. REV. 149, 150 (1995) ("More than any other story, the story of Raleigh's case, handed down over generations, has driven Anglo-American lawyers to limit the use of hearsay and to ensure a right of confrontation."); White, *supra* note 21, at 541 ("History teaches that the [Confrontation] Clause has far earlier beginnings [than Raleigh's trial], but it remains emotionally linked with the conviction, and eventual beheading, of Raleigh based on proof made through *ex parte* affidavits."); Raymond LaMagna, Note, *(Re)Constitutionalizing Confrontation: Reexamining Unavailability and the Value of Live Testimony*, 79 S. CAL. L. REV. 1499, 1520 (2006) ("Legendary among [defendants demanding face-to-face confrontation] was Sir Walter Raleigh, whose 1603 trial for treason is popularly credited with embedding confrontation into the public's conception of justice.")

24. Raleigh's Trial, 2 How. St. Tr. 1 (1603).

Specifically, the prosecution relied upon a sworn confession signed by Raleigh's alleged co-conspirator, Lord Cobham.²⁵ In response, Raleigh demanded that Cobham be present in the courtroom to deliver his testimony.²⁶ The court rejected Raleigh's protests.²⁷ Raleigh was thereafter convicted and sentenced to die.²⁸ Consequently, the relatively recent history of similar injustices during the revolutionary period undeniably contributed to the adoption of confrontation clauses in the United States.²⁹

With these abuses of *ex parte* examinations at common law in mind, the language in the Sixth Amendment's Confrontation Clause likely finds its roots in early state constitutions.³⁰ Scholars generally agree that *Blackstone's Commentaries on the Laws of England* was the primary source for the drafting of confrontation clauses in state constitutions.³¹ In 1776, Virginia was the first state

25. See White, *supra* note 21, at 542 ("The prosecution, led by Sir Edward Coke, introduced evidence in the form of a sworn confession from Raleigh's alleged co-conspirator, Lord Cobham.").

26. Raleigh's Trial, 2 How. St. Tr. at 15 ("But it is strange to see how you press me still with my Lord Cobham, and yet will not produce him . . . [H]e is in the house hard by, and may soon be brought hither; let him be produced, and if he will accuse me or avow this confession of his, it shall convict me and ease you of further proof.").

27. *Id.* Interestingly enough, the same judge who rejected Raleigh's arguments later praised the virtues of live testimony. See LaMagna, *supra* note 23, at 1521 ("For the Testimonies, being viva voce before the Judges in open face of the world . . . [are] much to be preferred before written depositions by private examiners or Commissioners. First, for that the Judge and Jurors discern often by the countenance of a Witness whether he come prepared, and by his readiness and slackness, whether he be ill affected or well affected, and by short questions may draw out circumstances to approve or discredit his testimony, and one witness may contest with another where they are viva voce. All which are taken away by written depositions." (quoting Case of the Union of the Realms, (1606) 72 Eng. Rep. 908, 913 (K.B.) (Popham, C.J.)); see also White, *supra* note 21, at 543 ("Because Raleigh was denied that right [of confrontation] and quickly sentenced to die, one of the four trial judges later lamented that the trial had injured and degraded the justice of England." (internal quotation marks omitted)).

28. As one scholar notes, the King later pardoned Raleigh, but kept him in the tower of London. See White, *supra* note 21, at 543 n.20. After many years, Raleigh was ultimately executed for additional offenses and treason that were "not pardonable." *Id.*

29. See *supra* note 23 and accompanying text.

30. White, *supra* note 21, at 550.

31. *Id.* at 551 n.78 ("These volumes were avidly sought in the colonies and had inestimable impact there on the development and growth of the law and legal attitudes." (quoting Murl A. Larkin, *The Right of Confrontation: What Next?*, 1 TEX. TECH. L. REV. 67, 72 (1969))). To be sure, Blackstone's writings were quite persuasive with respect to the preference for live, in person examination and its benefits. See 3 WILLIAM BLACKSTONE, COMMENTARIES

to complete its Declaration of Rights, which included a defendant's right "in all capital or criminal prosecutions . . . to be confronted with the accusers and witnesses."³² Over the next eight years, seven other states constructed and adopted similar confrontation clauses in their respective constitutions.³³ This trend culminated in the adoption of the Sixth Amendment's Confrontation Clause.³⁴

*373–75 ("This open examination of witnesses viva voce, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination taken down in writing before an officer, or his clerk, in the ecclesiastical courts, and all others that have borrowed their practice from the civil law: where a witness may frequently depose that in private, which he will be ashamed to testify in a public and solemn tribunal . . . Besides the occasional questions of the judge, the jury, and the counsel, propounded to the witnesses on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled: and the confronting of adverse witnesses is also another opportunity of obtaining a clear discovery, which can never be had upon any other method of trial. Nor is the presence of the judge, during the examination, a matter of small importance; for besides the respect and awe, with which his presence will naturally inspire the witness, he is able by use and experience to keep the evidence from wandering from the point in issue. In short by this method of examination, and this only, the persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behaviour, and inclinations of the witness; in which points all persons must appear alike; when their depositions are reduced to writing, and read to the judge, in the absence of those who made them: and yet as much may be frequently collected from the manner in which the evidence is delivered, as from the matter of it."); *see also supra* note 14 (discussing viva voce requirement).

32. Virginia Declaration of Rights § 8 (1776), *reprinted in* 1 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 235 (1971); Larkin, *supra* note 31, at 75.

33. *See* Delaware Declaration of Rights § 14 (1776), *reprinted in* 1 *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY*, *supra* note 32, at 278; Maryland Declaration of Rights § XIX (1776), *reprinted in* 1 *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY*, *supra* note 32, at 282; Massachusetts Declaration of Rights § XII (1780), *reprinted in* 1 *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY*, *supra* note 32, at 342; New Hampshire Bill of Rights § XV (1783), *reprinted in* 1 *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY*, *supra* note 32, at 377; North Carolina Declaration of Rights § VII (1776), *reprinted in* 1 *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY*, *supra* note 32, at 287; Pennsylvania Declaration of Rights § IX (1776), *reprinted in* 1 *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY*, *supra* note 32, at 265; Vermont Declaration of Rights Ch. I, § X (1777), *reprinted in* 1 *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY*, *supra* note 32, at 323.

34. *See, e.g.,* White, *supra* note 21, at 550 ("Despite the general agreement that confrontation rights have ambiguous beginnings and that no history of the Clause can be proclaimed with certainty, it is without question that the language ultimately used in the Sixth Amendment Confrontation Clause was derived from state constitutions.").

Indeed, many of the individuals who drafted and ratified the Bill of Rights were the drafters of these state constitutions, and so they observed firsthand the development of the American adversarial system, including the right to confrontation.³⁵ Thus, it is unsurprising that the draft of the Bill of Rights included the right to confrontation in what would become the Sixth Amendment.³⁶

This right to confrontation, however, was not included in the original text of the United States Constitution. During the formation of the Constitution, Abraham Holmes of the Massachusetts Ratifying Convention objected that the proposed document did not guarantee “whether [a defendant] is to be allowed to meet his accuser face to face; whether he is to be allowed to confront the witnesses.”³⁷ A compromise materialized thereafter, and the states agreed to ratify the Constitution as proposed on the condition that the first Congress would adopt a bill of rights, which would encompass, *inter alia*, an amendment ensuring the right to confrontation.³⁸ On June 8, 1789, James Madison introduced to the House of Representatives a proposal that would become the Sixth Amendment,³⁹ which substantially mirrored the language used in the Virginia Constitution.⁴⁰ In particular, it guaranteed that an accused would have the right to be confronted “with his accusers, and the witnesses against him.”⁴¹ A subsequent revision deleted the words “his accusers,”⁴² and the final version of the Sixth Amendment provided:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory

35. *Id.* at 552. These drafters necessarily also witnessed the attempts of England to interfere with the right to confrontation by removing accused defendants to England for trial. *Id.*

36. *Id.*

37. See 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 110–11 (Jonathan Elliot ed., 2d ed. 1836).

38. LaMagna, *supra* note 23, at 1525.

39. *Id.*

40. White, *supra* note 21, at 552 (“When James Madison introduced the Sixth Amendment[,] it contained substantially the same language as that used in the Virginia Constitution.”).

41. *Id.* (citing Larkin, *supra* note 31, at 76).

42. *Id.*

process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.⁴³

This version of the Sixth Amendment contains what is now known as the “Confrontation Clause” and was adopted on December 15, 1791.⁴⁴

B. The Supreme Court’s Interpretations of the Confrontation Clause

Because of the relative dearth of historical interpretive materials to explain the Confrontation Clause, for a long time the Supreme Court felt free to follow its own interpretive path.⁴⁵ At the beginning of this path, the Court developed a test centered upon reliability and public policy, exemplified in the video-testimony context by *Maryland v. Craig*.⁴⁶ More recently, however, the Court has undertaken an originalist reconstruction of its Confrontation Clause jurisprudence focused on the notions of “testimonial,” witness unavailability, and the defendant’s opportunity for cross-examination, as articulated in *Crawford v. Washington*.⁴⁷ This Section describes this evolution.

1. Reliability and Important Public Policies: The Path to Craig

At the end of the nineteenth century, the Supreme Court set forth its first significant interpretation of the Confrontation Clause, which ensured the right to confrontation unless public policy overrode that right.⁴⁸ At issue in *Mattox v. United States* was the admission of a stenographer’s notes of a dead witness’s testimony from a prior trial as evidence in a new criminal trial.⁴⁹ The Supreme Court emphasized that the Confrontation Clause compels

43. U.S. CONST. amend. VI.

44. LaMagna, *supra* note 23, at 1525.

45. See, e.g., Charles F. Baird, *The Confrontation Clause: Why Crawford v. Washington Does Nothing More Than Maintain the Status Quo*, 47 S. TEX. L. REV. 305, 305–06 (2005) (stating that the Supreme Court’s Confrontation Clause analyses have “caused much confusion” and concurring that the opinions are as “drunken lurching from lightpost to lightpost in search of a viable confrontation theory”).

46. See *Maryland v. Craig*, 497 U.S. 836 (1990); see also discussion *infra* Part I.B.2.

47. See *Crawford v. Washington*, 541 U.S. 36 (2004); see also discussion *infra* Part I.B.3.

48. See *Mattox v. United States*, 156 U.S. 237 (1895).

49. *Id.* at 251 (Shiras, J., dissenting). *Mattox* had previously been tried and convicted of murder. *Id.* The Supreme Court subsequently invalidated the conviction and remanded the case for a new trial. *Id.*

a witness to face the defendant and jury so that those individuals may affect and assess the witness's demeanor.⁵⁰ Yet, the Court noted that this right to confrontation "must occasionally give way to considerations of public policy and the necessities of the case."⁵¹ Ultimately, the Court admitted the notes of the witness's prior testimony, holding that public policy prohibits a criminal from going free just because a witness died and thus could not testify.⁵²

Nearly a century later, the Supreme Court added the concept of reliability to guide analyses in which public policies may trump the right to confrontation.⁵³ In *Ohio v. Roberts*, a witness testified at a preliminary hearing but did not show up to testify at trial.⁵⁴ The court admitted the transcript of the witness's prior testimony over the defendant's objection.⁵⁵ Affirming the admission of the transcript, the Court proceeded as it did in *Mattox*, contending that certain competing interests and policies might justify dispensing with confrontation at trial.⁵⁶ For these situations, the Court created a two-pronged test, which allowed prior testimony if: (1) the witness was unavailable;⁵⁷ and (2) the testimony had sufficient "indicia of reliability."⁵⁸ Applying this test, the Court concluded that the witness was unavailable and that her prior testimony was reliable by definition because the witness testified under oath and was subjected to cross-examination.⁵⁹ Thus, the *Roberts* Court refined its *Mattox* analysis and laid the foundation upon which the *Craig* Court would later consider the constitutionality of one-way live video testimony.

2. *Craig: The Constitutionality of One-Way Live Video Testimony*

In *Maryland v. Craig*, Justice O'Connor phrased the question before the Court as whether the Confrontation Clause "prohibits a child witness in a child abuse case from testifying against a

50. *Id.* at 242–43 (majority opinion). In so emphasizing, the Court observed that the primary object of the Confrontation Clause was to prevent depositions or ex parte affidavits from being used against a defendant in lieu of a personal examination and cross-examination of the witness. *Id.*

51. *Id.* at 243.

52. *Id.* at 243–44.

53. *See generally* *Ohio v. Roberts*, 448 U.S. 56 (1980).

54. *Id.* at 58–59.

55. *Id.* at 59–60.

56. *Id.* at 64.

57. A court may consider a witness "unavailable" under several situations. *See* FED. R. EVID. 804 (listing scenarios).

58. *Roberts*, 448 U.S. at 66.

59. *Id.* at 73.

defendant at trial, outside the defendant's physical presence, by one-way closed circuit television."⁶⁰ In *Craig*, a grand jury indicted Sandra Ann Craig with child abuse.⁶¹ At trial, the State invoked a Maryland statutory procedure that sanctioned the use of one-way closed circuit television to procure a child's testimony if, during normal testimony, the child would suffer serious emotional distress in the presence of the accused.⁶² Under this procedure, the child, the prosecutor, and defense counsel withdrew to a separate room while the judge, jury, and defendant remained in the courtroom.⁶³ The parties then examined and cross-examined the child in the separate room, while a video monitor streamed the live video and audio of the examination in the courtroom.⁶⁴ Craig remained in electronic contact with her defense counsel and the parties entered objections, which the court ruled on as if the witness were in the courtroom.⁶⁵ Nonetheless, Craig objected to use of the procedure on Confrontation Clause grounds.⁶⁶

The Court upheld the use of the one-way video testimony in a 5-4 decision.⁶⁷ The Court primarily enumerated four fundamental requirements of the Confrontation Clause: (1) physical presence of the witness; (2) testimony by the witness under oath; (3) cross-examination of the witness by defense counsel; and (4) observation of the witness's demeanor by the jury.⁶⁸ The Court acknowledged that the video testimony in question did not demand the physical presence of the witness.⁶⁹ Nevertheless, the Court contended that the clear satisfaction of the three remaining factors made the child's testimony sufficiently reliable.⁷⁰ The Court further reinforced its argument by highlighting the compelling state interests in protecting the physical and psychological well-being of child abuse victims.⁷¹ Thus, emphasizing its "non-absolute"

60. *Maryland v. Craig*, 497 U.S. 836, 840 (1990).

61. *Id.*

62. *Id.*

63. *Id.* at 841.

64. *Id.*

65. *Id.* at 842.

66. *Id.*

67. *Id.* at 838.

68. *Id.* at 845-46.

69. *Id.* at 851.

70. *Id.* Specifically, the Court noted that "[t]he child witness must be competent to testify and must testify under oath; the defendant retains full opportunity for contemporaneous cross-examination; and the judge, jury, and defendant are able to view (albeit by video monitor) the demeanor (and body) of the witness as he or she testifies." *Id.*

71. *Id.* at 852-54.

interpretation of the right of confrontation,⁷² the Court held that one-way live video testimony is constitutional on two conditions: (1) the state must make a showing of necessity by demonstrating an important public policy of protecting child witnesses from the trauma of testifying in the defendant's presence;⁷³ and (2) the procedure, despite the absence of physical confrontation, must ensure the reliability of the evidence by preserving the essence of effective confrontation.⁷⁴ This is the test that courts typically extend to govern two-way live video testimony.⁷⁵

3. Crawford: *An Overhaul of Confrontation Clause Jurisprudence*

In 2004, however, the Supreme Court retreated from its initial emphasis on reliability, effectively transforming its Confrontation Clause jurisprudence. In *Crawford v. Washington*, Michael Crawford was charged with assault and attempted murder for stabbing Kenneth Lee.⁷⁶ At trial, Crawford argued self-defense.⁷⁷ This theory, however, conflicted with a recorded statement given by Crawford's wife during a police interrogation prior to Crawford's trial, suggesting that perhaps Crawford did not stab Lee in self-defense.⁷⁸ Because of a state marital privilege rule that prohibited a spouse from testifying without the other spouse's consent, Crawford's wife was unable to testify.⁷⁹ Thus, the prosecution attempted to introduce her recorded statement in lieu of her live testimony.⁸⁰ The trial court admitted the statement into evidence,⁸¹ which Crawford alleged to be a violation of his constitutional rights under the Confrontation Clause.⁸²

Writing for the majority, Justice Scalia conducted a historical analysis to ultimately hold that the admission of the recorded statement violated Crawford's rights under the Confrontation Clause.⁸³ Justice Scalia emphasized that the Confrontation Clause's fundamental protection is its assurance of reliable testimony.⁸⁴ Here, however, the

72. *Id.* at 849.

73. *Id.* at 850, 856–57.

74. *Id.* at 850, 857.

75. See discussion *infra* Part II.A.1–2.

76. *Crawford v. Washington*, 541 U.S. 36, 40 (2004).

77. *Id.*

78. *Id.* at 38–40.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 40–69.

84. *Id.*

Court diverged from its prior jurisprudence.⁸⁵ Although it acknowledged that the Confrontation Clause demands reliable testimony, the Court argued that the *Roberts* test injected subjective judicial determinations that were detrimental to the spirit of the Confrontation Clause.⁸⁶ Instead, Justice Scalia stated that history dictates that the primary safeguards of confrontation entail witness unavailability and cross-examination of the witness.⁸⁷ Thus, the Court overruled the *Roberts* test and its subscription to unilateral judicial determinations of reliability.⁸⁸ The Court held that the prosecution may admit testimonial⁸⁹ hearsay only if: (1) the witness is unavailable; and (2) the defendant had a prior opportunity to cross-examine the witness.⁹⁰ This is the now well-known *Crawford* test.

So, Supreme Court Confrontation Clause jurisprudence demonstrates that there are two arguably viable tests—the *Craig* test and the *Crawford* test—that might govern the constitutionality of two-way live video testimony. However, each test has potential drawbacks. Some scholars question whether *Craig* is still good law after *Crawford* given the *Craig* Court’s reliance upon *Roberts* for its understanding of reliability and the *Crawford* Court’s subsequent rejection of *Roberts*.⁹¹ On the other hand, some courts and scholars question whether video testimony should be considered hearsay for the purposes of *Crawford*.⁹² That is, because *Crawford* expressly addressed testimonial hearsay,⁹³ which is an out of court statement that the

85. *Id.* at 61.

86. *Id.* at 62–69.

87. *Id.* at 68.

88. *See id.* at 69 (Rehnquist, C.J., concurring in the judgment) (“I dissent from the Court’s decision to overrule *Ohio v. Roberts* . . .”).

89. The term “testimonial” refers to statements made in “material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially.” *Id.* at 51 (citation omitted). Notably, the *Crawford* Court “[left] for another day any effort to spell out a comprehensive definition of ‘testimonial.’” *Id.* at 68. The scope of the term “testimonial” is as of yet unclear, despite the Court’s attempts to refine the definition. *See supra* note 9 and accompanying text. For purposes of this Comment, testimony via two-way live video would undoubtedly be “testimonial” in the most basic sense of the word; thus, this Comment foregoes significant inquiry into this aspect of *Crawford*’s potential application.

90. *Crawford*, 541 U.S. at 68.

91. *See* discussion *infra* Part II.B.3.

92. *See* discussion *infra* Part II.B.2.

93. *See Crawford*, 541 U.S. at 68 (“Where *nontestimonial* hearsay is at issue, it is wholly consistent with the Framers’ design to afford the States flexibility in their development of *hearsay* law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where *testimonial* [hearsay] is at issue, however, the Sixth

declarant does not make while testifying at trial,⁹⁴ it seems that live testimony at trial via video is not hearsay within the purview of *Crawford*.⁹⁵ This uncertainty is illustrated—and compounded—by numerous approaches to the constitutional question.

II. APPROACHES TO TWO-WAY LIVE VIDEO TESTIMONY UNDER THE CONFRONTATION CLAUSE

Against this historical and jurisprudential backdrop, lower courts and scholars attempting to apply the underlying principles of confrontation to two-way live video testimony have come to vastly different conclusions. This Part first reviews how the federal circuit courts have addressed the issue, analyzing decisions that have applied *Craig* and found the testimony both constitutional and unconstitutional and discussing the Second Circuit's decision to not apply *Craig* at all. It then outlines four popular proposals by scholars and responses that have been made to each proposal.

A. Federal Circuit Courts' Approaches

Many scholars have noted a purported circuit split in the federal circuit courts' approaches to two-way live video testimony because the Second Circuit has refused to apply *Craig* to two-way video.⁹⁶ This Section illustrates, however, that although there is a circuit split that hinges upon whether to apply *Craig* to two-way live video testimony, the majority of circuit courts that have addressed the issue fall on one side of the split—*Craig* applies.⁹⁷ Thus, while there is technically a “circuit split” on whether to apply *Craig* at all, it is quite lopsided and there is mostly a

Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.” (emphasis added)).

94. See FED. R. EVID. 801(c) (“‘Hearsay’ means a statement that . . . the declarant does not make while testifying at the current trial or hearing . . .”).

95. See discussion *infra* Part II.B.2.

96. See, e.g., Marc Chase McAllister, *Two-Way Video Trial Testimony and the Confrontation Clause: Fashioning a Better Craig Test in Light of Crawford*, 34 FLA. ST. U. L. REV. 835, 845 (2007) (noting the “federal circuit split”); Brooks, *supra* note 13, at 202 (noting the “uncertainty and the circuit split in *Gigante* and *Yates*”); Tokson, *supra* note 13, at 1592 (noting the “circuit split regarding the constitutionality of two-way video testimony”); Christine L. Olson, Comment, *Accusations from Abroad: Testimony of Unavailable Witnesses Via Live Two-Way Videoconferencing Does Not Violate the Confrontation Clause of the Sixth Amendment*, 41 U.C. DAVIS L. REV. 1671, 1689 (2008) (advocating that the Supreme Court “resolve the circuit split”).

97. See discussion *infra* Part II.A.1–3.

consensus among the circuits. However, there is widespread disagreement on the more practical question of *how* to apply *Craig* to two-way live video testimony. This Section describes the circumstances where courts have applied *Craig* and found such testimony constitutional, circumstances where courts have applied *Craig* and found such testimony unconstitutional, and finally the Second Circuit's refusal to apply *Craig* altogether. It then concludes by highlighting principles that contextualize the following analysis of scholarship.

1. Federal Circuit Courts Applying Craig and Finding Two-Way Video Testimony Constitutional

After *Craig*, circuit courts began to extend the *Craig* test to two-way live video testimony in child abuse cases, reading *Craig* to protect child victims from the *presence* of the defendant rather than from the *image* of the defendant. In these cases, courts routinely held such testimony constitutional as long as the lower courts found that the child displayed a fear of being in the defendant's presence.⁹⁸ For example, in *United States v. Weekley*, the Sixth Circuit upheld the use of two-way live video testimony because the district court determined that the child "genuinely feared" the defendant and there was a "substantial likelihood that [the child] would suffer emotional trauma" if required to testify in the defendant's presence.⁹⁹ Similarly, in *United States v. Rouse*, the Eighth Circuit upheld two-way live video testimony because the district court found that the children believed that the defendants would attack them if they entered the courtroom.¹⁰⁰ Numerous other circuits have come to identical conclusions in similar cases.¹⁰¹

98. See, e.g., *United States v. Rouse*, 111 F.3d 561, 568 (8th Cir. 1997) (emphasizing the "trauma [to the child] that would be caused by [the child] testifying in the physical presence of the defendant" (quoting *Maryland v. Craig*, 497 U.S. 836, 851, 857 (1990))); *United States v. Weekley*, 130 F.3d 747, 753 (6th Cir. 1997) (quoting *Craig*, 497 U.S. at 857).

99. *Weekley*, 130 F.3d at 752.

100. *Rouse*, 111 F.3d at 568.

101. See, e.g., *United States v. Quintero*, 21 F.3d 885, 892 (9th Cir. 1994) (upholding the testimony because the district court concluded that there was a substantial likelihood of the child suffering emotional trauma if forced to testify in the courtroom); *United States v. Carrier*, 9 F.3d 867, 870-71 (10th Cir. 1993) (upholding the testimony because the district court found that testifying in the defendant's presence would cause the child "severe" distress); *United States v. Farley*, 992 F.2d 1122, 1125 (10th Cir. 1993) (upholding the testimony because the district court found that the child would likely suffer trauma if forced to testify in the defendant's presence).

Courts likewise began to apply *Craig* to two-way live video testimony in contexts other than child abuse cases. For example, in *Horn v. Quarterman*, the prosecution in a Texas trial attempted to introduce a witness's testimony via two-way live video because the witness was terminally ill with cancer and undergoing treatment in Ohio.¹⁰² On appeal, the Fifth Circuit found that *Craig* governed the inquiry into the constitutionality of the two-way live video testimony.¹⁰³ Specifically, the court recognized that the trial court had conducted the "case-specific finding of necessity" mandated by *Craig* by determining that the witness was ill and could not travel.¹⁰⁴ Accordingly, the court found that the terminally ill witness's testimony via two-way live video was constitutionally sound.¹⁰⁵ Similarly, in *United States v. Benson*, the Sixth Circuit faced a situation where the witness who testified via two-way live video was 85 years old and too ill to travel.¹⁰⁶ Addressing the defendant's appeal, the Sixth Circuit held that the district court's considerations of the witness's major stomach surgery in the previous year, extensive health problems, severe weight loss, and fatigue satisfied the *Craig* test.¹⁰⁷ Thus, many circuit courts have applied *Craig* to both child abuse cases and non-child abuse cases, allowing two-way live video testimony in a wide range of scenarios as long as both the reliability and important public policy prongs of the *Craig* test were satisfied.

2. Federal Circuit Courts Applying Craig and Finding Two-Way Video Testimony Unconstitutional

On the other hand, many circuit courts have extended *Craig* to consider two-way live video testimony but have found the use of such testimony unconstitutional because the facts in those cases did not satisfy the *Craig* test.¹⁰⁸ In the child-abuse context, for example, the Eighth Circuit in *United States v. Bordeaux* held that the district court's considerations of and emphasis on a child's fear did not satisfy the *Craig* test.¹⁰⁹ Specifically, the court found that, because the child's fear of the defendant was not the "dominant

102. *Horn v. Quarterman*, 508 F.3d 306, 310 (5th Cir. 2007).

103. *Id.* at 317.

104. *Id.* at 318.

105. *Id.*

106. *United States v. Benson*, 79 F. App'x 813, 820 (6th Cir. 2003) (per curiam).

107. *Id.* at 820–21.

108. *See, e.g., United States v. Bordeaux*, 400 F.3d 548 (8th Cir. 2005); *United States v. Moses*, 137 F.3d 894 (6th Cir. 1998).

109. *Bordeaux*, 400 F.3d at 555.

reason” why she could not testify in open court, use of two-way live video testimony did not serve *Craig*’s important public policy requirement.¹¹⁰ Similarly, the Sixth Circuit in *United States v. Moses* found a child’s testimony via two-way live video unconstitutional under the Confrontation Clause because the child told the district court that she was not afraid of the defendant.¹¹¹ Moreover, the court emphasized that courts commonly agree that a child’s general fear of the courtroom is not sufficient to satisfy the *Craig* test.¹¹²

In a non-child abuse context, the Eleventh Circuit sitting en banc likewise found that two-way live video testimony violated a defendant’s rights under the Confrontation Clause because mere efficiency of live video does not satisfy *Craig*.¹¹³ In *United States v. Yates*, the federal government moved to allow two Australian witnesses to testify via two-way live video.¹¹⁴ The government emphasized that, although the witnesses were unwilling to travel to the United States to testify (and were beyond the government’s subpoena powers), they *were* willing to testify via live video.¹¹⁵ The government also argued that the witnesses were essential to its case-in-chief, and the district court agreed.¹¹⁶ On appeal, the Eleventh Circuit held that such testimony violated the defendant’s constitutional rights.¹¹⁷ Relying upon circuit precedent, the court affirmed that *Craig* is the appropriate test to determine the admissibility of two-way live video testimony.¹¹⁸ The court then

110. *Id.* This decision echoed the Eighth Circuit’s decision the previous year in *United States v. Turning Bear*, where the court held that a child’s general fear of the courtroom environment did not satisfy *Craig*. *United States v. Turning Bear*, 357 F.3d 730, 737 (8th Cir. 2004).

111. *Moses*, 137 F.3d at 898–99.

112. *Id.* (citing *United States v. Rouse*, 111 F.3d 561, 568 (8th Cir. 1997); *United States v. Quintero*, 21 F.3d 885, 892 (9th Cir. 1994); *United States v. Carrier*, 9 F.3d 867, 870–71 (10th Cir. 1993); *United States v. Garcia*, 7 F.3d 885, 887 (9th Cir. 1993); *United States v. Farley*, 992 F.2d 1122, 1125 (10th Cir. 1993)).

113. *See United States v. Yates*, 438 F.3d 1307 (11th Cir. 2006) (en banc).

114. *Id.* at 1310.

115. *Id.*

116. *Id.*

117. *Id.* at 1318.

118. *Id.* at 1313 (citing *Harrell v. Butterworth*, 251 F.3d 926, 930 (11th Cir. 2001) (where the Eleventh Circuit, on habeas review, held that the Florida Supreme Court’s decision finding that *Craig* justified using two-way live video testimony was not contrary to, nor an objectively unreasonable application of, federal law as determined by the Supreme Court)). The court reinforced this affirmation by noting that four other circuits agreed that *Craig* governs two-way live video testimony. *Id.* (citing *United States v. Bordeaux*, 400 F.3d 548 (8th Cir. 2005); *United States v. Turning Bear*, 357 F.3d 730 (8th Cir. 2004); *United*

applied the two-pronged *Craig* analysis, focusing specifically on the “important public policy” prong.¹¹⁹ Of course, presenting the fact-finder with crucial evidence is an important public policy.¹²⁰ Nevertheless, the court held that this policy was not important enough to outweigh the defendant’s right to confront her accusers face to face.¹²¹ The court noted that all criminal prosecutions include evidence “crucial” to the government’s case.¹²² Moreover, prosecutors could undoubtedly resolve more criminal cases efficiently if it were unnecessary for witnesses to appear physically at trial.¹²³ Yet, the court reasoned that, if courts were to approve this testimony for mere efficiency purposes, prosecutors would argue for blanket rules allowing two-way live video testimony under the guise of providing crucial prosecutorial evidence and resolving cases expeditiously.¹²⁴ Surely, the court opined, this was not the type of important public policy that the *Craig* Court required.¹²⁵

Furthermore, the court emphasized that, under *Craig*, video testimony must be *necessary*, not just more convenient, to further an important public policy.¹²⁶ The court held that “[i]n this case, there simply is no necessity of the type *Craig* contemplates.”¹²⁷ In particular, the court noted that there were other available avenues to obtain the testimony, including procedures for taking video depositions.¹²⁸ Consequently, the court concluded that this case was no different from any other criminal prosecution in which the government would find it convenient to present testimony via two-way live video.¹²⁹ Thus, the Eleventh Circuit held that the video testimony in this case did not further an “important enough” public

States v. Moses, 130 F.3d 747 (6th Cir. 1997); United States v. Rouse, 111 F.3d 561 (8th Cir. 1997); United States v. Quintero, 21 F.3d 885 (9th Cir. 1994); United States v. Carrier, 9 F.3d 867 (10th Cir. 1993); United States v. Garcia, 7 F.3d 885 (9th Cir. 1993); United States v. Farley, 992 F.2d 1122 (10th Cir. 1993)). The court additionally chided the Second Circuit for “stand[ing] alone in its refusal to apply *Craig*.” *Id.* at 1313–14.

119. *Id.* at 1315–18.

120. *Id.* at 1316.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 1315–16.

126. *Id.* at 1316.

127. *Id.*

128. *Id.* at 1316–18. These depositions are called “Rule 15 depositions.” See FED. R. CRIM. P. 15; see also discussion *infra* Part II.A.3.

129. *Yates*, 438 F.3d at 1316.

policy under the demands of *Craig*.¹³⁰ As a result, the testimony violated the defendant's rights under the Confrontation Clause.¹³¹

3. *The Second Circuit's Rejection of Craig in United States v. Gigante*

In contrast with this nearly universal acceptance of *Craig*'s reasoning in the context of two-way live video testimony, the Second Circuit in one notable instance refused to apply the *Craig* test to such testimony.¹³² In *United States v. Gigante*, the government charged Mafia member Vincent Gigante with murder and labor racketeering, alleging that he was the boss of the Genovese crime family.¹³³ A man named Peter Savino, a former associate of the Genovese crime family, was a crucial witness against Gigante.¹³⁴ Savino had previously cooperated with the government and was a participant in the Federal Witness Protection Program.¹³⁵ At the time of Gigante's trial, Savino was in the final stages of inoperable, fatal cancer and was under medical supervision at a secret location.¹³⁶ Thus, the government moved to allow Savino to testify via two-way live video.¹³⁷ The district court allowed the testimony over Gigante's objection.¹³⁸

On appeal, the Second Circuit upheld the testimony as constitutional—but not under the *Craig* test.¹³⁹ Instead, the court distinguished *Craig*, arguing that the *Craig* Court crafted the “important public policy” standard *exclusively* for one-way video testimony, “whereby the witness could not possibly view the defendant.”¹⁴⁰ Here, the court contended, the district court used a two-way system through which the witness could see the

130. *Id.* at 1314–18.

131. *Id.* at 1314.

132. *United States v. Gigante*, 166 F.3d 75 (2d Cir. 1999). *See also Yates*, 438 F.3d at 1313–14 (“The Second Circuit stands alone in its refusal to apply *Craig*.” (citing *Gigante*, 166 F.3d 75)).

133. *Gigante*, 166 F.3d at 78. The New York Mafia is comprised of five organized crime families: the Bonnano, Colombo, Gambino, Lucchese, and Genovese families, each spearheaded by a boss. *Id.* The government claimed that Gigante was the boss of the Genovese family and supervised its criminal activity. *Id.*

134. *Id.* at 79.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 80.

139. *Id.* at 82.

140. *Id.* at 81.

defendant.¹⁴¹ Correspondingly, the court opined that two-way video preserves the essence of confrontation in a manner that the one-way video in *Craig* could not.¹⁴² For this reason, the court concluded that it was unnecessary to enforce *Craig*'s arguably high "important public policy" standard in this case.¹⁴³

Rather, the Second Circuit upheld the video testimony by analogy to the protections afforded by Rule 15 depositions.¹⁴⁴ Under Rule 15, parties may take a deposition "[w]henever[,] due to exceptional circumstances of the case[,] it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial."¹⁴⁵ That testimony may then be admitted at trial "as substantive evidence if the witness is unavailable."¹⁴⁶ The Second Circuit noted that a court could consider a witness unavailable if he or she "is unable to be present or to testify at the hearing because of . . . physical or mental illness or infirmity."¹⁴⁷ The Second Circuit reasoned that the trial court could have admitted Savino's testimony via these rules.¹⁴⁸ Moreover, the court argued, two-way live video testimony actually afforded greater protection of Gigante's confrontation rights than Rule 15 could afford because it forced Savino to testify live before a jury, which in turn allowed the jury to assess his demeanor.¹⁴⁹ Accordingly, the Second Circuit held that it could not hold two-way live video testimony to a higher standard than the Rule 15 standard.¹⁵⁰ In so holding, the court articulated its rule: "[u]pon a finding of exceptional circumstances, such as were found in this case, a trial court may allow a witness to testify via two-way closed-circuit television when this furthers the interest of justice."¹⁵¹

From this survey of circuit court cases, two main points emerge concerning the constitutionality of two-way live video testimony. First, with the exception of the Second Circuit, the federal circuit courts, as well as many district courts and state courts,¹⁵² seem to

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* (quoting FED. R. CRIM. P. 15(a)).

146. *Id.* (quoting FED. R. CRIM. P. 15(e)).

147. *Id.* (quoting FED. R. EVID. 804(a)(4)).

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *See, e.g.,* United States v. Rosenau, 870 F. Supp. 2d 1109 (W.D. Wa. 2012) (applying *Craig* and allowing a Canadian witness to testify via two-way live video testimony because a Canadian court order prevented the witness from

generally accept *Craig* as the appropriate test for determining the constitutionality of two-way live video testimony. So, although there is a circuit split, it is a very unbalanced one. The consensus about which test should apply is actually fairly strong. Second, the inconsistencies that do percolate amongst the lower courts seem to stem not from troubles determining *whether* the *Craig* test applies, but from efforts to determine *how* *Craig* applies—namely (1) what constitutes an “important public policy” under *Craig*; and (2) whether that definition varies depending upon which type of system, one-way video or two-way video, is in question. Indeed, these cases illustrate the confusion that stems from a type of “vertical” analysis where courts measure the circumstances in each case against the high standard of an important public policy protecting child abuse victims.

B. Scholars’ Approaches

This conflicting jurisprudence has, in turn, encouraged a diverse array of proposals put forth by scholars in an attempt to solve the two-way live video testimony issue. This Section groups the most popular proposals into four categories: those in favor of complete constitutionality of the testimony; those who argue that *Crawford* governs the testimony; those who claim that *Craig* governs the testimony; and those who assert that all such testimony is unconstitutional. This Section describes the arguments in favor of each proposal and then discusses scholars’ objections to each proposal.¹⁵³

coming to the United States); *Commonwealth v. Atkinson*, 987 A.2d 743 (Pa. Super. Ct. 2009) (applying *Craig*, but finding that mere incarceration did not justify a prisoner’s testimony via two-way live video); *Bush v. Wyoming*, 193 P.3d 203 (Wyo. 2008) (applying *Craig* and allowing a husband *and* his wife to testify via two-way live video just because of the husband’s congestive heart failure).

153. To be sure, some scholars have issued proposals advocating completely new tests. See McAllister, *supra* note 96, at 870–71 (advocating a “Modified *Craig* Test” that has numerous additional nuances); Tokson, *supra* note 13, at 1603–04 (advocating a less strict *Craig* test for unavailable witnesses where the alternative is a Rule 15 deposition); Natalie D. Montell, Note, *A New Test for Two-Way Video Testimony: Bringing Maryland v. Craig into the Technological Era*, 50 U. LOUISVILLE L. REV. 361, 377–81 (2011) (advocating a test dependent upon whether the witness is “accusatory”); Michael R. Rocha, Note, *Going Too Far in United States v. Yates: The Eleventh Circuit’s Application of Maryland v. Craig to Two-Way Videoconferencing*, 36 STETSON L. REV. 365, 391–93 (2007) (advocating a test based on *Gigante* and *Crawford*); Yvonne M. Dutton, *Virtual Witness Confrontation in Criminal Cases: A Proposal to Use Videoconferencing*

1. Two-Way Live Video Testimony Is Undoubtedly Constitutional

Some scholars have argued that two-way live video testimony is constitutional in all cases.¹⁵⁴ A number of these scholars base their arguments upon the four elements of confrontation that *Craig* emphasized: (1) personal examination; (2) testimony under oath; (3) cross-examination of the witness by defense counsel; and (4) observation of the witness by the jury.¹⁵⁵ First, with respect to personal examination, two-way live video testimony satisfies this element because it subjects the witness to personal examination that the defendant can fully observe.¹⁵⁶ Second, the witness is placed under oath prior to the commencement of the witness's testimony.¹⁵⁷ Third, the defendant has the same opportunity to cross-examine the witness testifying via the two-way live video feed.¹⁵⁸ Finally, the jury is given a full opportunity, and quite possibly a better opportunity, to view the witness and the witness's demeanor during video testimony because the witness's image is projected onto a large television or screen.¹⁵⁹ Accordingly, these scholars argue, two-way live video testimony preserves the values mandated by the Confrontation Clause.¹⁶⁰

One objection to this argument is that lazy parties might rely too heavily upon the ease of two-way live video testimony, thereby destroying the Confrontation Clause's seemingly inherent preference for physical, face-to-face confrontation.¹⁶¹ Historically, confrontation has almost exclusively entailed the simultaneous

Technology in Maritime Piracy Trials, 45 VAND. J. TRANSNAT'L L. 1283, 1330–31 (2012) (advocating a three-pronged test for maritime piracy trials). This Comment highlights only the more popular trends in the scholarship in order to show a general trend of both scholarship and courts.

154. See, e.g., Hadley Perry, Comment, *Virtually Face-to-Face: The Confrontation Clause and the Use of Two-Way Video Testimony*, 13 ROGER WILLIAMS U. L. REV. 565, 588–89 (2008); Brooks, *supra* note 13, at 204–07.

155. See Perry, *supra* note 154, at 588–89; Brooks, *supra* note 13, at 204–07.

156. See Perry, *supra* note 154, at 588–89; Brooks, *supra* note 13, at 204–07.

157. See Perry, *supra* note 154, at 588–89; Brooks, *supra* note 13, at 204–07.

158. See Perry, *supra* note 154, at 588–89; Brooks, *supra* note 13, at 204–07.

159. See Perry, *supra* note 154, at 588–89; Brooks, *supra* note 13, at 204–07.

160. See Perry, *supra* note 154, at 588–89; Brooks, *supra* note 13, at 204–07.

161. See generally Cathleen J. Cinella, Note, *Compromising the Sixth Amendment Right to Confrontation—United States v. Gigante*, 32 SUFFOLK U. L. REV. 135, 159–60 (1998).

physical presence of both the accused and the accuser.¹⁶² Moreover, the public policy exception established by the Court anticipates circumstances in which allowing the testimony would further an important public policy.¹⁶³ Allowing universal constitutionality of two-way live video testimony would prevent courts from considering important policies depending upon the unique circumstances at hand.¹⁶⁴ Thus, this objection argues, parties should not be able to enact (at will) such a broad, sweeping use of new technology that completely changes the manner in which courts receive testimony.¹⁶⁵ The ease of new technology should not by itself overrule centuries of physical confrontation simply because it is easier than requiring a witness's physical presence in the courtroom.

Relatedly, critics object that efficiency gains alone should not suffice to eliminate a defendant's fundamental constitutional rights under the Confrontation Clause.¹⁶⁶ This objection is most commonly made in rebuttal to the argument that sometimes the testimony is so non-accusatorial and the disadvantages of requiring a witness's physical presence are so great that the efficiency of video testimony is clearly superior to any reasonable expectation of physical confrontation.¹⁶⁷ Objectors point out that this argument is contrary to contemporary understandings of constitutional rights, under which mere efficiency cannot justify the elimination of a constitutional right.¹⁶⁸

Finally, one of the most common objections is that two-way live video testimony eliminates the emotional tension in the courtroom that stems from physical confrontation, thereby making

162. See *supra* note 14 and accompanying text. Of course, the clear rebuttal to this statement is that live video did not exist during the Framers' era, so physical confrontation was the only way confrontation *could* take place.

163. See discussion *supra* Part I.B.1–2 (noting important public policies such as protecting a child abuse victim from the potential trauma of testifying in the presence of the defendant); see also *Maryland v. Craig*, 497 U.S. 836 (1990).

164. See *Cinella*, *supra* note 161, at 159–60.

165. *Id.*

166. *Id.*

167. *Id.* An example of this scenario might be where an old analyst is bed-ridden, lives thousands of miles away from the location of a trial, and would only testify to “scientific tests far removed from the crime and the defendant.” See *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 343–52 (2009) (Kennedy, J., dissenting) (arguing that certain witnesses are not “witnesses against” a defendant within the meaning of the Confrontation Clause).

168. This argument finds firm support in the Court's jurisprudence. See *Stanley v. Illinois*, 405 U.S. 645, 656 (1972) (“[T]he Constitution recognizes higher values than speed and efficiency.”); *Bowen v. Gilliard*, 483 U.S. 587, 629 (1987) (holding that efficiency may not be invoked “as a basis for infringing . . . constitutional rights”).

it easier for witnesses to lie and harder for juries to tell whether the witnesses are lying.¹⁶⁹ This objection specifically targets the validity of the witness's oath and the fact-finder's fair observation of the witness's demeanor.¹⁷⁰ This argument assumes that witnesses will have a greater propensity to lie if they do not have to physically look into the eyes of the defendant, attorneys, judge, and jury.¹⁷¹ In response to the argument that the witness can "feel" the courtroom looking at him or her via the screen, objectors claim that it is simply not the same as true physical presence.¹⁷² Moreover, objecting scholars argue that such testimony deprives the fact-finder of the ability to adequately observe the intangibles of the witness's demeanor.¹⁷³ For example, the fact-finder may not be able to watch the witness physically walk to the witness stand or observe certain fluctuations in the witness's voice and facial features. This objection boils down to a preference for a fact-finder's inherent need to "feel" the witness's presence in order to adequately gauge his or her truthfulness.¹⁷⁴

2. Two-Way Live Video Testimony Is Subject to a Crawford Analysis

Other scholars contend that the constitutionality of two-way live video testimony should be considered under *Crawford*.¹⁷⁵ *Crawford* held that the prosecution may introduce testimonial

169. See Cinella, *supra* note 161, at 156–59. However, this argument ran into significant problems after the William & Mary School of Law tested the effects of video testimony on jurors and found no detrimental effects caused by the video testimony. See generally Fredric I. Lederer, *The Road to the Virtual Courtroom? A Consideration of Today's—and Tomorrow's—High-Technology Courtrooms*, 50 S.C. L. REV. 799 (1999); Fredric I. Lederer, *The Legality and Practicality of Remote Witness Testimony*, CTR. FOR LEGAL AND COURT TECH., <http://www.legaltechcenter.net/download/articles/The%20Legality%20And%20Practicality%20Of%20Remote%20Witness%20Testimony.pdf>, archived at <http://perma.cc/4Z9U-24UG> (last visited Jan. 20, 2014).

170. See Cinella, *supra* note 161, at 156–59.

171. *Id.*

172. *Id.* See also *United States v. Gigante*, 166 F.3d 75, 81 (2d Cir. 1999) (“There may well be intangible elements of the ordeal of testifying in a courtroom that are reduced or even eliminated by remote testimony.”). *But see supra* note 169 and accompanying text.

173. See Cinella, *supra* note 161, at 156–59.

174. “The jury listens to words, but they respond to fear.” Louis Litt, *Suits: Sucker Punch* (USA Network television broadcast Aug. 2, 2013).

175. See, e.g., Olson, *supra* note 96, at 1697–98; Amy Ma, Note, *Mitigating the Prosecutors' Dilemma in Light of Melendez-Diaz: Live Two-Way Videoconferencing for Analyst Testimony Regarding Chemical Analysis*, 11 NEV. L.J. 793, 811–12 (2011).

statements if the witness is unavailable to testify and if the defendant had a prior opportunity to cross-examine the witness.¹⁷⁶ These scholars argue that a witness's testimony via two-way live video is clearly "testimonial" in the traditional sense of the word.¹⁷⁷ Second, these scholars opine that, when a witness is declared unavailable by the court, this satisfies the unavailability prong of the *Crawford* analysis.¹⁷⁸ Finally, these scholars argue that a *present* opportunity to cross-examine the witness by video is better than a *prior* opportunity for cross-examination in person.¹⁷⁹

The primary objection to this argument is that *Crawford* only applies to prior hearsay.¹⁸⁰ Thus, *Crawford* should arguably not apply to two-way live video testimony for three reasons. First, the testimony is not prior to the occurrence of the trial. Instead, the testimony is contemporaneous with the trial. Second, the testimony is not "out of court" in the traditional sense of the term. Here, the testimony is arguably more similar to physical, in-court testimony because it is streamed contemporaneously in the courtroom. Finally, under a strict textualist reading of the definition of hearsay in the Federal Rules of Evidence, two-way live video testimony is not hearsay because it is a statement delivered at trial, whereas hearsay is defined as a statement *not* given at trial.¹⁸¹ Consequently, *Crawford* should not govern two-way live video testimony.

176. See discussion *supra* Part I.B.3; see also *Crawford v. Washington*, 541 U.S. 36 (2004).

177. See Olson, *supra* note 96, at 1697–98; Ma, *supra* note 175, at 811–12.

178. See Olson, *supra* note 96, at 1697–98; Ma, *supra* note 175, at 811–12.

179. See Olson, *supra* note 96, at 1697–98; Ma, *supra* note 175, at 811–12.

180. See, e.g., *United States v. Yates*, 438 F.3d 1307, 1314 n.4 (11th Cir. 2006) (en banc) ("Notably, both dissenting opinions argue (but the Government does not) that the proper standard to be applied is that stated in [*Crawford*], the most recent Supreme Court case governing the admissibility of out-of-court testimonial statements. No doubt the Government passes on this argument because it recognizes that *Crawford* applies only to testimonial statements made prior to trial, and the live two-way video testimony at issue in this case was presented at trial." (citation omitted)); *State v. Henriod*, 131 P.3d 232, 237 (Utah 2006) ("By its own terms, the *Crawford* holding is limited to testimonial hearsay. Testimonial hearsay is significantly different from a child's testimony that is given under oath during trial and simply is transmitted into the courtroom by electronic means." (citation omitted)); Anthony Garofano, Comment, *Avoiding Virtual Justice: Video-Teleconference Testimony in Federal Criminal Trials*, 56 CATH. U. L. REV. 683, 708–09 (2007) (similarly arguing the inapplicability of *Crawford*).

181. See FED. R. EVID. 801(c) (defining "hearsay" as a statement that, *inter alia*, "the declarant does not make *while testifying at the current trial or hearing*" (emphasis added)).

3. *Two-Way Live Video Testimony Is Subject to a Craig Analysis*

Other scholars argue that two-way live video testimony can be constitutional under *Craig*.¹⁸² Under *Craig*, one-way live video testimony is constitutional if it: (1) furthers an important public policy; and (2) the video system is sufficiently reliable.¹⁸³ Proponents of *Craig*'s application in the two-way live video context argue that the standard easily extends to two-way live video.¹⁸⁴ Specifically, the first prong of the analysis is the same, ensuring that the circumstances further an important public policy similar to protecting child abuse victims from further trauma.¹⁸⁵ Moreover, two-way live video testimony seems to be more reliable than the one-way video that the *Craig* Court considered because now the witness can actually see the defendant.¹⁸⁶ Thus, the *Craig* test should apply.

Nonetheless, critics typically raise two common objections. First, some scholars argue that the Court decided *Craig* uniquely in the context of child abuse cases and, thus, its application should be confined to child abuse cases.¹⁸⁷ In particular, this objection focuses on the reason the prosecutor in *Craig* used one-way video: to protect the child from seeing and being in the presence of the defendant.¹⁸⁸ Accordingly, the intentional use of one-way video seems to imply that the *Craig* Court decided the case exclusively for circumstances involving a sexually abused child.¹⁸⁹ Therefore, *Craig* should not govern cases with facts that exceed the scope of its holding.¹⁹⁰

Another objection is that *Craig*'s reliability prong did not survive *Crawford* and thus is no longer good law.¹⁹¹ This objection stems from the premise that *Crawford* expressly overturned *Ohio*

182. See, e.g., Ma, *supra* note 175, at 812–13; Olson, *supra* note 96, at 1698–1702; Garofano, *supra* note 180, at 709–10.

183. See discussion *supra* Part I.B.2.

184. See, e.g., Ma, *supra* note 175, at 812–13; Olson, *supra* note 96, at 1698–1702; Garofano, *supra* note 180, at 709–10.

185. See, e.g., Ma, *supra* note 175, at 812–13; Olson, *supra* note 96, at 1698–1702; Garofano, *supra* note 180, at 709–10.

186. See, e.g., Ma, *supra* note 175, at 812–13; Olson, *supra* note 96, at 1698–1701; Garofano, *supra* note 180, at 709–10.

187. See Rocha, *supra* note 153, at 391.

188. *Id.*

189. *Id.*

190. *Id.*

191. See, e.g., Horn v. Quarterman, 508 F.3d 306, 318–19 (5th Cir. 2007) (rejecting the argument that *Crawford* overruled *Craig*).

v. Roberts.¹⁹² The objection also notes that the *Craig* Court explicitly relied upon *Roberts*' understanding of reliability.¹⁹³ Thus, the objection deductively argues that *Crawford* implicitly overturned *Craig*'s reliability prong as well when it overruled *Roberts*.¹⁹⁴ As a result, this objection contends that the *Craig* test is no longer a viable doctrine.¹⁹⁵ Accordingly, it would be nonsensical to apply bad law to two-way live video testimony.¹⁹⁶

4. Two-Way Live Video Testimony Is Always Unconstitutional

Finally, some scholars argue that two-way live video testimony should never be considered constitutional.¹⁹⁷ Mirroring many of the arguments against the total constitutionality of such testimony, this argument emphasizes that two-way live video testimony is not a constitutionally permissible substitute for physical confrontation.¹⁹⁸ Particularly, there are many intangibles that may be lost through the video transmission, including body language not on camera.¹⁹⁹ As a result, witnesses may lie more freely, and it may be harder for jury members to determine whether the witness is lying.²⁰⁰ Furthermore, this argument complains that efficiency alone should not outweigh a defendant's fundamental right to the traditional notion of physical confrontation.²⁰¹ Such justification would lead to abuses by parties more interested in efficiency than in protecting the defendant's constitutional rights.²⁰² Thus, such testimony should be unconstitutional.

The primary objection to blanket unconstitutionality is that such a rule would fail to provide a safety valve for circumstances in which a public policy is so important that bending the rule

192. *See id.*; *see also* Whorton v. Bockting, 549 U.S. 406, 416 (2007) (“[I]t is clear that *Crawford* announced a new rule. The *Crawford* rule was not ‘dictated’ by prior precedent. Quite the opposite is true: The *Crawford* rule is flatly inconsistent with the prior governing precedent, *Roberts*, which *Crawford* overruled.”).

193. *Horn*, 508 F.3d at 318–19.

194. *Id.*

195. *Id.*

196. *Id.*

197. *See* Cinella, *supra* note 161, at 156–60.

198. *Id.*

199. *Id.* at 157–58.

200. *Id.* at 156–60.

201. *Id.* *See supra* note 168 and accompanying text.

202. Cinella, *supra* note 161, at 156–60.

would make sense.²⁰³ For example, under this proposed rule of universal unconstitutionality of two-way live video testimony, the child in *Craig* could testify via one-way live video but would not have been able to testify via two-way live video, despite the important public policy of protecting the child from the presence of the defendant. Moreover, if anything, the two-way video provides a more reliable means of procuring the testimony than the one-way video provided in *Craig*. Yet, this rule would absolutely bar the child's testimony via two-way live video, even though *Craig* would allow the child to testify via one-way live video. Therefore, reasoning *ad absurdum*, the rule would be unduly restrictive.

Additionally, one might object that such a rule would needlessly dampen courts' efforts to integrate new technology into the courtroom.²⁰⁴ This objection highlights the fact that two-way live video testimony would streamline the trial process.²⁰⁵ It would alleviate the costs of bringing witnesses physically into the courtroom. Moreover, it would efficiently ease the procedural stresses of the testimonial process, particularly when it is hard to secure and retain witnesses. In sum, courts should be able to embrace twenty-first century technology.²⁰⁶ This rule of uniform unconstitutionality would inhibit that opportunity for enhanced efficiency.

The numerous proposals as well as the conflicting jurisprudence illustrate the unsettled state of the law concerning the constitutionality of two-way live video testimony. This confusion thus requires a workable proposal that can alleviate the current tensions.

III. A SUBSTANTIAL PUBLIC POLICY STANDARD FOR EVALUATING WHETHER TWO-WAY LIVE VIDEO TESTIMONY VIOLATES THE CONFRONTATION CLAUSE

With these jurisprudential and scholarly trends as a background, this Comment proposes a substantial public policy standard for two-way live video testimony that would square the trends in the lower courts, reconcile the various scholarly proposals, and preserve *Craig*'s application to one-way live video testimony. This Part first details the aspects of the proposed substantial public policy standard, the

203. See Garofano, *supra* note 180, at 712 (“[A]n absolute ban on [two-way live video] testimony ignores the value of a limited and careful application of this powerful technology.”).

204. See Perry, *supra* note 154, at 592–93; Brooks, *supra* note 13, at 211–14.

205. See Perry, *supra* note 154, at 592–93; Brooks, *supra* note 13, at 211–14.

206. See Perry, *supra* note 154, at 592–93; Brooks, *supra* note 13, at 211–14.

reasoning behind the proposal, and the potential functionality of the standard. It then discusses various justifications for the proposal, highlighting its resolution of the differing opinions amongst both courts and scholars.

A. *The Proposal*

In plain terms, the proposed substantial public policy standard for two-way live video testimony would demand less of prosecutors than the arguably high important public policy prong of the *Craig* test.²⁰⁷ The premise of the proposed standard is that two-way live video is an inherently more accurate approximation of physical confrontation than one-way live video's approximation of physical confrontation.²⁰⁸ Whereas one-way live video does not permit mutual, witness–defendant eye contact, two-way live video allows the witness to see the defendant. As a result, two-way live video enables potential emotional tension more typical of true physical confrontation because the witness must virtually testify to the defendant's face. Two-way live video testimony is therefore more similar to physical confrontation than is one-way live video testimony. Consequently, the standard for two-way live video testimony should not be as stringent as the *Craig* test's important public policy requirement because the testimony via two-way live video is not as substantially different from physical confrontation as is one-way live video testimony.

The proposed substantial public policy standard thus would allow prosecutors to use two-way live video testimony not only in

207. Cf. Garofano, *supra* note 180, at 712 (advocating that a strict reading of *Craig* applies to two-way live video testimony, and arguing that “[a]ny lesser standard impermissibly sacrifices a defendant’s confrontation right”); Francis A. Weber, Comment, *Complying with the Confrontation Clause in the Twenty-First Century: Guidance for Courts and Legislatures Considering Videoconference-Testimony Provisions*, 86 TEMP. L. REV. 149, 151 (2013) (“[I]n the absence of a defendant’s consent, a constitutionally compliant statute or court rule must condition the admissibility of videoconference testimony upon the prosecution’s ability to meet a legal standard that is at least as stringent as the one that the Supreme Court applied in *Maryland v. Craig*.”).

208. This argument might be aptly rephrased as emphasizing that two-way video is more “reliable” than one-way video, reflecting specifically on *Craig*’s admonition that the procedure “ensure[] that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony.” See *Maryland v. Craig*, 497 U.S. 836, 851 (1990). The proposed substantial public policy standard would certainly retain this dedication to ensuring reliability of the video system. The scope of this Comment and its proposal, however, is confined to elucidating what types of policies justify the use of two-way live video testimony when an appropriately reliable video system is used.

circumstances where the testimony advances public policies as important as protecting child abuse victims, but also in circumstances where the public policy advanced is less important and yet still substantial enough to promote the administration of justice. In practice, courts adopting the substantial public policy standard should retain as a compass the decisions from the lower courts that have addressed two-way live video testimony. For example, courts should adopt the findings of the courts that have found that severe illnesses and unavailability due to witness protection programs would suffice to satisfy the substantial public policy standard.²⁰⁹ Similarly, courts should uniformly affirm the use of two-way live video testimony of child abuse victims and other child witnesses who may suffer emotional trauma from testifying in open court.²¹⁰ Likewise, this standard would approve of the testimony in cases where witnesses have been threatened or intimidated in attempts to prevent them from testifying.²¹¹ Moreover, the use of such testimony in cases that advance the public policy of protecting national security would be justified under the substantial public policy standard.²¹² Furthermore, the proposed standard would allow this testimony in cases concerning border issues that present international concerns.²¹³ All in all, the substantial public policy standard would permit two-way live video testimony in circumstances that entail, *inter alia*, issues of national concern and witnesses' health and protection.²¹⁴

209. See discussion *supra* Parts II.A.1, II.A.3.

210. See discussion *supra* Part II.A.1; see also *State v. Collins*, 65 So. 3d 271 (La. Ct. App. 2011); *People v. Lujan*, 150 Cal. Rptr. 3d 727 (Ct. App. 2012) (allowing two-way live video testimony from child witnesses in both cases) (modified on rehearing on other grounds).

211. See, e.g., *State v. Johnson*, 958 N.E.2d 977 (Ohio Ct. App. 2011) (allowing two-way live video testimony from witnesses that had been intimidated by the defendant's associates).

212. See *Haig v. Agee*, 453 U.S. 280, 307 (1981) (“[N]o governmental interest is more compelling than the security of the Nation.”); see also *United States v. Moussaoui*, 382 F.3d 453, 469–70 (4th Cir. 2004) (emphasizing the deference shown to the political branches of government when deciding cases that implicate sensitive matters of foreign policy, national security, or military affairs).

213. See, e.g., *United States v. Rosenau*, 870 F. Supp. 2d 1109, 1113 (W.D. Wash. 2012) (stating that “the public policy interest in allowing the Government to effectively try cases regarding the breach of international boundaries by smuggling of narcotics by air into the United States is sufficiently important to justify permitting live video testimony”).

214. To be sure, this is not an exhaustive list. In extraordinary circumstances that demonstrate a clearly substantial public policy, courts should retain the flexibility to allow such testimony.

On the other end of the spectrum, however, courts should also adopt the Eleventh Circuit's general rule that mere efficiency and convenience cannot justify the use of two-way live video testimony.²¹⁵ To that end, the potential for cost savings would be similarly inadequate to satisfy the substantial public policy standard.²¹⁶ On a greater scale, an ambiguous "generalized interest in law enforcement" would fail to meet the substantial public policy standard.²¹⁷ In short, prosecutors would have to demonstrate circumstances, which, contrary to these efficiency and convenience arguments, entail unique factual complications that would not be present in every run-of-the-mill case. Building upon these foundations, courts should infer general principles that would likely be recognized across the nation as public policies that would satisfy the proposed substantial public policy standard.

B. The Proposal's Practical and Theoretical Justifications

The primary virtues of the proposed substantial public policy standard lie within its resolution of the various debates surrounding the constitutionality of two-way live video testimony. This Section first describes the proposal's resolution of judicial disagreements and then turns to its resolution of scholarly disagreements.

1. Resolution of Judicial Disagreements

The proposed substantial public policy standard accomplishes three important objectives in response to the underlying judicial concerns surrounding two-way live video testimony. First, the

215. See *United States v. Yates*, 438 F.3d 1307, 1316 (11th Cir. 2006) (en banc) ("The district court made no case-specific findings of fact that would support a conclusion that this case is different from any other criminal prosecution in which the Government would find it convenient to present testimony by two-way video conference."); see also *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 325 (2009) ("[R]espondent asks us to relax the requirements of the Confrontation Clause to accommodate the 'necessities of trial and the adversary process.' It is not clear whence we would derive the authority to do so. The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause—like those other constitutional provisions—is binding, and we may not disregard it at our convenience." (citation omitted)).

216. See, e.g., *Commonwealth v. Musser*, 82 Va. Cir. 265 (Cir. Ct. 2011) (rejecting the prosecutor's request for "permission to save money and inconvenience by presenting the testimony of [the witness] through two-way videoconferencing technology").

217. See, e.g., *United States v. Abu Ali*, 528 F.3d 210, 241 (4th Cir. 2008) ("*Craig* plainly requires a public interest more substantial than convicting someone of a criminal offense.>").

proposed standard resolves the overarching circuit split between the Second Circuit and its sister circuits concerning whether *Craig* applies to two-way live video testimony.²¹⁸ It does so by borrowing the strengths and concerns from both sides of the split. From *Gigante*, the proposal borrows the Second Circuit's reasoning that proponents of two-way live video testimony should not have to satisfy *Craig*'s incredibly high "important public policy" test; instead, prosecutors need only meet a less rigorous version of the *Craig* test.²¹⁹ From the circuits that have adopted *Craig* in the two-way live video context, the proposal concurs with and endorses *Craig*'s continued application to one-way live video testimony, requiring a public policy as important as that of protecting child abuse victims.²²⁰ The proposal additionally incorporates *Craig*'s understanding that certain public policies justify a witness's physical absence during the witness's testimony.²²¹ The proposal further imports *Craig*'s understanding that these public policies must necessarily be substantial to validate depriving a defendant of physical confrontation with a witness.²²² Thus, strains of reasoning from both sides of the circuit split comprise the substantial public policy standard, thereby reconciling the split.

On a deeper level, the proposal addresses and eliminates the confusion amongst lower courts concerning *how* the *Craig* test would or should apply to two-way live video testimony.²²³ The courts currently engage in a "vertical" analysis to determine whether the circumstances surrounding the two-way live video testimony meet the *Craig* test. That is, they first articulate *Craig*'s holding as the governing standard.²²⁴ They then illustrate the "important public policy" test by highlighting the public policy of protecting child abuse victims from further trauma.²²⁵ As a result, courts look up to this single important policy as emblematic of the types of extreme situations that must be present to justify the use of two-way live video testimony. This proposal eliminates that hierarchical pressure by instead endorsing a "horizontal" analysis. Under this analysis and the proposed framework,²²⁶ courts would look not up

218. See discussion *supra* Part II.A.

219. See discussion *supra* Part II.A.3.

220. See discussion *supra* Part I.B.2.

221. See *id.*

222. See *id.*

223. See discussion *supra* Part II.A.1–2.

224. See, e.g., *Horn v. Quarterman*, 508 F.3d 306, 315 (5th Cir. 2007) (noting that although "the United States Supreme Court has not specifically addressed the use of two-way closed-circuit television," it has decided *Craig*, which should be controlling); *United States v. Yates*, 438 F.3d 1307, 1312–15 (11th Cir. 2006) (en banc).

225. See *supra* note 224 and accompanying text.

226. See discussion *supra* Part III.A.

to an extreme standard, but to each other's decisions in a quest for common ground. This process would thus focus courts on more common scenarios rather than on the factually unique—and incredibly sensitive—child abuse cases for which *Craig* was created. In so doing, the proposal would enable easier judicial assent to common lines of reasoning, thereby creating firm precedent concerning circumstances where two-way live video testimony is constitutional.

Finally, the proposal mitigates—if not eliminates—the opportunities for judicial subjectivity that the Supreme Court so heavily denounced in *Crawford*.²²⁷ The proposal's emphasized reliance upon well-recognized, substantial public policies deprives courts of the ability to create ad hoc reasons that justify the use of two-way live video testimony. Contrary to the Second Circuit's *Gigante* test and Rule 43 of the Federal Rules of Civil Procedure, this proposal maintains a higher standard than the discretionary "exceptional circumstances" and "compelling circumstances" standards.²²⁸ The proposal guards against case-by-case judicial determinations that might create inter-jurisdictional conflicts. Instead, the proposal promotes deference to well-recognized public policies, thereby requiring public policy to be the source of the rule rather than judicial subjectivity.

2. Resolution of Scholarly Disagreements

The proposed substantial public policy standard likewise answers scholars' concerns in numerous ways. One notable justification for this proposal is that it guards against the potential abuses of two-way live video testimony while simultaneously quelling fears of the complete unavailability of the option to use two-way live video testimony. With respect to the fears that prosecutors might rely too heavily upon the ease of such testimony,²²⁹ this proposal answers those fears by retaining as

227. See *Crawford v. Washington*, 541 U.S. 36, 62–63 (2004) (deploring the "unpredictability" and "entirely subjective" aspects of the *Roberts* framework, which "depend[ed] heavily on which factors the judge considers and how much weight he accords each of them").

228. See *United States v. Gigante*, 166 F.3d 75, 81 (2d Cir. 1999) ("Upon a finding of exceptional circumstances, such as were found in this case, a trial court may allow a witness to testify via two-way closed-circuit television when this furthers the interest of justice."); FED. R. CIV. P. 43(a) ("For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.").

229. See discussion *supra* Part II.B.1.

persuasive *Craig*'s extremely high "important public policy" test. Of course, the substantial public policy standard provides for a less stringent interpretation of the *Craig* test; however, it retains significant public policies as the mainstay of the standard, thereby disallowing rampant use of the testimony for less important purposes such as efficiency. With respect to the fears of the complete unavailability of the use of two-way live video testimony,²³⁰ this proposal—in accordance with Supreme Court precedent—dispels those fears by providing for the complete availability of such testimony in circumstances that implicate substantial public policies. Instead of completely ignoring the advances of technology and its aid in obtaining testimony in unique circumstances, this proposal explicitly constructs an avenue through which parties may utilize the technology. Thus, the proposal eliminates the many fears surrounding the potential complete use or potential complete unavailability of two-way live video testimony.

Relatedly, the proposal resolves scholars' disagreement concerning whether *Craig* should apply to two-way live video testimony.²³¹ The proposal agrees with proponents of such an application by adopting the general reasoning that undergirded the *Craig* decision. Yet, the proposal also agrees with opponents of such an application, preserving and ensuring *Craig*'s sole application to cases involving one-way video testimony and child abuse victims. Moreover, the proposal acknowledges the additional objection that *Craig*'s reasoning is no longer good law after *Crawford*, but the proposal simply notes that the Court has cited *Craig* with approval on two occasions after *Crawford*, specifically relying upon *Craig*'s emphasis on reliability.²³² Thus, presumably *Craig*'s reliability prong survived *Crawford* and therefore justifies continued reliance upon a reliability requirement in the context of live video testimony.²³³

Lastly, the proposal bridges the gap between disagreements concerning whether *Crawford*'s hearsay analysis should govern by acknowledging the strongest arguments from both sides.²³⁴ The proposal acknowledges that there are circumstances where two-

230. See discussion *supra* Part II.B.4.

231. See discussion *supra* Part II.B.3.

232. See *Williams v. Illinois*, 132 S. Ct. 2221, 2251 (2012) (Breyer, J., concurring) (plurality opinion) (noting that *Craig* stands for the proposition that "[t]he central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant") (quoting *Maryland v. Craig*, 497 U.S. 836, 845 (1990)); *Perry v. New Hampshire*, 132 S. Ct. 716, 728 (2012) (also discussing *Craig*'s emphasis on reliability).

233. See *supra* note 208 and accompanying text (explaining this Comment's treatment of *Craig*'s reliability prong).

234. See discussion *supra* Part II.B.2.

way live video testimony allowed under the substantial public policy standard would also satisfy *Crawford*'s requirements of witness unavailability and an opportunity for cross-examination of the witness.²³⁵ However, under the proposed standard, witness unavailability should be neither a necessary nor a sufficient condition for satisfying the substantial public policy standard. Because this proposal is an extension of *Craig*'s reasoning, the proposal should remain true to the factual underpinnings in *Craig*. There, the child was never declared unavailable; indeed, the child was actually seemingly available.²³⁶ Thus, this apparent lack of a requirement of witness unavailability should similarly govern in the substantial public policy standard. Taking into account the argument that *Crawford* is completely inapplicable, this proposal takes a middle-of-the-road approach, acknowledging that *Crawford* may be satisfied in some circumstances under the proposed standard but ultimately agreeing that *Crawford* should chiefly apply to true hearsay alone and not to live video testimony.

All in all, the proposed substantial public policy standard provides the Supreme Court with an efficient, workable standard that systematically addresses and alleviates the concerns surrounding the constitutionality of two-way live video testimony. Most importantly, it remains true to the reasons underlying the Court's Confrontation Clause precedent while simultaneously modifying the precedent to adapt to increasingly popular technology and circumstances not at issue in that precedent. The proposed standard thus represents an attractive solution to an otherwise vexing problem.

CONCLUSION

In an era of constant innovation, it makes sense to embrace the inevitable technological facelift of the courtroom by amending Confrontation Clause jurisprudence accordingly. Two-way live video testimony has generated uncertainty amongst courts and scholars alike, providing spirited discussions and equally spirited disagreements. As a result, the Supreme Court should provide

235. Indeed, *Crawford* would be satisfied every time a court declared a witness unavailable, because two-way live video allows contemporaneous cross-examination. See discussion *supra* Parts I.B.3, II.B.2.

236. See *United States v. Yates*, 438 F.3d 1307, 1328 (11th Cir. 2006) (en banc) (Marcus, J., dissenting) ("The most important distinction is that the child witnesses in *Craig* were not unavailable; the court could have compelled them to testify in open court in the usual manner."); *Maryland v. Craig*, 497 U.S. 836, 865-66 (1990) (Scalia, J., dissenting) (arguing that the child did not seem to be unavailable because the child was only unwilling to testify in the presence of the defendant).

guidance to lower courts, dictating the correct path that courts should take to determine the constitutionality of two-way live video testimony. Moreover, this process should coincide with current Supreme Court precedent and assuage the fears of abuse or the unavailability of such testimony. The proposed substantial public policy standard, which allows furtherance of less important public policies to justify the use of the testimony, accomplishes these objectives. It takes the arguments from competing sides of the current debates and fuses them together in support of the proposed standard. This unification is crucial in light of the currently conflicted Confrontation Clause jurisprudence. The substantial public policy standard presents the best path forward to consistently analyzing confrontation in a FaceTime generation.

*J. Benjamin Aguiñaga**

* J.D./D.C.L., 2015, Paul M. Hebert Law Center, Louisiana State University. Recipient of the 2013–2014 Vinson & Elkins Outstanding Student Casenote or Comment Award. I dedicate this work to my closest friend, confidant, and partner in crime—my sister, Abigail. I thank my family for their unending love and encouragement. I also thank the members of the *Louisiana Law Review*, in particular Minia Bremenstul and Ashley Carver, for their input and unparalleled friendship. Finally, I thank Vice Chancellor Cheney Joseph and Professor Ed Dawson for their guidance throughout the writing process. Any errors are mine alone.

