

THE DISGUISED WITNESS AND *CRAWFORD*'S  
UNEASY TENSION WITH *CRAIG*: BRINGING  
UNIFORMITY TO THE SUPREME COURT'S  
CONFRONTATION JURISPRUDENCE

*Marc C. McAllister*\*

TABLE OF CONTENTS

I. Introduction .....	482
II. Supreme Court Manner-of-Testimony Case Law .....	489
A. <i>Coy v. Iowa</i> .....	490
B. <i>Maryland v. Craig</i> .....	492
III. The <i>Craig</i> Test as Applied in the Disguised Witness Cases.....	494
A. The Important-Public-Policy Prong.....	494
B. The Reliability Prong .....	499
1. Personal Examination/Physical Presence.....	500
2. Demeanor .....	502
3. Cross-Examination.....	506
4. Oath .....	507
IV. <i>Crawford</i> 's Effect upon <i>Craig</i> .....	507
A. The Argument that <i>Craig</i> Could Be Overruled.....	507
B. The Argument that <i>Craig</i> and <i>Crawford</i> Can Coexist .....	512
V. Elements of Confrontation in a Post- <i>Crawford</i> World .....	514
A. Cross-Examination as the Confrontation Clause's Primary Focus.....	515
B. Face-to-Face Confrontation and Cross-Examination as the Two Pillars of Confrontation.....	519
1. The Text .....	519
2. Common Law Meaning .....	522

---

\* Assistant Professor of Law, Florida Coastal School of Law; J.D., *cum laude*, University of Notre Dame Law School; Clerk for the Hon. Charles Wilson, Eleventh Circuit Court of Appeals. The author's publications include *Down But Not Out: Why Giles Leaves Forfeiture by Wrongdoing Still Standing*, 59 CASE W. RES. L. REV. 393 (2009); *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 (2007); and *What the High Court Giveth the Lower Courts Taketh Away: How to Prevent Undue Scrutiny of Police Officer Motivations Without Eroding Randolph's Heightened Fourth Amendment Protections*, 56 CLEV. ST. L. REV. 663 (2008).

3. The Purposes .....	525
4. Supreme Court Pronouncements .....	527
VI. Unmasking the Disguised Witness.....	531
VII. Conclusion.....	538

## I. INTRODUCTION

A prosecution witness enters the courtroom wearing dark sunglasses, a hat that casts a long shadow over his face, and a scarf wrapped tightly around his neck and extending up to his jaw line. Defense counsel objects, invoking his client's Sixth Amendment right of confrontation, and the stage is set for another landmark United States Supreme Court Confrontation Clause ruling. Surprisingly, the Supreme Court has never addressed whether a criminal defendant's confrontation right is violated by an adverse witness's disguise.<sup>1</sup> Further, only one federal appellate court has addressed such a claim,<sup>2</sup> and state court opinions on the issue are scarce.<sup>3</sup>

Courts considering the disguised witness issue have typically applied the *Maryland v. Craig* test when analyzing the defendant's confrontation challenge.<sup>4</sup> The *Craig* test was designed to address the circumstances under which a criminal defendant can be denied a literal, face-to-face

---

1. See Aron Goldschneider, *Choose Your Poison: A Comparative Constitutional Analysis of Criminal Trial Closure v. Witness Disguise in the Context of Protecting Endangered Witnesses at Trial*, 15 GEO. MASON U. CIV. RTS. L.J. 25, 48 (2004). Indeed, there are currently no applicable federal constitutional constraints on the use of disguises, which allows trial courts to permit such procedures as they see fit. *See id.* at 52.

2. See *Morales v. Artuz*, 281 F.3d 55 (2d Cir. 2002) (upholding admission of adult witness testimony when witness testified while wearing sunglasses).

3. See, e.g., *People v. Brandon*, 52 Cal. Rptr. 3d 427 (Ct. App. 2006) (holding one witness's wearing dark sunglasses and scarf during testimony did not deny defendant's confrontation right); *Commonwealth v. Lynch*, 789 N.E.2d 1052 (Mass. 2003) (holding a witness's wearing dark or tinted glasses does not create a substantial likelihood of a miscarriage of justice); *People v. Sammons*, 478 N.W.2d 901 (Mich. Ct. App. 1991) (holding that permitting the prosecution's chief witness to wear a mask and prohibiting the disclosure of identifying information about the witness violated the defendant's right of confrontation); *People v. Smith*, 869 N.Y.S.2d 88 (App. Div. 2008) (holding the trial court properly allowed witness to wear a wig and fake facial hair because there was a heightened need to protect the security of the witness and any prejudice to the defendant was alleviated by the court's supplemental instruction); *Romero v. State (Romero I)*, 136 S.W.3d 680 (Tex. Ct. App. 2004) (holding defendant's Sixth Amendment Right to confront witnesses was violated when adult witness was allowed to testify in disguise), *aff'd*, 173 S.W.3d 502 (Tex. Crim. App. 2005).

4. See *Maryland v. Craig*, 497 U.S. 836 (1990).

confrontation during live trial testimony,<sup>5</sup> so application of that test seems appropriate. Recent developments, however, cast doubt on whether *Craig*'s analytical framework would pass unscathed through today's Court. In particular, *Crawford v. Washington*, which soundly denounced a reliability-based confrontation analysis similar to that of *Craig*, suggests the stage has been set for *Craig*'s demise.<sup>6</sup>

Whatever the most appropriate test may be for challenging testimony by a disguised witness, the arguments are strong on both sides of the constitutional debate. From the defense perspective, the mere presence of a witness in disguise threatens to erode the presumption of innocence.<sup>7</sup> Just as problematic, a disguise may restrict a defendant's ability to cross-examine the witness.<sup>8</sup> Moreover, a disguise that conceals the eyes and facial features inhibits the jury's ability to assess credibility,<sup>9</sup> and such disguises would presumably offend those state constitutions guaranteeing

---

5. See Order of the Supreme Court, 207 F.R.D. 89, 93 (2002) (Scalia, J., commenting).

6. See *Crawford v. Washington*, 541 U.S. 36 (2004) (determining the circumstances under which an out-of-court statement is subject to the Confrontation Clause). The pre-*Crawford* rule of *Ohio v. Roberts*, 448 U.S. 56, 65 (1980), allowed admission of unfronted, out-of-court statements when those statements were deemed reliable. The *Craig* Court then adopted a reliability-based test similar to that of *Roberts*. *Craig*, 497 U.S. at 837. *Crawford* thereafter overruled *Roberts* in a manner arguably undermining *Craig*'s rationale. See *Crawford*, 541 U.S. at 61–62 (“Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation.”).

7. See, e.g., *Romero I*, 136 S.W.3d at 689–90 (ruling that a witness's disguise prejudiced the defense by improperly conveying to the jury that the defendant was particularly dangerous or culpable, and thus posed an unconstitutional threat to his right to a fair trial); see also *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978) (“[O]ne accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.”); *State v. Coy*, 397 N.W.2d 730, 735 (Iowa 1986), *rev'd*, *Coy v. Iowa*, 487 U.S. 1012 (1988) (“If a practice gives rise to an unmistakable brand of guilt or creates an unacceptable risk the jury may consciously or subconsciously be influenced in their deliberations, the practice is inherently prejudicial.”).

8. See *Goldschneider*, *supra* note 1, at 55 (noting the possibility that a disguise could mask the witness's reactions and demeanor, thus hampering an effective cross-examination).

9. See, e.g., *People v. Sammons*, 478 N.W.2d 901, 909 (Mich. Ct. App. 1991) (holding that the witness's full-face mask prevented the fact-finder from assessing the witness's credibility through observation of demeanor, noting that “[d]emeanor is of the utmost importance in the determination of the credibility of a witness” (quoting *People v. Dye*, 427 N.W.2d 501, 505 (Mich. 1988)) (internal quotation marks omitted)).

defendants the more literal right to meet accusers face-to-face.<sup>10</sup> In light of such varied constitutional concerns, the general reluctance of trial courts to permit disguises and the consequent lack of appellate case law on the issue are not surprising.<sup>11</sup>

From the prosecution's view, legitimate concerns for the witness's physical or psychological well-being,<sup>12</sup> along with the need to present crucial evidence—particularly in prosecuting the most serious crimes<sup>13</sup>—are sufficient to override Sixth Amendment claims.<sup>14</sup> Absent the protection offered by the disguise, crucial prosecution testimony would often be lost. In these instances, permitting the witness to testify in

---

10. See *infra* note 238.

11. See Nora V. Demleitner, *Witness Protection in Criminal Cases: Anonymity, Disguise or Other Options?*, 46 AM. J. COMP. L. 641, 649–50 (1998).

12. See, e.g., *Maryland v. Craig*, 497 U.S. 836, 853 (1990) (“[A] State’s interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh . . . a defendant’s right to face his or her accusers in court.”).

13. See, e.g., *Romero v. State (Romero II)*, 173 S.W.3d 502, 509 (Tex. Crim. App. 1995) (Holcomb, J., dissenting) (arguing that “the trial court could have reasonably concluded that [the witness’s] disguise was necessary to further the important state interest in presenting key evidence to establish guilt in a felony case”). *But see United States v. Yates*, 438 F.3d 1307, 1316 (11th Cir. 2006) (en banc) (“All criminal prosecutions include at least some evidence crucial to the Government’s case, and there is no doubt that many criminal cases could be more expeditiously resolved were it unnecessary for witnesses to appear at trial. If we were to approve introduction of testimony in this manner, on this record, every prosecutor wishing to present testimony from a witness overseas would argue that providing crucial prosecution evidence and resolving the case expeditiously are important public policies . . .”). See also *infra* note 82 and accompanying text.

14. In similar cases beyond the scope of this Article, a witness’s refusal to remove a religious covering may pit the witness’s First Amendment right of free exercise against the defendant’s Sixth Amendment right of confrontation. See, e.g., *Boyd v. Texas*, 301 Fed. App’x 363, 364–65 (5th Cir. 2008). In *Boyd*, the plaintiff sued the State of Texas and a Texas trial judge, alleging that the trial judge ordered her to leave his courtroom because she refused to remove a head scarf that she was wearing in religious observance of hijab. *Id.* Afterward, the chief judge of the district sent a letter to all judges in the district reminding them to be sensitive to the constitutional rights of courtroom participants, specifically noting that people who wear religious clothing are not required to remove such clothing or head wear upon entering the courtroom. *Id.* *But see* MICH. R. EVID. 611(b) (authorizing Michigan judges to order the removal of religious clothing or head wear to protect the right of confrontation and specifically permitting Michigan trial judges to “exercise reasonable control over the appearance of parties and witnesses so as to (1) ensure that the demeanor of such persons may be observed and assessed by the fact-finder and (2) ensure the accurate identification of such persons”).

disguise is a better alternative than losing the evidence entirely.<sup>15</sup>

While few appellate court opinions have addressed the disguised witness issue, the handful of available cases separate along rather clear lines: minimal disguises have withstood constitutional attack, while more expansive disguises have not. Three cases, each highlighting the jury's minimally impaired ability to assess witness demeanor, upheld the wearing of sunglasses by a prosecution witness;<sup>16</sup> a fourth case authorized a witness to testify in a wig and false facial hair.<sup>17</sup> Outcomes turn in the defendant's favor when the disguise becomes so extensive as to obstruct most of the typical evidence of demeanor. In one case, the court struck down a disguise consisting of sunglasses, a hat, and a turned-up collar.<sup>18</sup> In a second case, a full-face mask was deemed unconstitutional.<sup>19</sup>

Viewed along these lines, distinguishing the permissible disguise from the unconstitutional one seems rather straightforward: the most extreme disguises will rarely satisfy the Confrontation Clause, particularly where the government's need for limited confrontation is substantial. Upon closer inspection, however, the issue becomes layered and complex. At one level of analysis, the entire *Craig* framework becomes suspect, particularly in its adoption of a reliability-based framework similar to that struck down in *Crawford*<sup>20</sup> and in its tendency to promote cost-benefit analysis of an explicit constitutional guarantee.<sup>21</sup> At an even deeper level,

---

15. See *Crawford v. Washington*, 541 U.S. 36, 74 (2004) (Rehnquist, J., concurring) (“[C]ross-examination is [merely] a tool used to flesh out the truth . . .”). *But see id.* at 55–57 (majority opinion) (holding that, generally, cross-examination is a necessary condition for admitting testimonial statements).

16. See *Morales v. Artuz*, 281 F.3d 55 (2d Cir. 2002) (applying the *Craig* test and upholding admission of adult witness testimony when witness testified while wearing sunglasses); *People v. Brandon*, 52 Cal. Rptr. 3d 427 (Ct. App. 2006) (rejecting defendant's Confrontation Clause challenge for adult witness who testified at trial while wearing sunglasses and a scarf); *Commonwealth v. Lynch*, 789 N.E.2d 1052 (Mass. 2003) (finding no Confrontation Clause violation when an adult witness testifies while wearing sunglasses).

17. *People v. Smith*, 869 N.Y.S.2d 88, 90 (App. Div. 2008).

18. *Romero II*, 173 S.W.3d at 505–06.

19. *People v. Sammons*, 478 N.W.2d 901, 909 (Mich. Ct. App. 1991).

20. In *Craig*, the Court upheld the one-way video procedure despite no face-to-face confrontation between accuser and accused, in part due to the other assurances of reliability in the child's testimony, citing *Roberts* for support. *Maryland v. Craig*, 497 U.S. 836, 851–52 (1990). *Crawford* later overruled *Roberts*, specifically denouncing its practice of admitting testimonial evidence on the basis of “adequate indicia of reliability.” See *Crawford*, 541 U.S. at 42, 61–62.

21. See *Craig*, 497 U.S. at 861, 870 (Scalia, J., dissenting) (complaining of

the shifting foundations of the confrontation right itself create uncertainty as to its precise nature, which then obscures the proper method for analyzing the disguised witness issue.

Ultimately, the questions of whether, and to what extent, adverse criminal witnesses may constitutionally be permitted to testify in disguise depends upon the importance a court attaches to the two guarantees underlying the confrontation right: the right to a physical, face-to-face confrontation with an accuser<sup>22</sup> and the right to cross-examine the accusing witness.<sup>23</sup> This struggle is played out in the meaning of the word “confront,”<sup>24</sup> with some judges and historians equating the common law right of confrontation with the literal right to meet one’s accuser face-to-face,<sup>25</sup> others equating the term with the opportunity for cross-examination,<sup>26</sup> and a third group finding both aspects indispensable<sup>27</sup> to an

---

*Craig’s* “subordination of explicit constitutional text to currently favored public policy,” and concluding that “[w]e are not free to conduct a cost-benefit analysis of clear and explicit constitutional guarantees, and then to adjust their meaning to comport with our findings”).

22. See *California v. Green*, 399 U.S. 149, 156 (1970) (“The origin and development of . . . the Confrontation Clause ha[s] been traced by others and need not be recounted in detail here. It is sufficient to note that the particular vice that gave impetus to the confrontation claim was the practice of trying defendants on ‘evidence’ which consisted solely of ex parte affidavits or depositions secured by the examining magistrates, thus denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact.” (footnote omitted)).

23. In *Mattox v. United States*, the United States Supreme Court declared that “[t]he primary object of [the Confrontation Clause]” is “prevent[ing] depositions or ex parte affidavits . . . being used . . . in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection . . . of the witness, but of compelling him to stand face to face with the jury . . .” *Mattox v. United States*, 156 U.S. 237, 242 (1895).

24. The Sixth Amendment’s Confrontation Clause assures the right of an accused “to be confronted with the witnesses against him.” U.S. CONST. amend. VI. While the meaning of the phrase “confronted with” is subject to interpretation, the Sixth Amendment itself does not contain the words “face-to-face” or “cross-examination.”

25. In *Green*, Justice Harlan observed that, “[s]imply as a matter of English,” the Confrontation Clause confers at least “a right to meet face to face all those who appear and give evidence at trial.” *Green*, 399 U.S. at 175 (Harlan, J., concurring). Similarly, in his *Craig* dissent, Justice Scalia declared that the phrase “‘to confront’ plainly means to encounter face-to-face, whatever else it may mean in addition.” *Craig*, 497 U.S. at 864 (Scalia, J., dissenting).

26. See, e.g., *State v. Coy*, 397 N.W.2d 730 (Iowa 1986), *rev’d*, *Coy v. Iowa*, 487 U.S. 1012 (1988) (finding no Confrontation Clause violation by the State’s use of a large opaque screen to shield accuser from accused on the rationale that the

effective confrontation.<sup>28</sup>

A judge's perspective on this underlying issue can have a profound impact upon the case of a disguised witness. If, on the one hand, a judge believes the confrontation right guarantees nothing more than an opportunity to cross-examine the accusing witness, that judge might find even the most extensive disguises constitutionally permissible.<sup>29</sup> If, on the other hand, a judge believes the confrontation right requires a literal face-to-face confrontation between accuser and accused, then even the most minimal disguises would not pass constitutional muster. Still other possibilities exist between these extremes.<sup>30</sup>

---

Confrontation Clause is not violated so long as the ability to cross-examine the witness is not impaired); *see also* 5 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 1365 (3d ed. 1940) (“Confrontation is, in its main aspect, *merely another term for the test of Cross-examination*. . . . The right of confrontation is the right to the opportunity for cross-examination.”).

27. *See, e.g.,* *Romero v. State (Romero I)*, 136 S.W.3d 680, 682 (Tex. Ct. App. 2004), *aff'd*, 173 S.W.3d 502 (Tex. Crim. App. 2005) (“[T]he Confrontation Clause provides a criminal defendant not only the right to cross-examination, but also the right to physically face those who testify against him.” (citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 51–53 (1987)); *see also* *United States v. Yates*, 438 F.3d 1307, 1325 (11th Cir. 2006) (Tjoflat, J., dissenting) (“[T]he ideal Confrontational Clause situation . . . [is] cross-examination of a sworn-in witness in the physical presence of both the defendant and the finder-of-fact.”).

28. For a practical illustration of this disagreement, compare the majority opinion and dissenting opinion in *Yates*, 438 F.3d 1307. In finding that the Confrontation Clause was violated by the presentation of live, two-way videoconference testimony of a government witness physically located overseas, the majority stressed that, absent “waiver or case-specific findings of exceptional circumstances creating the type of necessity *Craig* contemplates, . . . witnesses and criminal defendants should meet face-to-face. The Sixth Amendment so requires.” *Id.* at 1318. The dissent, in contrast, argued that “[t]he sole purpose of the *Craig* test is to determine when a court can relax the rigid requirement of face-to-face confrontation. But when a witness is truly unavailable, the requirement of face-to-face confrontation does not apply in the first place, so the *Craig* test ought not to apply either.” *Id.* at 1331 (Marcus, J., dissenting).

29. This view is seemingly supported by influential commentator John Henry Wigmore. *See* 5 WIGMORE, *supra* note 26, § 1396 (“If there has been a Cross-examination, there has been a Confrontation. The satisfaction of the right of Cross-examination . . . disposes of any objection based on the so-called right of Confrontation.”).

30. For example, even a judge who equates confrontation with cross-examination might nevertheless view the right of cross-examination as a guarantee of effective cross-examination, and might believe that testimony in disguise amounts to ineffective cross-examination, thus inhibiting that right.

If the confrontation right's foundations were firmly cast in stone, the disguised witness issue would be a simple matter. Unfortunately, the Supreme Court has not been entirely consistent in this regard.<sup>31</sup> In 1988, the *Coy v. Iowa* Court described "the irreducible literal meaning of the Clause" as "[the] right to *meet face to face* all those who appear and give evidence *at trial*," and on this reasoning struck down the placement of a screen between defendant and witness stand.<sup>32</sup> Just two years later, however, the *Craig* Court permitted the use of one-way, closed-circuit television to display a complaining witness's testimony despite no possibility for eye contact between accuser and accused<sup>33</sup>—the very feature that had prompted the opposite outcome in *Coy*.<sup>34</sup> To justify the switch, the *Craig* Court declared that "face-to-face confrontation . . . is not the *sine qua non* of the confrontation right."<sup>35</sup> *Crawford* picked up where *Craig* left off by seemingly exalting the opportunity for cross-examination as the new confrontation right *sine qua non*.<sup>36</sup>

These recent developments raise several fundamental questions, including whether *Craig* and *Crawford* can legitimately coexist; whether the face-to-face-confrontation requirement retains independent significance in a post-*Crawford* world; and to what extent a literal face-to-face confrontation may be compromised before a defendant's confrontation right is violated.

In response to these concerns, Part II of this Article summarizes the leading manner of confrontation cases, *Coy* and *Craig*, with a focus on the inconsistencies underlying those opinions. Part III more closely examines the *Craig* test through a critique of the disguised witness cases applying that test. Part IV considers *Crawford*'s effect upon *Craig*, and argues that the *Craig* test would offend the current Court. With *Craig*'s continued vitality in doubt, Part V explores the deeper issue of whether the

---

31. See *Morales v. Artuz*, 281 F.3d 55, 59–60 (2d Cir. 2002) (discussing the "sometimes varying rationales that the Supreme Court has given concerning" the confrontation right, including the Court's emphasis on cross-examination over that of a face-to-face encounter in some contexts).

32. *Coy v. Iowa*, 487 U.S. 1012, 1020–21 (1988) (quoting *California v. Green*, 399 U.S. 149, 175 (1970) (Harlan, J., concurring)).

33. See *Maryland v. Craig*, 497 U.S. 836, 852 (1990).

34. See *Coy*, 487 U.S. at 1020.

35. *Craig*, 497 U.S. at 847 (citations omitted).

36. This view of confrontation, which I believe erroneous, is supported by *Crawford*'s holding and reasoning, as reflected in various passages throughout that opinion. See *infra* notes 218–23 and accompanying text.

Confrontation Clause's cross-examination requirement should subsume its guarantee of face-to-face confrontation, or whether each guarantee should retain independent significance.<sup>37</sup> Part V concludes that the face-to-face requirement is an indispensable aspect of confrontation and argues that the requirement should be enforced more rigorously than it has been under *Craig*.

With these principles in mind, Part VI revisits the disguised witness issue. While Part VI contends that *Crawford's* interpretative principles would prohibit nearly any disguise, it concludes by advocating an exception to this general rule. Under my proposal, the common law's forfeiture-by-wrongdoing exception, which the Court sanctioned in the context of out-of-court statements just two years ago,<sup>38</sup> should be extended to courtroom manner-of-testimony issues as well and should authorize the wearing of limited disguises where the witness's genuine safety concerns arise from the defendant's deliberate acts of intimidation. Part VII concludes.

## II. SUPREME COURT MANNER-OF-TESTIMONY CASE LAW

The Sixth Amendment's Confrontation Clause assures the right of an accused "to be confronted with the witnesses against him."<sup>39</sup> The confrontation right applies to two distinct types of statements. For statements made within the confines of trial, the right determines the *manner* in which the testimony must be presented. The right may also apply to statements made out of court, but in this context, the right's protections extend to only certain *types* of statements—i.e., those deemed "testimonial" in nature. Despite being linked by similar concerns, the *type* and *manner* issues can be viewed as two distinct lines of confrontation jurisprudence.<sup>40</sup> Viewed this way, *Craig* governs the precise manner in

---

37. See, e.g., *Mattox v. United States*, 156 U.S. 237, 242–43 (1895) (declaring the substance of the Confrontation Clause to include both cross-examination and face-to-face confrontation). *But see Crawford v. Washington*, 541 U.S. 36, 55–57 (2004) (stating that "a prior opportunity to cross-examine" the adverse witness is "dispositive," and limiting *Mattox's* holding to "an adequate opportunity to confront the witness").

38. See *Giles v. California*, 128 S. Ct. 2678, 2687–88 (2008) (ratifying forfeiture-by-wrongdoing as a valid post-*Crawford* exception to the confrontation right and deeming the exception applicable when a criminal defendant has engaged in conduct *specifically designed* to prevent an accusing witness from testifying).

39. U.S. CONST. amend. VI.

40. See Order of the Supreme Court, 207 F.R.D. 89, 94 (2002) (Scalia, J., commenting) ("[T]he constitutional test we applied to live testimony in *Craig* is different from the test we have applied to the admission of out-of-court statements.");

which courtroom testimony may be taken, whereas *Crawford* and its progeny<sup>41</sup> separately determine what out-of-court statements are testimonial and therefore subject to the confrontation right.

Testimony taken live and in court is indisputably not a *Crawford* issue, so disguised witness challenges have instead applied *Craig* and have focused upon the degree to which the disguise inhibits the preferred manner of courtroom testimony. Before turning to those cases, a brief examination of *Coy* and *Craig* is warranted.

#### A. *Coy v. Iowa*

In *Coy*, defendant John Avery Coy was charged with sexually assaulting two thirteen-year-old girls.<sup>42</sup> At trial, the State moved to allow the complaining witnesses to testify behind a screen.<sup>43</sup> The court granted the motion, and a large screen was placed between the defendant and each witness.<sup>44</sup> The screen enabled the defendant to dimly perceive the witnesses, but prevented the witnesses from seeing the defendant.<sup>45</sup> Coy objected, arguing that the Sixth Amendment guarantees an unobstructed, face-to-face confrontation.<sup>46</sup> The trial court rejected the claim, and Coy

---

*see also* *White v. Illinois*, 502 U.S. 346, 358 (1992) (“There is thus no basis for importing the ‘necessity requirement’ announced in [*Craig*] into the much different context of out-of-court declarations admitted under established exceptions to the hearsay rule.”); *United States v. Yates*, 438 F.3d 1307, 1314 n.4 (11th Cir. 2006) (en banc) (“*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,” thereby making *Craig* applicable rather than *Crawford*); *id.* at 1329 (Marcus, J., dissenting) (distinguishing *Craig* from *Crawford* in several respects and arguing that “*Crawford* reinforced the longstanding principle that the Confrontation Clause in effect imposes two parallel sets of ground rules, one governing testimony by witnesses who are available to appear in court and one governing testimony by witnesses who are unavailable”).

41. *See generally* *Hammon v. State*, 829 N.E.2d 444 (Ind. 2005), *rev’d sub nom.* *Davis v. Washington*, 547 U.S. 813 (2006) (further clarifying the constitutional meaning of the word “testimonial”).

42. *Coy v. Iowa*, 487 U.S. 1012, 1014 (1988).

43. *Id.* at 1014–15. The screen was authorized by an Iowa statute that in relevant part provided: “The court may require a party be confined to an adjacent room or behind a screen or mirror that permits the party to see and hear the child during the child’s testimony, but does not allow the child to see or hear the party.” *Id.* at 1014 n.1 (quoting IOWA CODE § 910A.14 (1987)).

44. *Id.* at 1014–15.

45. *Id.*

46. *Id.* at 1015. The defendant also objected to the screen on due process grounds, arguing that “the procedure would make him appear guilty and thus erode the presumption of innocence.” *Id.* The court rejected this claim as well. *Id.*

was convicted.<sup>47</sup> Significantly downplaying Coy's right to a face-to-face confrontation, the Iowa Supreme Court affirmed the conviction.<sup>48</sup> Notably, the court reasoned that Coy's ability to cross-examine the witnesses adequately ensured his confrontation right.<sup>49</sup>

The United States Supreme Court reversed the Iowa Supreme Court both on the merits and in its rationale. In doing so, the Court declared the "right to *meet* [one's accusers] *face to face*," not the right of cross-examination, as "the irreducible literal meaning of the Clause."<sup>50</sup> Invoking the Sixth Amendment's underlying policies, the Court declared that "[a] witness 'may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts,'"<sup>51</sup> as "[i]t is always more difficult to tell a lie about a person 'to his face.'"<sup>52</sup> Here, because the screen permitted each complaining witness to avoid viewing the defendant as she testified, the Court found it "difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter."<sup>53</sup>

---

47. *Id.* at 1014.

48. *State v. Coy*, 397 N.W.2d 730, 733–34 (Iowa 1986) (characterizing the right of face-to-face confrontation "[a]s a secondary (and at times dispensable) purpose" of the Sixth Amendment's Confrontation Clause, and declaring that while the confrontation right permits the judge and jury "to obtain the elusive and incommunicable evidence of a *witness' deportment while testifying*," this is only a "secondary advantage" that "*does not arise from the confrontation of the opponent and the witness*," but is rather secured by "the witness' presence before the *tribunal*" (quoting *State v. Strable*, 313 N.W.2d 497, 500 (Iowa 1981)), *rev'd*, 487 U.S. 1012 (1988).

49. *See id.* at 733 ("Primarily, confrontation is guaranteed 'for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers.'" (quoting *Strable*, 313 N.W.2d at 500)); *see also Coy*, 487 U.S. at 1015 (summarizing the Iowa Supreme Court's holding in the same manner).

50. *Coy*, 487 U.S. at 1021 (quoting *California v. Green*, 399 U.S. 149, 175 (1970) (Harlan, J., concurring)); *see also id.* at 1015–16 ("We have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." (citing *Kentucky v. Stincer*, 482 U.S. 730, 748, 749–50 (1987) (Marshall, J., dissenting))). To bolster this point, the Court cited numerous cases from as early as the 1890s. The Court cited, for example, *Green*, 399 U.S. 149; *Dowdell v. United States*, 221 U.S. 325 (1911); and *Kirby v. United States*, 174 U.S. 47 (1899).

51. *Coy*, 487 U.S. at 1019 (quoting ZECHARIAH CHAFEE, JR., *THE BLESSINGS OF LIBERTY* 35 (1956)).

52. *Id.* (quoting CHAFEE, *supra* note 51).

53. *Id.* at 1020. While the Court found that the placement of the screen

## B. Maryland v. Craig

Despite *Coy*'s emphasis upon the right to meet one's accusers face-to-face, the Court began its retreat from this position just two years later in *Craig*. In *Craig*, a school teacher was charged with sexual abuse of a six-year-old child.<sup>54</sup> Before trial, the State sought to invoke a statutory procedure permitting testimony by one-way, closed-circuit television.<sup>55</sup> Under this procedure, witnesses would be unable to view the defendant as they testified, which would prevent the trauma of looking their abuser in the eye.<sup>56</sup>

Finding it likely that each witness would suffer "serious emotional distress" if forced to testify in the defendant's presence, the trial court permitted the procedure.<sup>57</sup> Thereafter, the witnesses each testified in a separate room with only the attorneys present, and a video monitor displayed the testimony to the courtroom audience.<sup>58</sup> Craig was convicted of all charges.<sup>59</sup>

On appeal before the Supreme Court, Craig argued that the procedure violated her confrontation right.<sup>60</sup> The Court rejected Craig's claim, dismissing the fact that, just as in *Coy*, the witnesses in *Craig* never had to look the accused in the eye.<sup>61</sup> In a distinct change in rhetoric from *Coy*, the Court concluded that "the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial,' a preference that 'must occasionally give way to . . . the necessities of the case.'"<sup>62</sup> Exceptions to the face-to-face requirement are warranted, according to the Court, by the confrontation right's *substantive* nature. Endorsing confrontation as a

---

between defendant and witness violated the Sixth Amendment, the Court ruled that such violations are nevertheless subject to harmless-error analysis. *Id.* at 1021. Because the Iowa courts had not passed upon the harmless error issue, the Court remanded the case for determination of that point. *Id.* at 1022.

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

55. *Id.* at 840.

56. *Id.* at 841.

57. *See id.* at 842-43.

58. *Id.*

59. *Id.* at 843.

60. *See id.* at 840.

61. *See id.* at 860 ("So long as a trial court makes such a case-specific finding of necessity, the Confrontation Clause does not prohibit a State from using a one-way closed circuit television procedure for the receipt of testimony by a child witness in a child abuse case.").

62. *Id.* at 849 (citations omitted).

substantive rather than a procedural right, the Court characterized the right as one “promoting reliability”<sup>63</sup> and “advanc[ing] a practical concern for the accuracy of the truth-determining process.”<sup>64</sup>

Applying these principles, *Craig* set forth a two-part test to govern potential exceptions to the Clause’s face-to-face requirement. According to *Craig*, “a physical, face-to-face confrontation [may be dispensed with] at trial [1] only where denial of such confrontation is necessary to further an important public policy and [2] only where the reliability of the testimony is otherwise assured.”<sup>65</sup>

Applying this two-part test, the State argued that it had a substantial interest in protecting abused children from the trauma of testifying against their alleged abusers and that the video procedure was necessary to further that interest.<sup>66</sup> Invoking cases recognizing the State’s interest in “the protection of minor victims of sex crimes” as “compelling,” the Court agreed.<sup>67</sup>

Turning to its second requirement, the Court declared that the testimony’s reliability is assured by “[t]he combined effect of the[] elements of confrontation,”<sup>68</sup> which consist of a personal examination, opportunity for cross-examination, testimony under oath, and opportunity to assess witness demeanor.<sup>69</sup> Applying this standard, *Craig* deemed the video procedure sufficiently reliable because, despite the absence of a face-to-face meeting between accuser and accused, the remaining three elements of confrontation were each preserved.<sup>70</sup>

---

63. *Id.* at 846 (quoting *Kentucky v. Stincer*, 482 U.S. 730, 739 (1987) (Marshall, J., dissenting)).

64. *Id.* at 846 (quoting *Dutton v. Evans*, 400 U.S. 74, 89 (1970) (plurality opinion)); *see also id.* at 852 (“We are therefore confident that use of the one-way closed circuit television procedure, where necessary to further an important state interest, does not impinge upon the truth-seeking or symbolic purposes of the Confrontation Clause.”).

65. *Id.* at 850 (citing *Coy v. Iowa*, 487 U.S. 1012, 1021 (1988)).

66. *Id.* at 852.

67. *See id.* at 852–53. The Court cited, among other cases, *Globe Newspaper Co. v. Superior Court of Norfolk County*, 457 U.S. 596, 608–09 (1982), in which the Court “held that a State’s interest in the physical and psychological well-being of a minor victim was sufficiently weighty to justify depriving the press and public of their constitutional right to attend criminal trials, where the trial court makes a case-specific finding that closure of the trial is necessary to protect the welfare of the minor.”

68. *Craig*, 497 U.S. at 846.

69. *Id.*

70. *Id.* at 851. The Court reasoned:

### III. THE *CRAIG* TEST AS APPLIED IN THE DISGUISED WITNESS CASES

*Craig* signals the Court's willingness to permit trial testimony despite no actual face-to-face meeting between accuser and accused. The *Craig* test has since been applied by numerous courts in various challenges to the method of presenting witness testimony, and is the controlling test among the disguised witness cases.<sup>71</sup> This section examines the *Craig* requirements by considering how the *Craig* test has been applied in the disguised witness cases.

#### A. *The Important-Public-Policy Prong*

According to *Craig*, a defendant's confrontation right may be satisfied absent a physical, face-to-face confrontation at trial only when *necessary* to further an important public policy.<sup>72</sup> While the *Craig* Court did not define what constitutes an important public policy or provide a list of potentially adequate policies,<sup>73</sup> the Court did note that the face-to-face requirement

---

We find it significant . . . that Maryland's procedure preserves all of the other elements of the confrontation right: The 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. Although we are mindful of the many subtle effects face-to-face confrontation may have on an adversary criminal proceeding, the presence of these other elements of confrontation . . . adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony.

*Id.*

71. See, e.g., *United States v. Yates*, 438 F.3d 1307 (11th Cir. 2006) (en banc) (applying the *Craig* test in analyzing whether defendants' Sixth Amendment confrontation rights were violated by use of two-way videoconference technology to present the live trial testimony of government witnesses located in Australia).

72. See *Craig*, 497 U.S. at 855 ("[W]e hold that, if the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant.") (emphasis added).

73. See David M. Wagner, *The End of the "Virtually Constitutional"?* *The Confrontation Right and Crawford v. Washington as a Prelude to Reversal of Maryland v. Craig*, 19 REGENT U. L. REV. 469, 470 (2007) (noting that "no body of jurisprudence has arisen since *Craig* elaborating [upon *Craig*'s] 'sufficiently important in some cases' test").

may be sacrificed only in narrow circumstances.<sup>74</sup> In particular, the Court cautioned that the requirement may be met only when the special procedure is necessary to protect the welfare of the *particular* witness,<sup>75</sup> when the witness “would be traumatized, not by the courtroom generally, but by the presence of the defendant,”<sup>76</sup> and when “the [witness’s] emotional distress” is more than “mere nervousness or excitement.”<sup>77</sup> In the Court’s view, when these underlying requirements are present, truth determination is enhanced.<sup>78</sup>

In subsequent cases applying *Craig*, prosecutors have advanced the Government’s need to present “crucial prosecution evidence” as sufficient to override the confrontation right. Courts have routinely rejected this claim by invoking its potential to override confrontation rights in nearly all criminal cases.<sup>79</sup>

In other cases, the Government has argued that the policies of ensuring witness safety,<sup>80</sup> preventing serious crimes such as terrorism,<sup>81</sup> and

---

74. *Craig*, 497 U.S. at 848.

75. *Id.* at 855 (“The requisite finding of necessity must of course be a case-specific one: The trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify.” (citations omitted)); *see also id.* at 845 (distinguishing *Coy* on these grounds).

76. *Id.* at 856 (“Denial of face-to-face confrontation is not needed to further the state interest in protecting the child witness from trauma unless it is the presence of the defendant that causes the trauma.”).

77. *Id.* (quoting *Wildermuth v. State*, 530 A.2d 275, 289 (Md. 1987)). The Court went on to state that it “need not decide the minimum showing of emotional trauma required for use of the special procedure . . . because the Maryland statute, which requires a determination that the child witness will suffer ‘serious emotional distress such that the child cannot reasonably communicate,’ clearly suffices to meet constitutional standards.” *Id.* (citation omitted).

78. *See id.* at 857 (reasoning that confrontation that in fact causes “significant emotional distress in a child witness” would “*disserve* the Confrontation Clause’s truth-seeking goal”).

79. *See United States v. Yates*, 438 F.3d 1307, 1316 (11th Cir. 2006) (en banc) (finding the Government’s claimed need to present “crucial prosecution evidence” insufficiently weighty to override the confrontation right). *But see id.* at 1320 (Tjoflat, J., dissenting) (“It is beyond reproach that there is an important public policy in providing the fact-finder with crucial, reliable testimony . . .”).

80. *Id.* at 1317–18, 1318 n.10 (majority opinion) (distinguishing the legitimate government needs “to protect the health and safety of [a] former mobster witness” and to “preserve the delicate psyche of the child [in *Craig*] who was the alleged victim of abuse” from the insufficient government interest “in providing the fact-finder with crucial evidence”).

presenting crucial evidence in the prosecution of the most serious offenses<sup>82</sup> are each sufficient to outweigh the confrontation right.

Witness safety is the primary policy interest advanced in the disguised witness cases. In these cases, courts have found this interest constitutionally sufficient, particularly when the witness's testimony is crucial for the prosecution of a serious case. However, such interests have been deemed sufficient only when the confrontation impairment is minimal.<sup>83</sup>

*Morales v. Artuz* illustrates these principles.<sup>84</sup> In *Morales*, a murder case, the Second Circuit Court of Appeals upheld the trial court's decision

---

81. See, e.g., *Haig v. Agee*, 453 U.S. 280, 307 (1981) (“[N]o governmental interest is more compelling than the security of the Nation.” (citing *Aptheker v. Sec’y of State*, 378 U.S. 500, 509 (1964))); *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1027 (7th Cir. 2002) (“[T]he government’s interest in preventing terrorism is not only important but paramount.” (citing *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1135 (2000))); *United States v. Al-Arian*, 308 F. Supp. 2d 1322, 1343 (M.D. Fla. 2004) (“[S]topping the spread of terrorism is not just a sufficiently important governmental interest, but is a compelling governmental interest.”); see also *United States v. Abu Ali*, 528 F.3d 210, 241 (4th Cir. 2008) (“This is not to suggest that a generalized interest in law enforcement is sufficient to satisfy the first prong of *Craig*. *Craig* plainly requires a public interest more substantial than convicting someone of a criminal offense. The prosecution of those bent on inflicting mass civilian casualties or assassinating high public officials is, however, just the kind of important public interest contemplated by the *Craig* decision.”).

82. See, e.g., *Romero v. State (Romero II)*, 173 S.W.3d 502, 509 (Tex. Crim. App. 2005) (Holcomb, J., dissenting) (arguing that “the trial court could have reasonably concluded that [the witness’s] disguise was necessary to further the important state interest in presenting key evidence to establish guilt in a felony case,” i.e., aggravated assault resulting from the defendant’s shooting in the direction of a Houston nightclub). See also *Abu Ali*, 528 F.3d at 238–43. In *Abu Ali*, the court applied the *Craig* test and upheld the trial court’s admission of deposition testimony of Saudi Arabian officials who were deposed on behalf of the Government via a live two-way video link and who countered the defendant’s claim that he was tortured prior to his confessions, even though the defendant was not physically present at the location where the Rule 15 depositions were taken. *Id.* The court stressed that “requiring face-to-face confrontation here would have precluded the government from relying on the Saudi officers’ important testimony,” which “would . . . have greatly hindered efforts to prosecute the defendant . . .” *Id.* at 241.

83. See, e.g., *People v. Sammons*, 478 N.W.2d 901, 908 (Mich. Ct. App. 1991) (conceding that “a state [undoubtedly] has a valid interest in promoting the safety of witnesses at criminal proceedings,” but ruling that witness safety concerns may not override the defendant’s confrontation right where the reliability of the witness’s testimony is not otherwise assured).

84. See *Morales v. Artuz*, 281 F.3d 55 (2d Cir. 2002).

to permit an adult witness to testify in dark sunglasses.<sup>85</sup> The witness in that case, Ms. Sanchez, refused to remove her sunglasses due to her claimed fear of the defendant and his cohorts.<sup>86</sup> After examining the witness, the judge found her fear justified.<sup>87</sup> Permitting the testimony, the judge “concluded that however ‘partially’ the defendant’s right to confrontation would be infringed was outweighed by the necessity of having her provide critical testimony in a serious case.”<sup>88</sup> The jury subsequently found Morales guilty of manslaughter, and his conviction was affirmed on appeal.<sup>89</sup>

After his state court conviction, Morales filed a habeas corpus petition.<sup>90</sup> On the merits, the court reasoned that “[t]he obscured view of the witness’s eyes . . . resulted in only a minimal impairment of the jurors’ opportunity to assess her credibility”<sup>91</sup> and that the jurors “had an entirely unimpaired opportunity to assess the delivery of [the witness’s] testimony, notice any evident nervousness, and observe her body language.”<sup>92</sup> With such a minimal restriction upon demeanor evidence, the court rejected Morales’s habeas petition.<sup>93</sup>

In *People v. Brandon*, the California Court of Appeal applied *Craig* in a similar manner.<sup>94</sup> At Brandon’s trial for prostitution-related offenses, a prosecution witness, Mamie, sought to testify while wearing dark sunglasses and a scarf that covered her head.<sup>95</sup> Outside the jury’s presence, Mamie testified that Brandon’s friends had threatened to harm her and her family if she testified against him.<sup>96</sup> The trial court found Mamie’s fears legitimate and permitted her to remain in disguise.<sup>97</sup> In upholding the

---

85. *Id.* at 62.

86. *Id.* at 57.

87. *Id.*

88. *Id.*

89. On direct appeal, the reviewing court found that “the procedure was justified by the necessities of the case,” presumably referring to the combined need to protect the witness’s safety and to present critical testimony in a serious case. See *People v. Morales*, 246 A.D.2d 302, 302–03 (N.Y. App. Div. 1998).

90. *Morales*, 281 F.3d at 56.

91. *Id.* at 60–61.

92. *Id.* at 61.

93. *Id.* at 62.

94. *People v. Brandon*, 52 Cal. Rptr. 3d 427 (Ct. App. 2006).

95. *Id.* at 442.

96. *Id.* at 442–43.

97. See *id.* at 445.

procedure, the trial court stressed that the confrontation right provides “the right to be in the courtroom with the witness [and] . . . the right to ask questions of the witness,”<sup>98</sup> and that despite the disguise, the witness remained visible as she testified.<sup>99</sup> The Court of Appeal agreed,<sup>100</sup> reasoning that all courtroom participants “were able to hear Mamie’s testimony . . . while observing her facial expressions and body language *to a degree* that no constitutional violation occurred.”<sup>101</sup>

In a similar instance of minimal impairment, a New York trial court authorized a witness to testify under a pseudonym while wearing a wig and false facial hair. In *People v. Smith*, New York’s intermediate court of appeals upheld the ruling, finding “no evidence that the disguise impaired the jury’s ability to assess the witnesses’ demeanor,” and reasoning that “the disguise was justified by the necessities of the case,” consisting primarily of “a heightened need to protect the security of this witness.”<sup>102</sup>

As *Coy* and *Craig* instruct, in cases like *Brandon* and *Smith*, in which the confrontation impairment is minimal, courts require actual evidence of a legitimate safety concern before the witness’s safety interest will override the limited confrontation.<sup>103</sup>

---

98. *Id.*

99. *Id.*

100. The California Court of Appeal concluded that, “[i]n light of Mamie’s fear . . . it was not unreasonable . . . to allow her to wear [the disguise].” *Id.* at 446. While the court rejected Brandon’s claim on the merits, the court also declared that “any purported error” in allowing Mamie to testify in sunglasses and a scarf would have been “harmless beyond a reasonable doubt,” given the “staggering weight of the evidence of . . . criminal conduct independently described by [various prosecution witnesses].” *Id.*

101. *Id.* at 445 (emphasis added).

102. *People v. Smith*, 869 N.Y.S.2d 88, 90 (App. Div. 2008). In its brief analysis, the *Smith* court cited *Morales* to support its holding, but did not mention *Craig* or *Coy*. *See id.*

103. The *Coy* Court rejected the State’s argument that necessity was established in that case by the Iowa statute’s presumption of trauma, reasoning that “something more than [a] generalized finding” is required, such as “individualized findings that these particular witnesses needed special protection.” *Coy v. Iowa*, 487 U.S. 1012, 1021 (1988); *see also Maryland v. Craig*, 497 U.S. 836, 855 (1990). In finding *Craig*’s important-public-policy prong unmet, the *Romero* court, for example, reasoned that the witness had been unable to point to any concrete reason for suspecting retaliation from Romero. *Romero v. State (Romero II)*, 173 S.W.3d 502, 506 (Tex. Crim. App. 2005). Moreover, while a “compelling [ ] interest might be to protect a witness from retaliation,” the witness’s disguise did not further that interest because the witness’s name and address were already known to the defendant. *Id.* According

When impairment of the confrontation right becomes more substantial, the scale tilts in favor of the defense. For example, the Michigan Court of Appeals in *People v. Sammons* found that allowing a witness to wear a full-face mask violated the Confrontation Clause.<sup>104</sup> Despite acknowledging that “a state [undoubtedly] has a valid interest in promoting the safety of witnesses,” the *Sammons* court reasoned that “any procedures devised to protect a witness must be tailored to preserve the essence of effective confrontation” and that a full-face mask prevented the fact-finder from assessing witness credibility through observation of demeanor.<sup>105</sup>

### B. *The Reliability Prong*

Even when the State satisfies *Craig*'s important-public-policy requirement, a limited confrontation is permissible only if the testimony's reliability is “otherwise assured.”<sup>106</sup> Under the *Craig* standard, reliability is measured by “the combined effect of the elements of confrontation,” which are: (1) a personal examination, (2) opportunity for cross-examination, (3) testimony under oath, and (4) opportunity to assess witness demeanor.<sup>107</sup>

When three of *Craig*'s four elements of confrontation are not significantly compromised, the procedure will typically be deemed reliable.<sup>108</sup> This method of analysis, in which the court assesses the degree to which each element of confrontation is compromised as a measure of evidence reliability, is generally used to analyze a *Craig* claim.<sup>109</sup> Following *Craig*'s approach, *Romero*, for example, deemed the *Craig* test unmet when two of *Craig*'s four elements of confrontation were considered

---

to the *Romero* court, under these circumstances, “a defendant seeking retaliation could simply knock on the door at the known address and ask for the named person.” *Id.*

104. *People v. Sammons*, 478 N.W.2d 901, 910 (Mich. Ct. App. 1992).

105. *Id.* at 908–09.

106. *Craig*, 497 U.S. at 850.

107. *Id.* at 846.

108. *See id.* at 851.

109. *See, e.g., United States v. Abu Ali*, 528 F.3d 210, 241–42 (4th Cir. 2008) (“In *Craig*, the Court provided a blueprint on how to satisfy this requirement when it noted that ‘the presence of [the] other elements of confrontation—oath, cross-examination, and observation of the witness’ [sic] demeanor—adequately 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.’ These ‘other elements’ are present here. . . . We thus find there to be no violation of the Confrontation Clause under *Craig*.” (citations omitted)).

compromised.<sup>110</sup> Thus, as a general proposition, a face-to-face encounter may be dispensed with only when the remaining three *Craig* elements of confrontation—oath, cross-examination, and demeanor—are not significantly impaired. The remainder of this section more closely examines each of the *Craig* elements of confrontation.

### 1. *Personal Examination/Physical Presence*

As interpreted by the Supreme Court, *Craig*'s personal examination element encompasses not only "testify[ing] in the accused's presence," but also face-to-face interaction between accuser and accused.<sup>111</sup> Each of these requirements serves a distinct purpose.

With respect to the presence aspect of this element, the Supreme Court has stressed that testifying in the accused's presence deters false accusations and reduces the risk of implicating an innocent person.<sup>112</sup> Justice Scalia recently invoked this theme in rejecting the routine use of two-way videoconference testimony, arguing that "a purpose of the Confrontation Clause is ordinarily to compel accusers to make their accusations *in the defendant's presence*—which is not equivalent to making them in a room that contains a television set beaming electrons that portray the defendant's image."<sup>113</sup> As Justice Scalia's argument implies, most

---

110. *Romero v. State (Romero II)*, 173 S.W.3d 502, 506 (Tex. Crim. App. 2005). *But see Craig*, 497 U.S. at 870 (Scalia, J., dissenting) ("The Court has convincingly proved that the Maryland procedure serves a valid interest, and gives the defendant virtually everything the Confrontation Clause guarantees (everything, that is, except confrontation). I am persuaded, therefore, that the Maryland procedure is virtually constitutional. Since it is not, however, actually constitutional I would . . . revers[e] the judgment of conviction.").

111. *Craig*, 497 U.S. at 847 (citing *Coy v. Iowa*, 487 U.S. 1012, 1017 (1988)).

112. *Id.* at 846 (citing *Coy*, 487 U.S. at 1019–20); *see also Ohio v. Roberts*, 448 U.S. 56, 63–64, 64 n.6 (1980) ("The requirement of personal presence . . . undoubtedly makes it more difficult to lie against someone, particularly if that person is an accused and present at trial." (quoting 4 J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE* ¶ 800[01], at 800–10 (1979))).

113. Order of the Supreme Court, 207 F.R.D. 89, 94 (2002) (Scalia, J., commenting). Not all courts agree that confrontation via two-way video is constitutionally distinguishable from testimony taken in the defendant's physical presence, and the issue remains unresolved by the Supreme Court. *See, e.g., United States v. Gigante*, 166 F.3d 75, 79–80 (2d Cir. 1999) (rejecting confrontation challenge to a government witness who testified via two-way closed-circuit television from a remote location, reasoning that the procedure adequately preserved each of *Craig*'s four elements of confrontation and specifically noting that "[the witness] testified in full view of the jury, court, and defense counsel; and . . . under the eye of [the

jurists believe that the accused's presence, rather than the courtroom's formal setting, is primarily responsible for confrontation's truth-enhancing effects.<sup>114</sup>

While *Craig's* personal examination element includes the requirement of "testify[ing] in the accused's presence," this element also anticipates a face-to-face encounter between accuser and accused.<sup>115</sup> The face-to-face requirement, in turn, encompasses both an opportunity for the witness to *view the defendant* when testifying,<sup>116</sup> as well as an ability of the defendant and fact-finder to *view the witness*.<sup>117</sup> Notably, however, this element of confrontation may be satisfied even when the testifying witness chooses to avoid eye contact with the accused.<sup>118</sup>

---

defendant] himself"); *see also Abu Ali*, 528 F.3d at 238–43 (applying *Craig* and upholding the trial court's admission of deposition testimony of Saudi Arabian officials deposed via live two-way video, even though defendant was not physically present at the location where the depositions were taken).

114. Some jurists have argued that the positive moral effect produced upon the witness is attributed more to the formality of the courtroom setting than to testifying in the defendant's presence. *See, e.g., State v. Coy*, 397 N.W.2d 730, 733 (Iowa 1986) (citing *State v. Strabel*, 313 N.W.2d 497, 500 (1981)). This argument seems to derive from Wigmore's view of confrontation, which posits that the "subjective moral effect [that] is produced upon the witness . . . does not arise from the confrontation of the opponent and the witness; it is not the consequence of those two being brought face to face." 5 WIGMORE, *supra* note 26, § 1395 (footnote omitted). Rather, according to Wigmore, "[i]t is the witness'[sic] presence before the *tribunal* that secures this secondary advantage." *Id.* This view, however, directly conflicts with *Craig*, and has not been routinely accepted. *See Craig*, 497 U.S. at 856 ("Denial of face-to-face confrontation is not needed to further the state interest in protecting the child witness from trauma unless it is the presence of the defendant that causes the trauma. In other words, if the state interest were merely the interest in protecting child witnesses from courtroom trauma generally, denial of face-to-face confrontation would be unnecessary because the child could be permitted to testify in less intimidating surroundings, albeit with the defendant present.").

115. *See Craig*, 497 U.S. at 847.

116. The *Coy* Court, for example, noted the importance of having the witness look directly at the defendant during accusatory testimony, stating, "[t]he phrase still persists, 'Look me in the eye and say that.'" *Coy*, 487 U.S. at 1018.

117. *See id.* at 1017 (stating that the Confrontation Clause assures the defendant the presence of witnesses "upon whom he [the defendant] can look while being tried" (quoting *Kirby v. United States*, 174 U.S. 47, 55 (1899))); *see also State v. Lipka*, 817 A.2d 27, 32–33 (Vt. 2002) (finding the Confrontation Clause was violated by courtroom seating arrangement in which child witness was seated facing the jury and away from the defendant during her trial testimony).

118. *See, e.g., Coy*, 487 U.S. at 1019 ("The Confrontation Clause does not . . . compel the witness to fix his eyes upon the defendant . . . but the trier of fact will draw

## 2. *Demeanor*

At bottom, the virtue of face-to-face confrontation in the accused's presence is its ability to permit the jury to view the witness "and judge by his demeanor . . . whether he is worthy of belief."<sup>119</sup> Indeed, this requirement seems mandated by the very impetus for the confrontation right: preventing trial by affidavit.<sup>120</sup>

In contrast to the one-way video procedure employed in *Craig*, which the Court deemed adequate in preserving demeanor evidence, courts assessing the most extensive disguises have decried their more complete masking of witness demeanor.<sup>121</sup> Two disguised witness cases, *Romero v. State* and *People v. Sammons*, employed this rationale.<sup>122</sup>

In *Romero*, defendant Israel Romero was indicted for aggravated assault after a shooting outside a nightclub.<sup>123</sup> At Romero's trial, a key government witness, Cesar Vasquez, refused to enter the courtroom.<sup>124</sup> Citing his fear of the defendant, Vasquez endured a fine and noted that he "would rather go to jail than testify."<sup>125</sup> Shortly thereafter, Vasquez entered the courtroom wearing a disguise that hid almost all of Vasquez's face from view.<sup>126</sup> Outside the jury's presence, Vasquez conceded that he had never actually been threatened by Romero, but he testified that, in his

---

its own conclusions.").

119. *Mattox v. United States*, 156 U.S. 237, 242–43 (1895).

120. *See California v. Green*, 399 U.S. 149, 156–57 (1970) ("[T]he particular vice that gave impetus to the confrontation claim was the practice of trying defendants on 'evidence' which consisted solely of ex parte affidavits or depositions secured by the examining magistrates, thus denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact.").

121. *See Maryland v. Craig*, 497 U.S. 836, 851 (1990). "Maryland's procedure preserves all of the other elements of the confrontation right"—including observation of demeanor. *Id.* Under this procedure, "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.*

122. *See People v. Sammons*, 478 N.W.2d 901, 909 (Mich. Ct. App. 1991); *Romero v. State (Romero I)*, 136 S.W.3d 680, 682 (Tex. Ct. App. 2004), *aff'd*, 173 S.W.3d 502 (Tex. Crim. App. 2005).

123. *Romero I*, 136 S.W.3d at 682.

124. *Id.*

125. *Romero v. State (Romero II)*, 173 S.W.3d 502, 503 (Tex. Crim. App. 2005) (internal quotation marks omitted).

126. *Id.* The Court of Appeals of Texas described the disguise as "leaving visible only Vasquez's ears, the tops of his cheeks, and the bridge of his nose . . . ." *Romero I*, 136 S.W.3d at 682.

view, Romero's act of firing a gun towards a nightclub made him "a person who's dangerous on the street."<sup>127</sup> Romero then renewed his objection to the disguise, noting that he was already aware of Vasquez's name and address, but the court overruled the objection.<sup>128</sup> Vasquez then testified before the jury and Romero was convicted.<sup>129</sup>

Both the Texarkana Court of Appeals and the Texas Court of Criminal Appeals found that the disguise violated Romero's confrontation right.<sup>130</sup> According to the latter court, Vasquez's disguise compromised both the physical presence and demeanor elements of confrontation.<sup>131</sup> Addressing *Craig's* physical presence element, the court reasoned that even though Vasquez took the witness stand, the witness "believed the disguise would confer a degree of anonymity that would insulate him from the defendant" and as a result, "accountability was compromised."<sup>132</sup> With respect to the demeanor element, the court focused upon the jury's inability to observe Vasquez's eyes and facial expressions.<sup>133</sup> While conceding that the witness's tone of voice and body language remained accessible, the court described the face as "the most expressive part of the body," and thus critical in assessing credibility.<sup>134</sup> With two elements of confrontation compromised, the court deemed Romero's confrontation right violated.<sup>135</sup>

In another case involving a similarly extensive disguise, the Michigan Court of Appeals found a violation of the Confrontation Clause when an adult witness was permitted to testify in a full face mask.<sup>136</sup> In that case, defendant Martin Sammons was charged with cocaine-related crimes.<sup>137</sup> At his entrapment hearing, Sammons testified that a man he simply knew as

---

127. *Romero II*, 173 S.W.3d at 504. This is significant in that, under *Giles v. California*, it would mean that Romero had not forfeited his right to confront Vasquez in court. See *Giles v. California*, 128 S. Ct. 2678, 2687–88 (2008) (holding that the forfeiture-by-wrongdoing exception to the defendant's right to confront his accusers applies only when the defendant has engaged in conduct *specifically designed* to prevent the witness from testifying).

128. *Romero II*, 173 S.W.3d at 503.

129. *Id.* at 504.

130. *Romero I*, 136 S.W.3d 680; *Romero II*, 173 S.W.3d 502.

131. *Romero II*, 173 S.W.3d at 505.

132. *Id.* For an alternative view, see *id.* at 507–08 (Meyers, J., dissenting).

133. *Id.* at 505 (majority opinion).

134. *Id.* at 506.

135. *Id.*

136. *People v. Sammons*, 478 N.W.2d 901, 908–09 (Mich. Ct. App. 1991).

137. *Id.* at 904.

“Rick” pressured him into the drug sale for which he was being prosecuted by telling Sammons “that his people were ‘putting the heat on him’” and that he could “put the heat” on Sammons as well.<sup>138</sup> Sammons reportedly agreed to cooperate because Rick was desperate.<sup>139</sup> To rebut Sammons’s claims, the prosecution called Rick as a witness. Citing concern for Rick’s safety, the court permitted him to testify in a mask.<sup>140</sup> During the ensuing testimony, the defense was prevented from asking any identifying questions of the masked witness.<sup>141</sup> Rick denied pressuring Sammons,<sup>142</sup> and the court rejected the entrapment claim.<sup>143</sup>

On appeal, Sammons argued that his confrontation right was violated both by his inability to confront Rick face-to-face and by the fact-finder’s inability to assess Rick’s credibility.<sup>144</sup> The appellate court agreed.<sup>145</sup> In finding a Confrontation Clause violation, the court was primarily concerned with the judge’s inability to observe witness demeanor.<sup>146</sup> Demeanor evidence was particularly important here because entrapment was Sammons’s primary defense and because Rick’s credibility “was the major issue at the entrapment hearing.”<sup>147</sup> In addressing *Craig*’s physical presence element, the court stressed in language reminiscent of *Coy* that a full face mask “may very well make a witness ‘feel quite differently’ than when he has to repeat his story while looking at the defendant.”<sup>148</sup>

Like *Romero*, *Sammons* also suggests that the *Craig* test is unmet when two of *Craig*’s four reliability elements are compromised, and each of those cases turned upon the demeanor element. Thus, despite scholarly debate as to whether demeanor evidence truly leads to accurate credibility

---

138. *Id.* at 905.

139. *Id.* Sammons’s sister corroborated his claims, testifying that Rick called the defendant approximately seventy times over a two-week span. *Id.*

140. *Id.* The court justified the use of a mask because either Sammons or a codefendant allegedly offered someone cocaine to kill Rick. *Id.*

141. *Id.*

142. *Id.* at 906. Prior to these events, police had found cocaine in Rick’s house, and although he had not been arrested, Rick had agreed to assist the police in catching his suppliers in exchange for leniency regarding his own situation. *See id.*

143. *Id.*

144. *Id.*

145. *Id.* at 909–10.

146. *See id.* at 908–09. Citing the Michigan Supreme Court, the court declared: “Demeanor is of the utmost importance in the determination of the credibility of a witness.” *Id.* at 909 (quoting *People v. Dye*, 427 N.W.2d 501 (Mich. 1988)).

147. *Id.*

148. *Id.* at 908; *see also Coy v. Iowa*, 487 U.S. 1012, 1019–20 (1988).

determinations,<sup>149</sup> courts still place faith in such assessments<sup>150</sup> by, for example, routinely instructing jurors to carefully assess witness demeanor<sup>151</sup> and by generally deferring to a fact-finder's credibility determinations.<sup>152</sup>

---

149. See Jeremy A. Blumenthal, *A Wipe of the Hands, a Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 NEB. L. REV. 1157, 1163 (1993) ("Social science has produced overwhelming evidence refuting the ability of people to identify that a witness is lying when the witness is actually being deceptive."); I. Daniel Stewart, Jr., *Perception, Memory, and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence*, 1970 UTAH L. REV. 1, 23 ("[T]he value of demeanor evidence as a means of determining testimonial reliability has yet to be demonstrated factually."); Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1075 (1991) ("According to the empirical evidence, ordinary people cannot make effective use of demeanor in deciding whether to believe a witness. On the contrary, there is some evidence that the observation of demeanor diminishes rather than enhances the accuracy of credibility judgments."); Aaron J. Williams, *The Veiled Truth: Can the Credibility of Testimony Given by a Niqab-Wearing Witness be Judged Without the Assistance of Facial Expressions?*, 85 U. DET. MERCY L. REV. 273, 283–86 (2008) (analyzing recent scholarship on the issue and concluding that "twenty years of research indicates that not much confidence should be placed in attempting to determine truthfulness based on demeanor."). *But see* Max Minzner, *Detecting Lies Using Demeanor, Bias, and Context*, 29 CARDOZO L. REV. 2557 (2008) (analyzing recent social science findings and concluding that juries can effectively differentiate between truth and lies in certain situations).

150. See *Morales v. Artuz*, 281 F.3d 55, 61 (2d Cir. 2002) ("Even if we accept the idea, grounded perhaps more on tradition than on empirical data, that demeanor is a useful basis for assessing credibility, the jurors had an entirely unimpaired opportunity to assess the delivery of [the witness's] testimony, notice any evident nervousness, and observe her body language."); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074, 1084, 1086 (9th Cir. 1977) (Duniway, J., concurring in part and dissenting in part) ("I am convinced, both from experience as a trial lawyer and from experience as an appellate judge, that much that is thought and said about the trier of fact as a lie detector is myth and folklore. . . . Anyone who really believes that he can infallibly determine credibility solely on the basis of observed demeanor is naive.").

151. The Bench Book for United States District Court Judges directs jurors to assess "[a witness's] manner and demeanor in testifying before [them]." FED. JUDICIAL CTR., BENCHBOOK FOR U.S. DISTRICT COURT JUDGES § 7.04 (5th ed. 2007), available at [http://www.fjc.gov/public/pdf.nsf/lookup/Benchbk5.pdf/\\$file/Benchbk5.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Benchbk5.pdf/$file/Benchbk5.pdf).

152. *Batson v. Kentucky*, 476 U.S. 79, 98 n.21 (1986) ("Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference." (citing *Anderson v. Bessemer City*, 470 U.S. 564, 575–76 (1985))); *see also* *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003) ("Deference is necessary because a reviewing court, which analyzes only the [trial] transcripts . . . is not as well positioned as the trial court is to make credibility determinations."); *Lessee of Ewing v. Burnet*, 36 U.S. 41, 50–51 (1837) ("[I]t is the exclusive province of the jury [] to decide what facts are proved by

### 3. *Cross-Examination*

In a related line of Confrontation Clause jurisprudence, the Supreme Court has established that undue restrictions on the scope of cross-examination may alone violate the Confrontation Clause.<sup>153</sup> In the manner-of-testimony context, *Craig*'s primary concern on this element was ensuring a "full opportunity for contemporaneous cross-examination."<sup>154</sup>

The Supreme Court has declared cross-examination particularly important when questioning might expose a witness's motivation in testifying against the accused. In *Delaware v. Van Arsdall*, for example, the Court deemed the Confrontation Clause violated by the trial court's complete preclusion of cross-examination into the witness's potential bias which resulted from the State's dismissal of a pending criminal charge against the witness.<sup>155</sup> While the Court admitted that "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about . . . the witness'[s] safety," the Court felt such discretion did not justify "cutting off all questioning about an event that . . . [might have] furnished the witness a motive for favoring the prosecution."<sup>156</sup>

Applying these principles, *Sammons* found the confrontation right violated by the trial court's total preclusion of questions relating to the witness's identifying information.<sup>157</sup> According to *Sammons*, "the very starting point in 'exposing falsehood and bringing out the truth' through cross-examination must necessarily be to ask the witness who he is and where he lives."<sup>158</sup> Thus, while "the trial court would have been justified in limiting cross-examination regarding identifying information in light of the alleged threats," its "total foreclosure of identifying information 'effectively emasculated' defendant's right of cross-examination."<sup>159</sup>

---

competent evidence. It [is] their province to judge of the credibility of the witnesses, and the weight of their testimony, as tending, in a greater or less degree, to prove the facts relied on . . .").

153. See, e.g., *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986).

154. *Maryland v. Craig*, 497 U.S. 836, 851 (1990).

155. *Van Arsdall*, 475 U.S. at 678–79.

156. *Id.* at 679.

157. *People v. Sammons*, 478 N.W.2d 901, 909 (Mich. Ct. App. 1991).

158. *Id.* (quoting *Smith v. Illinois*, 390 U.S. 129, 131 (1968)).

159. *Id.* at 910 (quoting *Smith*, 390 U.S. at 131).

#### 4. *Oath*

The central role of the oath is to safeguard against perjury and to impress upon the witness the seriousness of the matter.<sup>160</sup> The oath is significant in the confrontation context because of its tendency to remind the witness of her “moral and legal obligation to tell the truth.”<sup>161</sup> Following *Craig*’s rationale, the disguised witness cases have simply assumed this particular element of confrontation is satisfied by the typical administration of a courtroom oath.<sup>162</sup>

### IV. *CRAWFORD*’S EFFECT UPON *CRAIG*

#### A. *The Argument that Craig Could Be Overruled*

While *Craig* and *Crawford* govern distinct confrontation issues, the views of the *Crawford* majority, which includes six current Supreme Court Justices, should be considered in assessing *Craig*’s continued vitality.<sup>163</sup> Indeed, the *Crawford* ruling, which soundly denounced the reliability-based analysis endorsed by *Craig*, suggests the stage has been set for *Craig*’s demise.<sup>164</sup> In that event, the few reported disguised witness cases would retain little to no precedential value, and the principles underlying *Crawford* would dictate the future of such claims. This section explores the likelihood that *Craig* will be limited or overruled, beginning with a brief description of the case that *Crawford* overruled, *Ohio v. Roberts*.<sup>165</sup>

In *Roberts*, defendant Herschel Roberts was charged with receiving stolen credit cards.<sup>166</sup> At Roberts’s preliminary hearing, defense counsel called to the stand the credit card holder’s daughter, Anita Isaacs, who

---

160. See *United States v. Yates*, 391 F.3d 1182, 1190 (11th Cir. 2004) (Edmondson, J., concurring), *rev’d en banc*, 438 F.3d 1307 (11th Cir. 2006).

161. *State v. Coy*, 397 N.W.2d 730, 734 (Iowa 1986). But see Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 BROOK. L. REV. 105, 200–01 (2005) (noting that while the Framers confidently believed the oath provided an assurance of truthfulness, “we are [now] less sure the oath assures the likelihood of truth-telling—which is why we now value cross-examination so much”).

162. See *Maryland v. Craig*, 497 U.S. 836, 851 (1990).

163. See *supra* notes 39–41 and accompanying text.

164. See *Wagner*, *supra* note 73, at 470 (“*Crawford v. Washington* contains dicta incompatible with *Maryland v. Craig* and portends that aberrant decision’s downfall.”).

165. *Ohio v. Roberts*, 448 U.S. 56 (1980).

166. *Id.* at 58.

testified that she had allowed Roberts to use her apartment while she was away, but refused to admit that she had given Roberts permission to use the credit cards.<sup>167</sup> When Roberts's trial commenced, Anita could not be located.<sup>168</sup> As a result, the trial judge admitted Anita's preliminary hearing testimony, and Roberts was convicted.<sup>169</sup>

By a four-to-three vote, the Ohio Supreme Court deemed the transcript inadmissible.<sup>170</sup> When the case reached the United States Supreme Court, the Court held that a hearsay declarant's out-of-court statement may be admitted if: (1) the declarant is unavailable to testify at trial, and (2) her out-of-court statement "bears adequate 'indicia of reliability.'"<sup>171</sup> According to *Roberts*, reliability is inferred "where the evidence falls within a firmly rooted hearsay exception"; otherwise, reliability may only be established if the evidence carries "particularized guarantees of trustworthiness."<sup>172</sup> Applying these principles, the Court found the preliminary hearing transcript sufficiently trustworthy, and thus reversed the Ohio Supreme Court's ruling.<sup>173</sup>

Over twenty years later, the Court abandoned the *Roberts* reliability framework in *Crawford*. In that case, "[p]etitioner Michael Crawford stabbed a man who allegedly tried to rape his wife, Sylvia."<sup>174</sup> At Crawford's attempted murder trial, the State sought to introduce a tape-recorded statement made by Sylvia to the police in which she described the stabbing in a manner contrary to Michael's self-defense claim.<sup>175</sup> Finding Sylvia's statement sufficiently reliable under the *Roberts* test, the trial court

---

167. *Id.*

168. *Id.* at 59–60. "Between November 1975 and March 1976, five subpoenas for four different trial dates were issued to Anita at her parents' Ohio residence." *Id.* at 59. However, Anita "was not at the residence when these were executed [ ] . . . and she did not appear at trial." *Id.*

169. *Id.* at 60.

170. *Id.* at 60–61 (holding that "the mere opportunity to cross-examine at a preliminary hearing did not afford constitutional confrontation for purposes of trial").

171. *Id.* at 66. According to *Roberts*, in the Court's Confrontation Clause jurisprudence prior to 1980, "[t]he focus of the Court's concern [was] to insure that there 'are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant.'" *Id.* at 65 (quoting *Dutton v. Evans*, 400 U.S. 74, 89 (1970)).

172. *Id.* at 66.

173. *See id.* at 67–73.

174. *Crawford v. Washington*, 541 U.S. 36, 38 (2004).

175. *Id.* at 38–40.

admitted the statement, and Crawford was convicted.<sup>176</sup>

On appeal, the Washington Court of Appeals deemed the statement unreliable.<sup>177</sup> Applying a nine-factor reliability test, the court found it significant that, among other things, Sylvia and Michael's statements differed on whether the victim actually had something in his hand when he was stabbed.<sup>178</sup> On further appeal, the Washington Supreme Court reversed.<sup>179</sup> Illustrating the malleability of the *Roberts* test, a unanimous court reasoned that Sylvia's statement was in fact reliable because it was nearly identical to Crawford's version of the events.<sup>180</sup>

When Crawford's case reached the United States Supreme Court, the Court overruled the *Roberts* test by replacing its reliability prong with the simple requirement of an opportunity to cross-examine the witness.<sup>181</sup> Writing for the Court, Justice Scalia reasoned:

[The Confrontation Clause] commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. . . .

. . . .

The *Roberts* test allows a jury to hear evidence . . . based on a mere judicial determination of reliability. It thus replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one.<sup>182</sup>

*Crawford's* reasoning has a potentially profound impact on *Craig*. Because the *Craig* test authorizes testimony under a *Roberts*-like judicial determination of reliability without necessarily requiring an actual

---

176. *Id.* at 40–41.

177. *Id.*

178. *Id.*

179. *Id.*

180. *See id.* at 41 (noting the Washington Supreme Court's reasoning that "when a codefendant's confession is virtually identical [to, *i.e.*, interlocks with,] that of a defendant, it may be deemed reliable").

181. *See id.* at 53–54, 68 ("[T]he Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination. . . . Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.").

182. *Id.* at 61–62.

confrontation,<sup>183</sup> and because *Craig*, like *Roberts*, permits “open-ended exceptions from the confrontation requirement to be developed by the courts,” the current Court would likely find the *Craig* test constitutionally suspect.<sup>184</sup> Under the *Craig* framework, like under *Roberts*, “[w]hether a statement is deemed reliable depends heavily on which factors the judge considers and how much weight he accords each of them.”<sup>185</sup> The disguised witness cases in general, and *Romero* in particular, support this point.

In analyzing *Craig*’s physical presence element of confrontation, the *Romero* majority found this element to encompass more than the witness’s presence in court.<sup>186</sup> According to the *Romero* majority, physical presence “entails an accountability” to the accused, which the majority deemed compromised by the witness’s belief that his disguise “would insulate him from the defendant.”<sup>187</sup> Adopting a more literal view of physical presence, dissenting Judge Lawrence E. Meyers disagreed. According to Judge Meyers, “unlike the screen in *Coy* and the closed circuit television in *Craig*[] . . . the outfit worn by [the witness] did not prevent or encroach upon face-to-face contact between the defendant and the witness.”<sup>188</sup> In the dissent’s view, “[n]othing was compromised—just slightly camouflaged.”<sup>189</sup> *Crawford* bemoaned the unpredictability of the *Roberts* framework, declaring that the Sixth Amendment’s protections should not turn on “amorphous notions of ‘reliability.’”<sup>190</sup> As the disagreement in *Romero* suggests, the same amorphous notions of reliability that plagued the *Roberts* test may also be present in *Craig*.

The seeds of this very argument were planted in *Craig*. While *Craig* held that the Confrontation Clause is not offended so long as reliability of the evidence is ensured, Justice Scalia’s dissent denounced this view.<sup>191</sup> According to Justice Scalia, “the Confrontation Clause does not guarantee

---

183. See *Maryland v. Craig*, 497 U.S. 836, 849 (1990) (stating that a physical confrontation was not always required).

184. *Crawford*, 541 U.S. at 54. Along with Justice Scalia, Justices Stevens, Kennedy, Thomas, Ginsburg, and Breyer signed the *Crawford* majority opinion. Chief Justice Roberts and Justices Alito and Sotomayor were not yet on the Court.

185. *Id.* at 63.

186. See *Romero v. State (Romero II)*, 173 S.W.3d 502, 505 (Tex. Crim. App. 2005).

187. *Id.*

188. *Id.* at 508 (Meyers, J., dissenting).

189. *Id.*

190. *Crawford*, 541 U.S. at 61.

191. See *Maryland v. Craig*, 497 U.S. 836, 857 (1990).

reliable evidence; it guarantees specific trial procedures that were thought to assure reliable evidence, undeniably among which was ‘face-to-face’ confrontation.”<sup>192</sup> A nearly identical argument earned seven votes in *Crawford* (with the other two Justices having since left the Court).<sup>193</sup> In a strikingly similar passage, the *Crawford* majority declared that the Confrontation Clause “commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”<sup>194</sup> According to *Crawford*, dispensing with confrontation because testimony is obviously reliable mischaracterizes the confrontation right as a substantive rather than a procedural guarantee, thus threatening to undermine the right.<sup>195</sup>

If Justice Scalia’s position continues to gain the support it received in *Crawford*, then *Craig*’s demise appears likely.<sup>196</sup> Under this approach, *Craig* would either be overruled or limited to its facts, and its reliability test would be replaced with the right to a literal confrontation.<sup>197</sup> Pairing Justice Scalia’s comments in *Craig* with his comments in *Crawford*, such a

---

192. *Id.* at 862 (Scalia, J., dissenting).

193. *See Crawford*, 541 U.S. 36.

194. *Id.* at 61.

195. *Id.* at 61–62.

196. Even before *Crawford*, commentators argued that a challenge to *Craig* would prove successful. In 2002, Professor Richard Friedman noted three problems with extending *Craig*: (1) *Craig* was a 5–4 decision, (2) *Craig* should arguably be limited to circumstances in which the “specific witness would be subject to trauma by testifying in the courtroom,” and (3) there is a fundamental difference between a child witness who would be traumatized “by having to testify face-to-face with the accused . . . [and a remote] witness who is fully able to testify but cannot be brought to the courtroom.” *See* Richard D. Friedman, *Remote Testimony*, 35 U. MICH. J.L. REFORM 695, 705–06 (2002).

197. Various courts have suggested that *Craig* should be limited to its unique factual setting. For example, in *Yates*, Judge Marcus argued in dissent that “*Craig* was tailored to a very particular predicament: that of an abused child who, if forced to take the witness stand to confront her abuser, would suffer emotional trauma that would compound the harm she had already suffered and also impair her ability to give reliable testimony.” *United States v. Yates*, 438 F.3d 1307, 1327 (11th Cir. 2006) (Marcus, J., dissenting). Applying a different method of distinguishing *Craig* in a similar case involving the use of two-way, closed-circuit television, the Second Circuit reasoned that the *Craig* standard was designed “to constrain the use of one-way closed-circuit television, whereby the witness could not possibly view the defendant. Because [the trial court] employed a two-way system that preserved the face-to-face confrontation celebrated by *Coy*, it is not necessary to enforce the *Craig* standard in this case.” *United States v. Gigante*, 166 F.3d 75, 81 (2d Cir. 1999).

right would presumably consist of both face-to-face confrontation<sup>198</sup> and an adequate opportunity for cross-examination.<sup>199</sup>

As applied to disguised witness cases, *Crawford's* principles would lead courts to strike down any disguise extensive enough to prevent a literal face-to-face confrontation.<sup>200</sup> Under this approach, the arguable reliability of the witness's testimony would not save it from constitutional attack. Further, *Craig's* cost-benefit method of analysis would be eliminated, and the right to face one's accusers would trump all but the most compelling government interests.<sup>201</sup> Before fully addressing this possible alteration of *Craig*, however, it is necessary to consider the argument that *Craig* might in fact survive the current Court's scrutiny.

#### B. *The Argument that Craig and Crawford Can Coexist*

Despite the constitutional infirmities inherent in the *Craig* test, it is possible that *Craig* and *Crawford* will continue to coexist, albeit in an uneasy manner. On the one hand, *Crawford* and its progeny set forth the standards for determining which out-of-court statements are subject to the confrontation right.<sup>202</sup> On the other hand, *Craig* governs the distinct issue

---

198. See *Maryland v. Craig*, 497 U.S. 836, 862 (1990) (Scalia, J., dissenting) (“[T]he Confrontation Clause . . . guarantees specific trial procedures that were thought to assure reliable evidence, undeniably among which was ‘face-to-face’ confrontation.”).

199. See *Crawford*, 541 U.S. at 53–54 (“[T]he Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant [ ] had a prior opportunity for cross-examination.”).

200. *Craig*, 497 U.S. at 862 (Scalia, J., dissenting).

201. See *id.* at 861, 870 (“The purpose of enshrining th[e] [Confrontation Clause] in the Constitution was to assure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant’s right to face his or her accusers in court. . . . We are not free to conduct a cost-benefit analysis of clear and explicit constitutional guarantees, and then to adjust their meaning to comport with our findings.”).

202. 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 . . . . Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’”); see also *Davis v. Washington*, 547 U.S. 813, 822 (2006) (clarifying the distinction between testimonial and nontestimonial statements in the context of police interrogations).

of the manner in which in-court testimony may be presented.<sup>203</sup> With such a clear separation between the cases, the *Craig* test might continue to govern courtroom testimony issues, whereas *Crawford* would delineate the outer reaches of the confrontation right.<sup>204</sup>

Although *Craig* and *Crawford* are analytically distinguishable, for *Craig*'s method of analysis to be sustained, something more than a mere ability to pigeonhole the cases into unique categories seems necessary. This additional justification may emerge from the impetus for *Crawford*'s jurisprudential change: the tendency of *Roberts* to "admit core testimonial statements that the Confrontation Clause plainly meant to exclude."<sup>205</sup> When the *Roberts* test is viewed through this lens, there is, in fact, one fundamental difference between the tests set forth in *Roberts* and *Craig*.

Under the old *Roberts* regime, evidence would be admitted if the court deemed the evidence reliable.<sup>206</sup> Under the *Craig* standard, a defendant's confrontation right may be satisfied if the testimony's reliability is assured.<sup>207</sup> While both tests premise constitutionality on whether a court deems the evidence reliable—a method of analysis generally rejected by *Crawford*—the *Craig* and *Roberts* tests diverge in exactly how reliability is to be determined.

Under *Craig*, evidence reliability is assured by "[t]he combined effect of the[] elements of confrontation," which consist of a personal

---

203. *Craig*, 497 U.S. at 860.

204. This view is supported by various passages in *Crawford*. For example, after completing its review of the historical record, the *Crawford* Court denoted the focus of its opinion by declaring: "[W]e once again reject the view that the Confrontation Clause applies of its own force only to in-court testimony, and that its application to out-of-court statements introduced at trial depends upon 'the law of Evidence for the time being.'" *Crawford*, 541 U.S. at 50–51 (citation omitted). The *Crawford* Court retained this focus on out-of-court statements throughout the remainder of its opinion. *See id.* at 54 ("[T]he common law in 1791 conditioned admissibility of *an absent witness's examination* on unavailability and a prior opportunity to cross-examine.") (emphasis added).

205. *Id.* at 63; *see also id.* at 67 ("We readily concede that we could resolve this case by simply reweighing the 'reliability factors' under *Roberts* and finding that Sylvia Crawford's statement falls short. . . . [However], to reverse the Washington Supreme Court's decision after conducting our own reliability analysis would perpetuate, not avoid, what the Sixth Amendment condemns. The Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and we, no less than the state courts, lack authority to replace it with one of our own devising.").

206. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

207. *Craig*, 497 U.S. at 850.

examination of the witness, opportunity for cross-examination, testimony under oath, and opportunity to assess demeanor.<sup>208</sup> Under *Roberts*, the reliability of evidence was analyzed by considering whether the evidence carried particularized guarantees of trustworthiness.<sup>209</sup> Unlike *Craig*, the *Roberts* Court did not further delineate its reliability standard, and by the time *Crawford* was decided, courts across the country had developed varying sets of reliability factors. Further, individual courts and judges often applied similar factors in different ways.<sup>210</sup> Thus, the *Roberts* reliability standard was far less clear, and much more amorphous, than its *Craig* counterpart. It was this very concern that led the *Crawford* Court to reject that standard.

Moreover, while the *Roberts* reliability analysis often included factors having nothing to do with actual confrontation, the same cannot be said of *Craig*'s elements of confrontation. Indeed, the *Craig* elements of personal examination, oath, cross-examination, and observation of witness demeanor, unlike the *Roberts* factors, collectively represent the Court's attempt to define the very procedural essence of confrontation.<sup>211</sup> Thus, the tendency under *Roberts* to "admit core testimonial statements that the Confrontation Clause plainly meant to exclude"<sup>212</sup> is not necessarily a concern under *Craig*.

#### V. ELEMENTS OF CONFRONTATION IN A POST-CRAWFORD WORLD

Despite the possibility of distinguishing *Craig* from *Crawford*, the fact remains that *Crawford* condemned the same type of judicial reliability assessment authorized by *Craig* on the grounds that such an inquiry is overly subjective and threatens to undermine the confrontation right's procedural nature. Indeed, various statements in the *Crawford* opinion suggest that any underlying differences between the *Roberts* and *Craig* methods of assessing reliability are constitutionally irrelevant and that any reliability-based assessment of the confrontation right fails to comport with

---

208. *Id.* at 845–46.

209. *Crawford*, 541 U.S. at 60 (citing *Roberts*, 448 U.S. at 66).

210. *See id.* at 63 (summarizing cases in which courts, applying the *Roberts* test, drew opposite inferences from similar facts). In *Crawford* itself, applying the *Roberts* test, the Washington Court of Appeals applied a nine-factor test to determine whether Sylvia Crawford's statement should be admitted. *Id.* at 41.

211. *See Craig*, 497 U.S. at 846 (describing these procedures as those that ensure evidence is "subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings").

212. *Crawford*, 541 U.S. at 63.

constitutional demands.<sup>213</sup> It thus remains likely that the current Court would disfavor *Craig*.

Assuming the *Craig* test will either be overruled or confined to the facts of that case, the next question to consider is precisely what test would replace *Craig*. To properly address this issue, the Court must first resolve the very nature of confrontation, beginning with the proposition that confrontation is merely synonymous with cross-examination.

A. *Cross-Examination as the Confrontation Clause's Primary Focus*

If *Crawford* indeed elevated cross-examination above face-to-face confrontation as the new confrontation right *sine qua non*, the test that would govern manner-of-courtroom-testimony issues would make opportunity for cross-examination its primary focus.<sup>214</sup> Thus, this underlying issue must be resolved before a coherent confrontation framework can be established.

*Crawford* simultaneously represents both the strongest supporting argument and the strongest counterargument for the proposition that the right of confrontation means nothing more than the opportunity for cross-examination. The argument favoring this proposition is based on the *Crawford* holding itself. On the precise issue before the Court, *Crawford* held that an out-of-court, testimonial statement may not be admitted against a criminal defendant unless the person who made the statement is unavailable for trial and is, or has been, subject to cross-examination.<sup>215</sup> Throughout its opinion, in those passages in which the *Crawford* Court mandated opportunity for cross-examination, the Court conspicuously failed to mention the right to face-to-face confrontation. In the most noteworthy example, the Court stated that “[w]here testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.”<sup>216</sup> Referencing cross-examination, the Court declared that “[i]t is not enough

---

213. See, e.g., *id.* at 69 (“[T]he only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.”); see also Wagner, *supra* note 72, at 476.

214. 5 WIGMORE, *supra* note 26, § 1396 (“If there has been a Cross-examination, there has been a Confrontation. The satisfaction of the right of Cross-examination . . . disposes of any objection based on the so-called right of Confrontation.”); *id.* § 1365 (“The right of confrontation is the right to the opportunity of cross-examination.”).

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

216. *Id.* at 68.

to point out that most of the usual safeguards of the adversary process attend the statement, when the *single safeguard* missing is *the one* the Confrontation Clause demands.”<sup>217</sup> Similar passages can be found throughout the opinion.<sup>218</sup>

At least one federal judge seems to have adopted this view of *Crawford* (notably, in a case involving an issue more properly understood as a manner-of-testimony claim).<sup>219</sup> According to Eleventh Circuit Judge Gerald Bard Tjoflat:

The constitutionality of admitting out-of-court, testimonial statements is governed by *Crawford v. Washington*. . . . Physical presence is not mentioned [in *Crawford*], nor is it required. In this case, the [overseas] witnesses’ statements [taken via two-way videoconference] were unquestionably testimonial, and therefore the *Crawford* requirements would need to be satisfied. The defendant here was given a full opportunity to cross-examine the unavailable witnesses. Constitutional issue settled.<sup>220</sup>

Unless one should read *Crawford*’s cross-examination requirement as requiring not just cross-examination but *effective* cross-examination (which might itself require a face-to-face meeting between accuser and accused) when *Crawford* applies, the *Crawford* holding suggests that a mere *opportunity* for cross-examination is sufficient to satisfy the Clause.<sup>221</sup>

---

217. *Id.* at 65 (emphases added).

218. *See, e.g., id.* at 67 (“Far from obviating the need for cross-examination, the ‘interlocking’ ambiguity of the two statements made it all the more imperative that they be tested to tease out the truth.”); *id.* at 68 (“In this case, the State admitted Sylvia’s testimonial statement against petitioner, despite the fact that he had no opportunity to cross-examine her. That alone is sufficient to make out a violation of the Sixth Amendment.”).

219. *See* 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, 863–65 (2007) (attacking the argument of the *Yates* dissenters characterizing live testimony transmitted via two-way videoconference as out-of-court evidence, and instead arguing that “[t]estimony taken from a remote location is nonetheless presented live during the trial, and hence is more similar to the testimony presented in *Craig* (that is, in-court testimony of a child abuse victim taken from the judge’s chambers during trial) than that presented in *Crawford* (that is, a tape-recorded statement given at the scene of a crime by a witness to the crime long before criminal charges have been filed).”).

220. *United States v. Yates*, 438 F.3d 1307, 1326–27 (11th Cir. 2006) (Tjoflat, J., dissenting) (citation omitted) (footnote omitted).

221. *See Crawford*, 541 U.S. at 68 (holding that the Sixth Amendment

Under *Crawford*, if a declarant is truly unavailable for trial, opportunity for prior cross-examination of that declarant is all that is required—no more and no less.<sup>222</sup> Such a singular insistence upon cross-examination could mean, for example, that the Court would admit the out-of-court testimonial statements of a declarant who is later subjected to cross-examination at the defendant’s preliminary hearing, even if that declarant testified at that hearing in full disguise.

To accept this argument as a general Confrontation Clause proposition, one must assume that *Crawford*’s insistence upon cross-examination was not only intended to apply to the precise issue before the Court—the admissibility of out-of-court testimonial statements—but also more broadly across all Confrontation Clause jurisprudence. One must also place primary emphasis on *Crawford*’s holding and entirely ignore the remainder of that opinion. These are each problematic assumptions.<sup>223</sup> Accepting these assumptions, however, it might then be reasonable to conclude that *Crawford*’s failure to mention the face-to-face requirement in its holding, combined with *Craig*’s explicit retreat from that requirement, add up to a Court prepared to equate confrontation with cross-examination.

The assumptions underlying this argument become potentially viable when one considers the Confrontation Clause’s muddled history. Prior to *Crawford*, the Supreme Court on numerous occasions exalted the right of cross-examination as the primary right advanced by the Clause. For example, in *Delaware v. Van Arsdall*, the Court stated that “the main and essential purpose of confrontation is *to secure for the opponent the*

---

demands a prior opportunity for cross-examination). Notably, the Ohio Supreme Court in *Roberts* reasoned that “the mere opportunity to cross-examine at [a] preliminary hearing cannot be said to afford [constitutional] confrontation for purposes of the trial.” *State v. Roberts*, 378 N.E.2d 492, 496 (Ohio 1978). The *Crawford* Court would have reversed the Ohio Supreme Court’s ruling directly on these grounds. Significantly, the Ohio Supreme Court’s three dissenting justices in *Roberts* would have ruled that “the test is the opportunity for full and complete cross-examination rather than the use which is made of that opportunity [by the defense].” *See id.* (quoting *United States v. Allen*, 409 F.2d 611, 613 (10th Cir. 1969), *overruled by Ohio v. Roberts*, 448 U.S. 56 (1980)).

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

223. *See, e.g., Davies, supra* note 161, at 121–26 (arguing that Justice Scalia’s *Crawford* opinion contained numerous historical flaws and misinterpretations, stating that the opinion “oversimplified history insofar as [it] conveyed the impression that the right to confrontation in the famous [English] cases was understood solely or primarily in terms of cross-examination”).

*opportunity of cross-examination.*"<sup>224</sup> In *Delaware v. Fensterer*, the Court similarly declared that "the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose [testimonial] infirmities [such as forgetfulness, confusion, or evasion] through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony."<sup>225</sup> And in the disguised witness context, the Second Circuit in *Morales* downplayed "the guarantee of a generalized right to face-to-face confrontation," questioning whether such a right is, in fact, clearly established by controlling Supreme Court precedent.<sup>226</sup>

Influential commentators have also viewed the confrontation right as guaranteeing nothing more than cross-examination. Wigmore is the most famous proponent of this view. According to Wigmore, "[t]here never was at common law any recognized right to an indispensable thing called Confrontation as distinguished from Cross-examination. . . . [I]t was the same right under different names."<sup>227</sup> In Wigmore's view, while confrontation also involves the incidental advantage of "the observation by the tribunal of the witness' demeanor on the stand," this aspect of confrontation is not essential, and "may be dispensed with when it is not feasible."<sup>228</sup>

Adopting Wigmore's view of confrontation, courts could dispense with the observation of witness demeanor when it becomes "feasible" to do so. As compared to *Craig*, this feasibility approach would permit prosecutors to utilize special testimonial procedures despite little to no public policy justification, and presumably would permit even the most extensive disguises. Under Wigmore's view, face-to-face confrontation would carry even less significance than under *Craig*.<sup>229</sup>

---

224. *Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986) (quoting *Davis v. Alaska*, 415 U.S. 308, 315–16 (1974)). Notably, however, the ultimate source for this proposition is Wigmore's Evidence treatise, which was itself debunked by the *Coy* Court. See *Coy v. Iowa*, 487 U.S. 1012, 1018 n.2 (1988).

225. *Delaware v. Fensterer*, 474 U.S. 15, 22 (1985) (per curiam).

226. *Morales v. Artuz*, 281 F.3d 55, 62 (2d Cir. 2002); see also *Romero v. State (Romero I)*, 136 S.W.3d 680, 688 (Tex. Ct. App. 2004) (discussing how the Second Circuit doubted Supreme Court precedent mandated an explicit face-to-face confrontation in a case involving a witness with dark sunglasses), *aff'd*, 173 S.W.3d 502 (Tex. Crim. App. 2005).

227. 5 WIGMORE, *supra* note 26, § 1397.

228. *Id.* § 1365 (emphasis added).

229. Compare *id.* ("Confrontation also involves . . . the observation by the tribunal of the witness' demeanor on the stand, as a minor means of judging the value

B. *Face-to-Face Confrontation and Cross-Examination as the Two Pillars of Confrontation*

When one considers the text of the Confrontation Clause, the purposes of the confrontation right, its common law roots, the Supreme Court's many pronouncements regarding the Clause's dual underlying requirements, and the entirety of the *Crawford* opinion, the thesis that the right of confrontation guarantees nothing more than an opportunity for cross-examination does not hold up. The starting point for analyzing this dispute is the constitutional text itself.

1. *The Text*

The Confrontation Clause assures the right of an accused "to be confronted with the witnesses against him."<sup>230</sup> The text does not contain the words "face-to-face" or "cross-examination." Thus, the precise nature of the confrontation right turns on the meaning of the word "confront," particularly as that term was understood at the time of the Sixth Amendment's ratification.

The argument against equating confrontation with cross-examination is strong. Indeed, the *Coy* Court soundly rejected that view,<sup>231</sup> and even *Craig* admitted that "face-to-face confrontation forms 'the core of the values furthered by the Confrontation Clause.'"<sup>232</sup> In a simple yet persuasive textual argument, the *Coy* Court declared that "[t]he thesis [equating confrontation and cross-examination] is on its face implausible, if only because the phrase 'be confronted with the witnesses against him' is an exceedingly strange way to express a guarantee of nothing more than cross-examination."<sup>233</sup> The *Coy* Court went further by characterizing "the irreducible literal meaning of the Clause" as the "right to *meet face to face*

---

of his testimony. But this minor advantage . . . may be dispensed with when it is not feasible."), *with Maryland v. Craig*, 497 U.S. 836, 851 (1990) (requiring, at a minimum, that the jury retain the opportunity "to view . . . the demeanor (and body) of the witness as he or she testifies").

230. U.S. CONST. amend. VI.

231. See *Coy v. Iowa*, 487 U.S. 1012, 1018 n.2 (1988) (criticizing the dissent's use of Wigmore's Evidence treatise as grounds for asserting the right to confrontation was simply equivalent to cross-examination).

232. See *Craig*, 497 U.S. at 847 (quoting *California v. Green*, 399 U.S. 149, 157 (1970)); see also Friedman, *supra* note 196, at 706 ("[A]t most *Craig* enunciated a constitutional outer bound within which departures from the norm of testimony given face-to-face would be tolerated.").

233. *Coy*, 487 U.S. at 1019 n.2.

all those who appear and give evidence at trial.”<sup>234</sup> To support this thesis, Justice Scalia noted that “the word ‘confront’ ultimately derives from the prefix ‘con-’ (from ‘contra’ meaning ‘against’ or ‘opposed’) and the noun ‘frons’ (forehead).”<sup>235</sup> Thus, the very structure of the word confront appears to signify a very personal, adversarial meeting, quite possibly an even more intimate encounter than what is typically provided by the courtroom setting.<sup>236</sup>

Despite Justice Scalia’s claims, a close reading of the Sixth Amendment reveals textual problems with his arguments. For example, while the Framers could have used the word “cross-examination” in the Sixth Amendment, this alone does not rule out the possibility that confrontation, as understood at that time, was indeed synonymous with cross-examination. Moreover, the same method of analysis *Coy* used to debunk Wigmore’s thesis can be used to disprove its own thesis. Just as the phrase “be confronted with the witnesses against him” is a “strange way to express a guarantee of nothing more than cross-examination,” the phrase is also “a strange way to express a guarantee of nothing more than” a confrontation literally performed face-to-face.<sup>237</sup> Indeed, twenty-one state constitutions—at least a handful of which were enacted around the same time as the federal Constitution<sup>238</sup>—have at some time provided a right to meet adverse witnesses face-to-face,<sup>239</sup> and those words could have easily

---

234. See *id.* at 1021 (quoting *Green*, 399 U.S. at 175) (internal quotation marks omitted).

235. *Id.* at 1016.

236. According to Justice Scalia, Shakespeare was likely referring to the root meaning of confrontation when Richard II declared: “Then call them to our presence—face to face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak . . . .” *Id.* (citing WILLIAM SHAKESPEARE, *RICHARD II* act 1, sc. 1). Notably, this very same passage can be found in Wigmore’s treatise, yet Wigmore attaches less significance to the passage than does Justice Scalia. 5 WIGMORE, *supra* note 26, § 1395. If Shakespeare’s view indeed reflects the Framers’ understanding of the confrontation right, then *Coy* might be correct in characterizing confrontation as the “right to *meet face to face*” one’s accusers. *Coy*, 487 U.S. at 1016 (quoting *Green*, 399 U.S. at 175). I fail to see how one line from Shakespeare’s voluminous writings can resolve this particular constitutional issue.

237. *Coy*, 487 U.S. at 1018–19 n.2.

238. See *Commonwealth v. Bergstrom*, 524 N.E.2d 366, 371 n.9 (Mass. 1988) (citing Murl A. Larkin, *The Right of Confrontation: What Next?*, 1 TEX. TECH L. REV. 67, 75–76 (1969)) (“The Massachusetts Declaration of Rights . . . was the first [State Constitution] to use the language ‘to meet the witnesses against him face to face.’”).

239. Seventeen states currently provide an explicit constitutional right to meet adverse witnesses face-to-face. See ARIZ. CONST. art. II, § 24 (“In criminal

been selected by the Constitution's drafters.<sup>240</sup>

Without a clear answer from the Clause's text, the debate turns to the

---

prosecutions, the accused shall have the right . . . to meet the witnesses against him face to face . . . ."); COLO. CONST. art. II, § 16 ("In criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face . . . ."); DEL. CONST. art. I, § 7 ("In all criminal prosecutions, the accused hath a right . . . to meet the witnesses in their examination face to face . . . ."); IND. CONST. art. I, § 13 ("In all criminal prosecutions, the accused shall have the right . . . to meet the witnesses face to face . . . ."); KAN. BILL OF RIGHTS § 10 ("In all prosecutions, the accused shall be allowed . . . to meet the witness face to face . . . ."); KY. CONST. § 11 ("In all criminal prosecutions the accused has the right . . . to meet the witnesses face to face . . . ."). Other states with similar constitutional provisions include Massachusetts, MASS. CONST. pt. I, art. 12; Missouri, MO. CONST. art. 1, § 18(a); Montana, MONT. CONST. art. 2, § 24; Nebraska, NEB. CONST. art. I, § 11; New Hampshire, N.H. CONST. pt. I, art. 15; Ohio, OHIO CONST. art. 1, § 10; Oregon, OR. CONST. art. I, § 11; South Dakota, S.D. CONST. art. VI, § 7; Tennessee, TENN. CONST. art. 1, § 9; Washington, WASH. CONST. art. I, § 22; and Wisconsin, WIS. CONST. art. I, § 7. Along with these seventeen current provisions, Pennsylvania only recently substituted the words "be confronted with the witnesses against him" for "meet the witnesses face to face." See PA. CONST. art. 1, § 9 (amended 1995). South Carolina made a similar change in 1971. Compare S.C. CONST. of 1895 art. I, § 14 (revised 1971) (guaranteeing the right "to be confronted with the witnesses against him"), with S.C. CONST. of 1868 art. I, § 13 (repealed 1895) (stating that "[e]very person shall have a right . . . to meet the witnesses against him face to face"). Illinois made a similar change in 1994, see ILL. CONST. art. 1, § 8 (amended 1994) (substituting "to be confronted with the witnesses against him or her" for "to meet the witnesses face to face"), as did Florida. Compare FLA. CONST. of 1885, DECLARATION OF RIGHTS, § 11 ("In all criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face"), with FLA. CONST. art. I, § 16 ("In all criminal prosecutions the accused shall . . . have the right to . . . confront at trial adverse witnesses"). Further, while North Dakota does not have a constitutional provision on this issue, a North Dakota statute once guaranteed state criminal defendants "the right . . . to meet the witnesses against him face to face." N.D. CENT. CODE § 10393 (1913).

240. This language distinction is not insignificant. For example, in federal court, the defendant's counsel could perform the confrontation on behalf of the accused via cross-examination of the accusing witness, and the defendant's *textual* claim that his right of confrontation was somehow infringed would likely be rejected. See, e.g., *United States v. Abu Ali*, 528 F.3d 210, 239 (4th Cir. 2008) (sanctioning defendant's physical absence from the depositions of key overseas witnesses because "the trial court attempted to fashion deposition procedures that would best preserve [the defendant]'s Confrontation Clause right[,] including the fact that "two defense attorneys . . . attended the depositions in Saudi Arabia, while a third attorney sat with [the defendant] in Virginia"). If this same scenario were played out in Massachusetts state court, however, the defendant would presumably have a viable constitutional claim under the Massachusetts Declaration of Rights. See *supra* notes 238–39 and accompanying text.

common law understanding of confrontation, along with the right's underlying historical purposes.

## 2. *Common Law Meaning*

The *Crawford* Court began its analysis by declaring that “the ‘right . . . to be confronted with the witnesses against him,’ is most naturally read as a reference to the right of confrontation at common law.”<sup>241</sup> This section considers that common law meaning.

In *California v. Green*, Justice Harlan squarely confronted the historical meaning of the confrontation right,<sup>242</sup> and ultimately found its common law meaning hopelessly ambiguous.<sup>243</sup> Justice Harlan invoked this ambiguity to rebuke the Wigmore thesis.<sup>244</sup> In Justice Harlan's view, “the common-law [meaning] of [confrontation] is so ambiguous as not to warrant the assumption that the Framers were announcing a principle whose meaning was so well understood that this Court should . . . accept those dicta in the common law that equated confrontation with cross-examination.”<sup>245</sup>

Rejecting the Wigmore thesis,<sup>246</sup> Justice Harlan reached only the

---

241. *Crawford v. Washington*, 541 U.S. 36, 54 (2004).

242. *See California v. Green*, 399 U.S. 149, 172 (1970) (Harlan, J., concurring) (“The California decision that we today reverse demonstrates . . . the need to approach this case more broadly than the Court has seen fit to do, and to confront squarely the Confrontation Clause because the holding of the California Supreme Court is the result of an understandable misconception, as I see things, of numerous decisions of this Court, old and recent, that have indiscriminately equated ‘confrontation’ with ‘cross-examination.’”).

243. *Id.* at 175. Justice Harlan, for example, found ambiguity in the scope of the Confrontation Clause's coverage. After quoting the Sixth Amendment's text, which explicitly grants “the accused . . . the right . . . to be confronted with the witnesses against him,” Justice Harlan noted that, “[s]imply as a matter of English the [Confrontation] [C]lause may be read to confer nothing more than a right to meet face to face all those *who appear and give evidence at trial*,” but that the same words are “equally susceptible of being interpreted as a blanket prohibition on the use of any hearsay testimony” from out-of-court declarants. *Id.* (emphasis added).

244. *Id.* at 178–79.

245. *Id.* at 174–75.

246. In challenging Wigmore's thesis, Justice Harlan writes:

Wigmore's more ambulatory view—that the Confrontation Clause was intended to constitutionalize the hearsay rule and all its exceptions as evolved by the courts—rests also on assertion without citation, and attempts to settle on ground that would appear to be equally infirm as a matter of logic.

following, broad conclusion regarding the Clause's meaning:

From the scant information available it may tentatively be concluded that the Confrontation Clause was meant to constitutionalize a barrier against flagrant abuses, trials by anonymous accusers, and absentee witnesses. [Wigmore's thesis] [t]hat the Clause was intended to ordain common law rules of evidence with constitutional sanction is doubtful . . . .<sup>247</sup>

For purposes of the instant analysis, if the above passage indeed reflects the Framers' understanding of the common law confrontation right, then the right, as understood at that time, would almost surely encompass both the right to cross-examine *and* to physically confront one's accusers. Anonymous accusers, after all, can most easily be stripped of their anonymity by a physical courtroom appearance, and trial by absentee witnesses can most easily be avoided by bringing those witnesses to court and subjecting their claims to cross-examination.

If Harlan's broad notion of confrontation indeed reflects the Framers' views, it would be difficult to rule out either cross-examination or physical confrontation as a core component of confrontation. Strangely enough, one needs to look no further than Wigmore's evidence treatise to discover support for this view within the common law cases.

According to the famous Wigmore treatise, "confrontation has two purposes," but "*the opportunity for cross-examination*" is its "main and essential purpose."<sup>248</sup> As such, a witness's presence before the tribunal may be easily dispensed with.<sup>249</sup> While Wigmore's thesis undermines the argument that confrontation requires more than cross-examination, the very same common law authorities Wigmore relies upon to support his claim in fact refute it.

Wigmore's treatise makes the following claim: "[t]hat [the opportunity for cross-examination] is the true and essential significance of

---

Wigmore's reading would have the practical consequence of rendering meaningless what was assuredly in some sense meant to be an enduring guarantee. It is inconceivable that if the Framers intended to constitutionalize a rule of hearsay they would have licensed the judiciary to read it out of existence by creating new and unlimited exceptions.

*Id.* at 178–79 (footnote omitted).

247. *Id.* at 179.

248. 5 WIGMORE, *supra* note 26, § 1395.

249. *Id.*

confrontation is clear . . . from the language of counsel and judges from the beginning of the Hearsay rule to the present day.”<sup>250</sup> Wigmore then immediately cites eight cases to support this claim, seven of which *actually support* the opposite proposition. Contrary to Wigmore’s claims, these cases actually reflect a common law understanding of confrontation consisting of both cross-examination and physical confrontation—a right which does not single out either guarantee as the lone, essential right.<sup>251</sup> One of Wigmore’s pre-Founding cited cases, for example, declares:

How contrary this is to a fundamental rule in our law, that no evidence shall be given against a man, when he is on trial for his life, but *in the presence of the prisoner*, because *he may cross-examine him* who gives such evidence; and that is due to every man in justice.<sup>252</sup>

A second of Wigmore’s cited cases declares:

Confronting witnesses does not mean impeaching their character, but means *cross-examination in the presence of the accused*. When the common law of England was transported to these colonies . . . our constitutions all declared—what statutes had then provided in England—that the accused should have . . . process for witnesses and be entitled to . . . *cross-examine those for the prosecution in the presence of (confronting) the accused*.<sup>253</sup>

A third cited case states:

It is quite a valuable right to a prisoner to be confronted upon his trial with the witnesses against him, so that he may cross-examine them and the jury see them and thus judge of their credibility. . . . *The evidence of the witness was taken in his presence where he had the opportunity to cross-examine him . . .*<sup>254</sup>

A fourth cited case similarly declares that “[t]he other side ought not to be deprived of the opportunity of *confronting the witnesses* and *examining them* publicly, which has always been found the most effectual

---

250. *Id.*

251. *See id.*

252. *See id.* (quoting Fenwick’s Trial, (1696) 13 How. St. Tr. 591, 638, 712 (H.C.)) (emphasis added).

253. *See id.* (quoting Howser v. Commonwealth, 51 Pa. 337 (1865)) (emphasis added).

254. *See id.* (quoting People v. Fish, 26 N.E. 319, 322 (N.Y. 1891)) (emphasis added).

method for discovering of the truth.”<sup>255</sup>

All of the above case quotations, along with other similar passages not provided above, explicitly elevate both cross-examination and physical confrontation *in the accused's presence* as core components of confrontation. Contrary to Wigmore's claim, these cases do not clearly elevate one right above the other. Yet, Wigmore presents these authorities as establishing the “main idea in the process of confrontation [a]s . . . the opponent's opportunity of cross-examination.”<sup>256</sup> This view of confrontation simply does not follow from the cited cases.<sup>257</sup>

### 3. *The Purposes*

By presumptively deterring false accusations and by enabling the jury to examine possible biases, the Clause's core protections of cross-examination and face-to-face confrontation work in tandem to generate effective fact-finding. Indeed, the confrontation right would seem to be only half a right if either of its underlying protections were eliminated.<sup>258</sup>

According to the Supreme Court, “there is something deep in human nature that regards face-to-face confrontation between accused and accuser as ‘essential to a fair trial in a criminal prosecution,’” in that a witness “may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts.”<sup>259</sup> This deep-rooted belief is premised on the notion that “it is always more difficult to tell a lie about a person ‘to his face’ than ‘behind his back,’” and that a lie told in the accused's presence “will often be told less

---

255. *See id.* (quoting *Duke of Dorset v. Girdler*, Finch's Prec. Ch. 531 (1720)) (emphasis added).

256. *Id.*

257. Further, in Wigmore's own observations regarding the common law meaning of confrontation, he notes that, “[i]n the period when . . . ‘ex parte’ depositions were still used against an accused person . . . we find him frequently protesting that the witness should be ‘brought face to face,’ or that he should be ‘confronted’ with the witnesses against him.” *Id.*

258. Invoking its ability to deter false accusations and enhance credibility determinations, the Supreme Court has declared face-to-face confrontation “the core” value underlying the Confrontation right. *Coy v. Iowa*, 487 U.S. 1012, 1017 (1988) (citing *California v. Green*, 399 U.S. 149, 157 (1970)); *see also* Carol A. Chase, *The Five Faces of the Confrontation Clause*, 40 HOUS. L. REV. 1003, 1011 (2003). In similar rhetoric, the Court has deemed cross-examination the “greatest legal engine ever invented for the discovery of truth.” *Maryland v. Craig*, 497 U.S. 836, 846 (1990) (quoting *Green*, 399 U.S. at 158).

259. *Coy*, 487 U.S. 1017, 1018–19.

convincingly.”<sup>260</sup>

In light of the perceived influence of the Sir Walter Raleigh incident, it is indeed difficult to imagine an adversarial-based confrontation right that dispenses with a face-to-face encounter between accuser and accused.<sup>261</sup> One of the Court’s earliest cases interpreting the Confrontation Clause affirms this position. In 1895, the *Mattox* Court wrote:

The primary object of [the Confrontation Clause] was to prevent depositions or ex parte affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may . . . judge by his demeanor . . . whether he is worthy of belief.<sup>262</sup>

There are inherently strong reasons for mandating a face-to-face encounter with one’s accusers. A Founding-era incident occurring in 1789 and recounted by Colonel George Rogers Clark supports this view.<sup>263</sup>

As recounted by Colonel Clark, one evening in 1789, the Colonel received reports that a Mr. Cerré, an influential local merchant and one of the young nation’s most inveterate enemies, had incited the local Indians to murder. Cerré later denied the allegations, and expressly “defied any man to prove that he had ever incited the Indians to war.”<sup>264</sup> Suspecting that Cerré’s accusers “were probably in debt to him, and hence desired to ruin him” in order to “extricate themselves from their debts,” the Colonel sent for the man’s accusers.<sup>265</sup> When the accusers arrived, the Colonel had Mr. Cerré brought in, at which point the Colonel “perceived plainly the

---

260. *Id.* at 1019.

261. A classic tale told in many law school courses and texts on Evidence, Sir Walter Raleigh’s conviction for treason in 1603—which was based on the ex parte confession of an alleged co-conspirator who later recanted his statements and whom Raleigh was not permitted to meet face-to-face or to cross-examine at trial—is often put forth as an example of the injustice inherent in refusing an accused the right to meet his accusers in court. See generally DAVID A. SKLANKSY, EVIDENCE: CASES, COMMENTARY, AND PROBLEMS 44–46 (2008).

262. *Mattox v. United States*, 156 U.S. 237, 242–43 (1895). Eighty-five years later, the Court in *Ohio v. Roberts* repeated this theme. See *Ohio v. Roberts*, 448 U.S. 56, 63–64 (1980).

263. 5 WIGMORE, *supra* note 26, § 1395 (quoting GEORGE ROGERS CLARK, MEMOIR ON THE CONQUEST OF THE ILLINOIS 42 (1920)).

264. *Id.* (quoting CLARK, *supra* note 263).

265. *Id.* (quoting CLARK, *supra* note 263).

confusion into which they were thrown by his appearance.”<sup>266</sup> According to the author’s rendition of the events:

I stated the case to the whole assembly, telling them that I never condemned a man unheard. I said that Cerré was now present, and I was ready to do justice to the world in general by punishing him if he were found guilty of inciting to murder, or by acquitting him if he proved innocent of the charge. I closed by desiring them to submit their information. [Cerré’s] accusers began to whisper among themselves and to retire for private conversation. At length only one out of six or seven was left in the room, and I asked him what he had to say to the point in question. In short, I found that *none of them had anything to say!* I gave them a suitable reprimand; and after some general conversation informed Mr. Cerré that I was happy to find he had so honorably acquitted himself of so black a charge. . . . [Later], he became a most valuable man to us.<sup>267</sup>

As Cerré’s case reveals, the right of confrontation can serve its truth-determining purposes either through cross-examination *or* through a physical confrontation between accuser and accused, and cross-examination is not always necessary. In Cerré’s case, the mere presence of Cerré across the room confounded his accusers and led to his acquittal. Indeed, the Colonel’s observations of the accusers’ strange demeanor appeared to resolve the case even before the accusers were asked to speak their case. Cerré’s case illustrates that, as a normative matter, an adversarial-based confrontation right should not easily dispense with a face-to-face encounter between accuser and accused. The question turns, therefore, to the level of support this view would garner from the current Supreme Court.

#### 4. *Supreme Court Pronouncements*

The right to a literal face-to-face confrontation is well-supported by the Supreme Court’s Confrontation Clause jurisprudence. Two cases decided near the turn of the twentieth century, *Kirby v. United States* and *Dowdell v. United States*, establish this proposition.<sup>268</sup>

In *Dowdell*, the Court equated the Sixth Amendment’s right of confrontation with a similar provision from the Philippine Bill of Rights,

---

266. *Id.* (quoting CLARK, *supra* note 263).

267. *Id.* (quoting CLARK, *supra* note 263).

268. *Dowdell v. United States*, 221 U.S. 325 (1911); *Kirby v. United States*, 174 U.S. 47 (1899).

declaring that the Philippine right “to meet the witnesses face to face . . . is substantially the provision of the 6th Amendment of the Constitution of the United States.”<sup>269</sup> The *Kirby* Court characterized the confrontation right as encompassing both the right to physical confrontation and an opportunity for cross-examination.<sup>270</sup> According to the Court, “a fact which can be primarily established only by witnesses cannot be proved . . . except by witnesses who confront [the accused] at the trial, *upon whom he can look while being tried, whom he is entitled to cross-examine*, and whose testimony he may impeach.”<sup>271</sup> Applying these principles, *Kirby* deemed the evidence at issue in that case inadmissible against the defendant because it “was not given *in his presence*.”<sup>272</sup>

Over seventy years later, Justice Harlan recounted the historical understanding of the confrontation right and concluded that, “as a matter of English,” the Clause confers at least “a right to meet face to face all those who appear and give evidence at trial.”<sup>273</sup> Building from Justice Harlan’s analysis, Justice Scalia’s *Coy* opinion similarly rejected the thesis equating confrontation with cross-examination.<sup>274</sup>

Pairing Justice Scalia’s *Craig* dissent with his *Crawford* opinion, one might conclude that Justice Scalia views the Clause’s two underlying protections as separate, literal requirements. In his *Craig* dissent, Justice Scalia rejected the view that the Confrontation Clause simply ensures reliability, arguing instead that the Clause “guarantees specific trial procedures that were thought to *assure* reliable evidence, undeniably *among which* was ‘face-to-face’ confrontation.”<sup>275</sup> Fourteen years later, Justice Scalia penned a strikingly similar passage in *Crawford*, arguing that the Clause “commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-

---

269. *Dowdell*, 221 U.S. at 329–30 (arguing that the Philippine Bill of Rights provision “is substantially taken from the Bill of Rights of the [United States] Constitution” (citing *Kepner v. United States*, 195 U.S. 100 (1904))).

270. *See Kirby*, 174 U.S. at 55.

271. *Id.* (emphasis added). Later, the Court summarized the underlying principle as follows: “[O]ne accused of having received stolen goods . . . is not, within the meaning of the Constitution confronted with the witnesses against him when the fact that the goods were stolen is established simply by the record of another criminal case with which the accused had no connection and in which he was not entitled to be represented by counsel.” *Id.* at 60.

272. *Id.* at 55 (emphasis added).

273. *California v. Green*, 399 U.S. 149, 175 (1970).

274. *Coy v. Iowa*, 487 U.S. 1012, 1021 (1988).

275. *Maryland v. Craig*, 497 U.S. 836, 862 (1990) (Scalia, J., dissenting).

examination.”<sup>276</sup> Given the factual context of *Craig*, in which the defendant was denied opportunity for face-to-face interaction with her accusers,<sup>277</sup> and that of *Crawford*, which dealt with the admissibility of out-of-court statements not previously subjected to cross-examination,<sup>278</sup> Justice Scalia’s shift from face-to-face confrontation to cross-examination makes sense.<sup>279</sup>

Rather than detracting from the face-to-face requirement, *Crawford* enhances it. Indeed, *Crawford*’s apparent insistence upon the opportunity for cross-examination must not trump the entirety of that opinion, which actually reveals a Court devoted to both protections. After its historical analysis of the confrontation right, *Crawford* summarized its findings as follows:

This history supports *two inferences* about the meaning of the Sixth Amendment.

First, the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused. It was these practices that the Crown deployed in notorious treason cases like [Sir Walter] Raleigh’s; that the Marian statutes invited; that English law’s assertion of a right to confrontation was meant to prohibit; and that the Founding-era rhetoric decried. *The Sixth Amendment must be interpreted with this focus in mind.*

....

... [E]*x parte* examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have

---

276. *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

277. *Craig*, 497 U.S. at 842.

278. *Crawford*, 541 U.S. at 40.

279. With an eye toward overruling the *Roberts* standard—a test which concerned the admissibility of out-of-court statements—it makes perfect sense for *Crawford* to have focused its analysis on cross-examination rather than face-to-face confrontation. All statements in this category of evidence involve witnesses who did not appear at trial, which would generally make face-to-face confrontation an impossibility. Thus, it makes little sense to speak of the right of a face-to-face confrontation with the witness, but it does make sense to speak of a prior opportunity to cross-examine that witness. Hence the Court’s declaration that “the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.” *Id.* at 53–54.

condoned them.

....

The historical record also supports a second proposition: that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.<sup>280</sup>

In this context, an *ex parte* examination is one in which, as in the Sir Walter Raleigh trial, the accusations at issue are made outside the defendant's presence. This, according to the *Crawford* Court, is "the principal evil" the Confrontation Clause was designed to prevent. While the *Crawford* Court focused the remainder of its analysis on its second enunciated inference, which effectively guarantees the right of cross-examination, the opinion later reiterates the combination of cross-examination and face-to-face confrontation. A few pages after the above passage, for example, the Court notes that its "case law has been largely consistent with these two principles."<sup>281</sup>

In rejecting the *Roberts* framework, the *Crawford* Court's primary intent was to reestablish that when ratifying the Confrontation Clause, "the Framers had an eye toward politically charged cases like Raleigh's—great state trials" at which *ex parte* examinations were used as evidence against the accused.<sup>282</sup> Thus, despite *Crawford's* apparent insistence upon cross-examination, its underlying intent was to reestablish confrontation as a procedural right—a procedure that guarantees both cross-examination and face-to-face confrontation. Even Justice Kennedy's dissent in *Melendez-Diaz v. Massachusetts* in 2009, which was joined by Chief Justice John Roberts and Justices Stephen Breyer and Samuel Alito, views the confrontation right as guaranteeing a face-to-face meeting between accuser and accused.<sup>283</sup> Indeed, the *Melendez-Diaz* dissenters declared that "[*Crawford* and *Washington v. Davis*] stand for the proposition that formal statements made by a conventional witness—one who has personal knowledge of some aspect of the defendant's guilt—may not be admitted

---

280. *Id.* at 50–54.

281. *See id.* at 57.

282. *Id.* at 68; *see also supra* note 279 and accompanying text.

283. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2543 (2009) (Kennedy, J., dissenting).

without the witness appearing at trial to meet the accused face to face.”<sup>284</sup>

The same logic that prompted *Crawford*'s more literal reading of the cross-examination requirement should prompt a similar reading of the face-to-face requirement. Essentially, this logic is that constitutional rights are to be read literally and must be applied in that manner by the nation's courts.<sup>285</sup> Further, to the extent exceptions to such core constitutional rights are permitted, those exceptions should generally be authorized only if and to the extent they were recognized at the time of the Founding.<sup>286</sup> Those Founding-era exceptions, however, should be interpreted in light of today's legal landscape.<sup>287</sup> Thus, despite no Founding-era exception specifically covering the issue, exceptions might nevertheless be authorized when the precise issue could not have been foreseen at the time of the Founding, and when truth determination would undoubtedly be enhanced by an alternative confrontation procedure (as in, for example, the post-Founding era child abuse cases involving testimony by one-way video).

#### VI. UNMASKING THE DISGUISED WITNESS

Today's Court appears committed to the principle that the right of confrontation is a procedural rather than a substantive guarantee, that the procedures the Framers had in mind included both cross-examination and confrontation of the accuser in the accused's presence, and that these procedural protections must not be subjected to cost-benefit analysis. With this understanding in place, this final section examines the extent to which a literal face-to-face confrontation may be compromised before a defendant's confrontation right is violated.

Under the current confrontation framework, in which confrontation challenges to in-court testimony are governed by *Craig*, extensive disguises

---

284. *Id.*

285. *See Maryland v. Craig*, 497 U.S. 836, 870 (1990) (Scalia, J., dissenting) (“The Court today has applied ‘interest-balancing’ analysis where the text of the Constitution simply does not permit it. We are not free to conduct a cost-benefit analysis of clear and explicit constitutional guarantees, and then to adjust their meaning to comport with our findings.”).

286. *Crawford* deemed the confrontation right as “most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the Founding.” *Crawford*, 541 U.S. at 54.

287. *See generally* Marc McAllister, *Down But Not Out: Why Giles Leaves Forfeiture by Wrongdoing Still Standing*, 59 CASE W. RES. L. REV. 393 (2009) (discussing the basis of the Court's holding in *Giles v. California* as an analysis of the Founding-era exception of forfeiture).

are constitutionally problematic. As a general proposition, *Craig* reveals that a face-to-face encounter between accuser and accused may be dispensed with *only when* the remaining three *Craig* elements of confrontation—oath, cross-examination, and demeanor—are not significantly impaired.<sup>288</sup> As *Romero* and *Sammons* illustrate, the most extensive disguises may actually impair all three of *Craig*'s core elements—physical presence, cross-examination, and demeanor—and thus should be routinely struck down as violative of the confrontation right.<sup>289</sup> Less extensive disguises might also fail to meet *Craig*'s demands, particularly where a truly compelling state interest is lacking.

A dilemma arises, however, when one considers the possibility of *Craig*'s overruling. Although it is difficult to predict the precise test that would replace *Craig*, by following the principles of *Crawford* the Court would likely replace *Craig*'s reliability-based analysis with a more literal confrontation right. Under a fair reading of *Crawford*, such a literal confrontation would generally ensure both an opportunity for cross-examination and an uninhibited face-to-face confrontation. Following this approach, the Court would strike down the wearing of any disguise extensive enough to undermine the defendant's right to an unobstructed, face-to-face confrontation, and the testimony's potential reliability could not save it from constitutional attack. Aside from only the most significant state interests—potentially those interests already recognized by the Court as compelling—the right to physically face one's accusers would not submit to the government's competing interests.<sup>290</sup>

Considering these principles, it is difficult to imagine any disguise that would survive a Confrontation Clause challenge before the current Court. This general proposition, however, should not be absolute. Under limited circumstances, the adult witness who exhibits a legitimate fear of the defendant and who wishes to testify in minimal disguise should be permitted to do so. Under a *Craig*-based assessment, prior cases, including *People v. Brandon* and *People v. Smith*, allowed relatively minimal disguises when the witness's safety was genuinely at risk.<sup>291</sup> The *Brandon*

---

288. See *supra* notes 108–10 and accompanying text.

289. See *People v. Sammons*, 478 N.W.2d 901, 907 (Mich. Ct. App. 1992); *Romero v. State*, 173 S.W.3d 502, 505–07 (Tex. Crim. App. 2005).

290. See *Craig*, 497 U.S. at 861 (Scalia, J., dissenting) (stating that “[t]he purpose of enshrining th[e] Confrontation Clause] in the Constitution was to assure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant's right to face his or her accusers in court”).

291. *People v. Brandon*, 52 Cal. Rptr. 3d 427, 446 (Ct. App. 2006) (allowing a

and *Smith* courts reached the right result, but for the wrong reason.

Consistent with recent Confrontation Clause jurisprudence, the defendant should forfeit his confrontation right in those cases like *Brandon* and *Smith* in which the prosecution presents sufficient evidence to establish a legitimate fear of the defendant. Under this proposal, the defendant's right would be forfeited not because of some asserted governmental necessity, but rather because the defendant's intentional misconduct created the claimed fear. This proposal would not require a *Craig*-based judicial exception, but would instead be premised upon the common law forfeiture-by-wrongdoing doctrine. By abandoning *Craig* and operating entirely within the *Crawford* framework, this proposal would be fully consistent with *Crawford* and its progeny.<sup>292</sup>

In recent cases, the Supreme Court has considered the possible application of forfeiture-by-wrongdoing for purposes of admitting a witness's prior, out-of-court, testimonial statements. When forfeiture-by-wrongdoing applies, a criminal defendant loses his confrontation right and the witness's out-of-court statements become admissible, even though the defendant enjoyed no opportunity to cross-examine the declarant regarding those statements. Notably, this result is not based upon the perceived reliability of the out-of-court statements, but on the simple notion that a criminal defendant should not be permitted to benefit from his own wrongdoing. In these instances, by deliberately preventing the witness from appearing at trial, the defendant loses the opportunity to challenge the witness's prior, out-of-court statements.

While the outer boundaries of the forfeiture-by-wrongdoing exception are ambiguous, case law is clear that when a criminal defendant deliberately intimidates a witness with the intent of preventing the witness from testifying against the defendant, the defendant forfeits his right to

---

witness to wear a disguise after receiving threats on two occasions in an attempt to discourage her from testifying); *see also* *People v. Smith*, 869 N.Y.S.2d 88, 90 (App. Div. 2008) (noting that “[t]he People made a sufficient showing that the disguise was justified by the necessities of the case”).

292. The *Crawford* Court noted, “the right . . . to be confronted with the witnesses against him,” is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding.” *Crawford v. Washington*, 541 U.S. 36, 54 (2004) (quoting *Mattox v. United States*, 156 U.S. 237, 243 (1895)). Later in its opinion, the Court ratified the rule of forfeiture-by-wrongdoing and noted that the rule “extinguishes confrontation claims on essentially equitable grounds.” *Id.* at 62 (citing *Reynolds v. United States*, 98 U.S. 145, 158–59 (1879)).

confront that witness's prior out-of-court statements.<sup>293</sup> *Crawford* ratified this rule, and *Giles v. California* clarified its scope.<sup>294</sup>

Arguably recognizing that an expansive forfeiture-by-wrongdoing exception is needed to curtail possible evidentiary advantages gained through intimidation, the Court in both *Crawford* and *Davis* reaffirmed forfeiture-by-wrongdoing as a core exception to the confrontation right.<sup>295</sup> For the instant analysis, the *Davis* Court's words are instructive:

[W]hen defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. . . . We reiterate . . . that "the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds." That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.<sup>296</sup>

In light of the current Court's commitment to uninhibited confrontation, it remains doubtful that the Court would sanction the type of testimony at issue in cases like *Brandon* and *Sammons*. However, when a witness has been intimidated by the defendant, the witness, as in *Brandon*, might prefer a court fine to testimony without disguise.<sup>297</sup> Absent the protection offered by the disguise, the witness's crucial

---

293. See *Giles v. California*, 128 S. Ct. 2678, 2691 (2008) (stating that "[t]he common-law forfeiture rule was aimed at removing the otherwise powerful incentive for defendants to intimidate, bribe, and kill the witnesses against them"). Throughout our nation's history, courts have held that a defendant's right of confrontation must sometimes yield to forfeiture-by-wrongdoing. For example, in *United States v. Carlson*, the Eighth Circuit Court of Appeals deemed the defendant to have waived his confrontation right when he intimidated a witness into not testifying at trial. See *United States v. Carlson*, 547 F.2d 1346, 1360 (8th Cir. 1976).

294. See *supra* note 286; see also *Giles v. California*, 128 S. Ct. 2678, 2684–86 (2008).

295. See *Davis v. Washington*, 547 U.S. 813, 833–34 (2006) ("*Crawford*, in overruling *Roberts*, did not destroy the ability of courts to protect the integrity of their proceedings."); *Crawford*, 541 U.S. at 62 (accepting forfeiture-by-wrongdoing as an exception to confrontation); see also Brief of Richard D. Friedman as Amicus Curiae Supporting Respondent, *Giles*, 128 S. Ct. 2678 (No. 07-6053), 2008 WL 859395, \*11 n.9 ("Given *Crawford*, the confrontation right . . . is rigid and categorical in nature. If the rule of forfeiture of the confrontation right is not fully developed, therefore, inequitable results will frequently occur.").

296. *Davis*, 547 U.S. at 833 (quoting *Crawford*, 541 U.S. at 62).

297. See *People v. Brandon*, 52 Cal. Rptr. 3d 427, 446 (Ct. App. 2006) (allowing a witness to use a disguise after being threatened twice).

prosecution testimony would often be lost. Yet it is precisely these cases in which the defendant's acts of intimidation should not be rewarded. To level the playing field, the forfeiture-by-wrongdoing exception should be extended beyond the context of out-of-court, testimonial statements (as already authorized by the Court in *Giles*) to encompass manner-of-testimony issues as well (which are as yet unrecognized by the Court).<sup>298</sup>

Under my proposal, the defendant's deliberate intimidating act would cause the defendant to forfeit his right to object to a *somewhat limited* confrontation. Assuming the requisite showing of witness tampering on the part of the defendant—as opposed to a mere perceived threat thereof—a witness who provides evidence of a legitimate safety concern caused by testifying in the defendant's presence would be permitted to testify in minimal disguise.

In many cases, my proposal would be advantageous to both prosecution and defense. From the prosecution's view, permitting the witness to testify in disguise is a better alternative than losing the evidence entirely. From the defense perspective, permitting the witness to testify in minimal disguise is a better alternative than a complete forfeiture of the confrontation right via admission of the witness's out-of-court testimonial statements in the absence of any confrontation, as authorized by *Giles*. Under this proposal, rather than the defendant completely forfeiting his confrontation right, the witness would remain subject to contemporaneous cross-examination, albeit in partial disguise.

*Sammons* illustrates a possible application of my proposed forfeiture-by-wrongdoing exception.<sup>299</sup> Prior to *Sammons*'s trial, the State presented evidence that either *Sammons* or a co-defendant had attempted to arrange to kill the State's key witness, Rick.<sup>300</sup> According to a confidential informant, *Sammons*'s co-defendant, Wallace, offered the informant a quarter pound of cocaine to have Rick "taken care of."<sup>301</sup> The informant then contacted another co-defendant, Stone, who confirmed the offer.<sup>302</sup> After crediting this testimony, the *Sammons* court permitted Rick to testify

---

298. See *Giles*, 128 S. Ct. at 2687–88 (holding that the forfeiture-by-wrongdoing exception to the defendant's right to confront his accusers applies only when the defendant has engaged in conduct *specifically designed* to prevent the witness from testifying).

299. See *People v. Sammons*, 478 N.W.2d 901, 905 (Mich. Ct. App. 1991).

300. See *id.*

301. *Id.* at 905 n.2.

302. *Id.*

in a full-face mask.<sup>303</sup> The appellate court, however, struck down the procedure as violative of the defendant's confrontation right.<sup>304</sup> In light of *Crawford* and *Davis*, in which the Court ratified the forfeiture-by-wrongdoing exception as "extinguish[ing] confrontation claims on essentially equitable grounds,"<sup>305</sup> rather than applying *Craig*,<sup>306</sup> the *Sammons* court should have upheld the procedure under the forfeiture-by-wrongdoing exception.

A similar ruling would have been appropriate in *Brandon*. In that case, the disguised witness presented testimony that she and her family had been threatened with harm if she testified against the defendant.<sup>307</sup> After weighing the evidence, the trial judge found the witness's fears legitimate.<sup>308</sup> Under my proposal, such a finding would trigger the forfeiture-by-wrongdoing exception, and the defendant would forfeit his right to object to the disguise.

For the forfeiture-by-wrongdoing exception to apply, the prosecution would be required to present sufficient evidence of actual witness tampering on the part of the defendant. The allegations of the masked witness in *Romero* would not meet this standard. In that case, when asked to explain the basis for his claimed fear, witness Vasquez conceded that he had never actually been threatened by Romero.<sup>309</sup> Rather, Vasquez testified that Romero's actions of spontaneously shooting in the direction of a nightclub indicated that he was "a person who's dangerous on the street."<sup>310</sup> After weighing Vasquez's testimony, the *Romero* court discredited the allegations, reasoning that the witness had been unable to point to any concrete reason for suspecting retaliation.<sup>311</sup>

Under circumstances similar to those in *Romero*, the forfeiture-by-wrongdoing exception would not apply, and the defendant could insist upon removal of the disguise. At this point, if the witness refuses to testify without the disguise, the prosecution would lose the opportunity to present

---

303. *Id.* at 905.

304. *Id.* at 909.

305. *Davis v. Washington*, 547 U.S. 813, 833 (2006) (quoting *Crawford v. Washington*, 541 U.S. 36, 62 (2004)).

306. *Sammons*, 478 N.W.2d at 908–10.

307. *People v. Brandon*, 52 Cal. Rptr. 3d 427, 442–43 (Ct. App. 2006).

308. *See id.* at 443.

309. *Romero v. State (Romero II)*, 173 S.W.3d 502, 504 (Tex. Crim. App. 2005).

310. *Id.*

311. *Id.* at 506.

this witness's testimony. If, however, the witness agrees to testify absent the disguise, the trial court could then limit cross-examination in a manner that would protect the witness from retaliation while still respecting the defendant's confrontation right, a procedure already authorized by the Supreme Court.<sup>312</sup>

Criticisms of this proposal are likely to center on possible distinctions between admitting out-of-court, testimonial statements under the forfeiture-by-wrongdoing exception, which the current Court has approved, and extending the forfeiture-by-wrongdoing exception to permit limited confrontation in manner-of-testimony cases, which the Court has not yet considered. There is, however, one critical difference between the factual circumstances presented in *Giles* and those implicated by my proposal, and this factual distinction actually supports a *more expansive* use of forfeiture-by-wrongdoing for in-court testimony.

In cases contemplated by *Giles*, the defendant's attempt to intimidate the adverse witness was fully successful.<sup>313</sup> In the circumstances suggested by my proposal, the witness, while intimidated, is not intimidated to the point at which he completely refuses to appear at trial. *Giles* deemed the equities served by applying forfeiture-by-wrongdoing to those cases in which the defendant specifically intended to make a witness unavailable.<sup>314</sup> The outcome should not change merely because the defendant's attempted intimidation was fully successful in one instance (by intimidating the witness to the point of nonappearance), yet only partially successful in another (by intimidating the witness to the point at which he might still

---

312. In *Delaware v. Van Arsdall*, the Court deemed the Confrontation Clause violated by the trial court's *complete preclusion* of cross-examination into the witness's potential bias resulting from the State's dismissal of a pending criminal charge against the witness. *Delaware v. Van Arsdall*, 475 U.S. 673, 678–80 (1986). The Supreme Court was primarily concerned with the complete denial of cross-examination on this critical aspect of the case. *Id.* Notably, the Court admitted that “trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about . . . the witness'[s] safety.” *Id.* at 679. Viewing the right of cross-examination as itself permitting few restraints upon face-to-face confrontation, the *Van Arsdall* rationale applies directly to the minimally disguised witness and lends further support to the proposal advocated here. In particular, the *Van Arsdall* Court would appear to authorize reasonable limits on a defendant's confrontation right when legitimate concerns for the witness's safety are present. *See id.*

313. *See Giles v. California*, 128 S. Ct. 2678, 2683 (2008) (noting several English cases in which the defendant was able to keep a witness from testifying).

314. *See id.* at 2693.

consider testifying, but only if he may do so in disguise).<sup>315</sup> Under both scenarios, the defendant's wrongful acts and intent are precisely the same. The only difference is the precise effect of the defendant's efforts, and this difference is only a matter of degree.

"[T]here are currently no applicable federal constitutional constraints on the use of witness disguise[s]," which allow trial courts to "permit or even implement such procedures as they see fit."<sup>316</sup> Further, under Federal Rules of Criminal Procedure 2 and 57(b), federal courts enjoy inherent power to structure criminal trials in a just manner.<sup>317</sup> The forfeiture-by-wrongdoing exception is an equitable doctrine with deep historical roots, and is grounded in the broadly formulated maxim that "no one shall be permitted to take advantage of his own wrong."<sup>318</sup> To prevent criminal defendants from benefiting from their wrongful acts of intimidation, courts should exercise their discretionary powers and permit limited disguises through application of the forfeiture-by-wrongdoing exception.

## VII. CONCLUSION

The constitutionality of testifying in disguise has never been addressed by the Supreme Court. The few courts that have considered the issue have routinely applied the *Craig* test. That test, however, employs a reliability-based framework reminiscent of the test overruled by *Crawford*, placing the *Craig* test in constitutional jeopardy.

Assuming *Craig* were to be struck down, one must resolve what test might replace *Craig*. The ultimate resolution of this issue depends upon the importance attached to the two guarantees underlying the confrontation right: the right to physically confront accusatory witnesses face-to-face, and the right to cross-examine such witnesses. While judges and historians have disagreed as to the relative importance of these underlying guarantees, today's Court appears to view both cross-examination and face-to-face confrontation as independent, indispensable

---

315. In the criminal law, attempt crimes are often treated the same, for punishment purposes, as their fully successful counterparts. See MODEL PENAL CODE § 5.05 cmt. 2 (1985).

316. See Goldschneider, *supra* note 1, at 52.

317. See *United States v. Gigante*, 971 F. Supp. 755, 758–59 (E.D.N.Y. 1997) (relying on this power to permit the use of closed-circuit television for witness examination despite the fact that the procedure was not specifically authorized by the Federal Rules).

318. See *Reynolds v. United States*, 98 U.S. 145, 159 (1878).

aspects of effective confrontation.<sup>319</sup>

Under the current Court's view, the new manner-of-testimony test would be less concerned with balancing the state's interest against the evidence's reliability and would emphasize proper confrontation procedure instead. While this approach would prohibit the wearing of nearly any disguise, equitable exceptions may sometimes be required. The common law forfeiture-by-wrongdoing exception, which the Court recently applied to out-of-court statements, should be extended to courtroom manner-of-testimony issues as well, and should authorize the wearing of limited disguises when the witness's genuine safety concerns arise from the defendant's deliberate acts of intimidation. Permitting the intimidated witness to testify in disguise will often be the best available option, since alternatives will usually entail the prosecution's complete loss of the witness's testimony or the defendant's total forfeiture of the right to confront the witness's prior out-of-court statements. In a world governed by *Crawford's* interpretative principles, the limited use of minimal disguises might best facilitate the broader truth-determining process, as partial confrontation is better than no confrontation at all.

---

319. Even if the Court would declare the face-to-face requirement subsumed within the cross-examination guarantee, or if the Court were to replace the *Craig* test with a simpler one, the mere opportunity for cross-examination cannot cure a significant restraint upon a defendant's right to a face-to-face meeting.