The Past & Future of Expatriation: A New Counterterrorism Tool?

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Abstract

Which of the following may unilaterally revoke your citizenship: yourself, the government, or both? The answer may be less intuitive than you think. This article seeks to provide an answer by tracing the historical development of expatriation—the loss or relinquishment of citizenship—from before the Declaration of Independence to the modern Twitterverse. From the historical analysis emerges a cycle oscillating between state expatriation and individual expatriation, competing doctrines which continue to vie for jurisprudential dominance. Hardly confined to the past, the battle over expatriation is once again poised to take center-stage. And it should. Citizenship, with its attendant rights and obligations, is a pillar of the American experience. As Americans increasingly venture out of (and into) the United States, questions over expatriation will touch a growing number of topics, including criminal procedure, international law, due process rights, civil liberties and even counterterrorism.

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In October 1959, Lee Harvey Oswald passed through cold metal gates at the American embassy in Moscow where he declared to the Consular Officer his desire to renounce his American citizenship. The Consular Officer, however, refused this declaration and informed Oswald that he did not have the necessary paperwork. Oswald persisted by offering to surrender his passport and disclosing his intention to provide Soviet intelligence officials with information on the operation of classified radar equipment. Further demonstrating his intentions, Oswald later delivered a letter to the Embassy in November 1959, again requesting revocation of his U.S. citizenship and declaring his allegiance to the Soviet Union. Despite attempting three of the four paths to renunciation, Oswald's imperfect reading of the requirements of the Immigration and Nationality Act ("INA")[1] never resulted in an effective expatriation. Fatefully, Oswald returned to the United States in 1962 and would go on to assassinate President Kennedy 15 months later.

Debates over expatriation—the loss or relinquishment of citizenship—have occupied the minds of Americans since the nation's founding.[2] This is understandable. Many of our most cherished liberties emanate from one's American citizenship, including the right to vote and the right to run for elected office. Similar to freedom of speech and due process, the doctrine of expatriation has undergone numerous changes since the Early Republic period. In fact, some have argued that many of the recently surfaced issues regarding expatriation are a direct result of these historical shifts.[3]

Expatriation has remained relevant throughout the country's history. From the era when American sailors were impressed into service in the British Navy preceding the War of 1812 to contemporary leaders' attempts to confront global terror networks, the questions surrounding expatriation—its applicability and effect—have resisted a definitive resolution for centuries.

The doctrine of expatriation is more relevant now than in most periods of U.S. history. Two main factors contribute to this heightened relevance. The principal factor is the increasingly cosmopolitan nature of society. The identities of many Americans are today informed by both the neighborhoods in which they live and work, as well as the ancestral homelands from which they and their families hail. Recent advances in technology allow Americans to physically reside in the United States while simultaneously interact with and participate in the societies of distant "home countries." Second, an evolution in the recruitment and methods used by foreign terrorist organizations ("FTOs") has exposed the limits of traditional law

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[1] 8 U.S.C. § 1101-1178 (2014) (66 Stat. 163 was later codified in 8 U.S. Code: Chapter 12—Aliens and Nationality.).

[2] For an exhaustive account of the history of the American doctrine of expatriation, *see generally* Jonathan David Shaub, *Expatriation Restored*, 55 HARV. J. ON LEGIS. 363 (2018).

[3] *Id*. at 369.

enforcement capabilities. These factors have precipitated recent attempts to shift the conversation about expatriation from one that conceives the doctrine as an individual right to a conception of expatriation as a punishment exacted by the state.

This note begins by placing the doctrine of expatriation within a broader historical context, following its development throughout the history of the United States. I then take account of recent developments, particularly in light of the struggle against al-Qaeda and related FTOs. This analysis contains an in-depth case study of Hoda Muthana, including the ways in which her case illuminates recent developments in American expatriation doctrine and its implications for the future of U.S. counterterrorism efforts. I argue that as the U.S. government struggles to confront terror groups' increasing recruitment of Americans, it will increasingly look to expatriation as a tool of punishment. Finally, the note concludes with a recommended course of action. This framework arms policy makers with the tools necessary to effectively counter organizations who seek to exploit the U.S. legal system, while also appreciating the challenges inherent in a constitutionally-sound conception of expatriation.

The history of American expatriation law can be described as an oscillation between two competing doctrines.[4] The first doctrine focuses the subject of the verb "expatriate" on the individual.[5] That is, the citizen's right to expatriate herself from the United States. This conception of expatriation has been referred to as *individual expatriation*. The second doctrine of expatriation views the subject of the verb "expatriate" not as the individual, but as the state.[6] Under this conception, it is not the individual who expatriates herself, but the state that expatriates her from it. This conception of expatriation has been referred to as *state expatriation*.

As the United States continues to struggle with FTO recruitment of Americans, the U.S. government will likely turn to state expatriation to supplement its counterterrorism efforts. Such a solution, however, is riddled with pitfalls. The United States should instead avoid the serious constitutional concerns which call into question the permissibility of state expatriation doctrine.

I. HISTORICAL DEVELOPMENT

A. The Colonial Era

Any contemporary legal analysis of American expatriation doctrine requires an understanding of the doctrine's historical development. Expatriation, as it was conceived of under the British common law tradition

[4] *Id*.
[5] *Id.* at 365–66.
[6] *Id.* at 366.

during the Colonial period, was a "perpetual allegiance" that forever bound royal subjects to the crown.[7] The doctrine of perpetual allegiance belies a reciprocal social contract; one in which royals provide their subjects with minimal security guarantees in exchange for their irrevocable fealty to the crown. This conception of expatriation, however, threatened the burgeoning colonies, whose human capital resources were highly dependent on population inflows of royal subjects emigrating from the United Kingdom. In a dramatic break from the ill-suited colonial conception of expatriation, the adoption of the Declaration of Independence cemented the early Americans' rejection of the British custom of inviolable allegiance to the sovereign.[8]

While united in their rejection of perpetual allegiance to the British crown, fault lines between the dominant political factions (the Federalists and Republicans) regarding the question of allegiance to the newly-established American government soon developed.[9] Republicans maintained that expatriation was a natural right.[10] Indeed, the Virginia Code, over which Jefferson had substantial influence, stated that the individual's right of expatriation was "inherent in every man by the laws of nature."[11] Hamilton, however, believed in a more limited individual right to expatriation, going so far as to argue that permitting British loyalists to expatriate themselves from the United States during the Revolutionary War would be "contrary to law."[12]

B. The Early Republic

After the end of the Revolutionary War, the focus of the expatriation debate began to shift from early Americans' expatriation from the sovereign to newly naturalized Americans who sought to expatriate themselves from their countries of origin. Early interactions between the United States and European powers would greatly influence this early debate. The issue often presented itself through the impressment of naturalized Americans of British origin into the British Navy. Keenly aware of the country's precarious position on the world stage, and not wanting to interpose into the affairs of European powers and their subjects, early presidential administrations

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[7] Donald K. Duvall, *Expatriation Under United States Law,* Perez *to* Afroyim*: The Search for a Philosophy of American Citizenship*, 56 VA. L. REV. 408, 413 (1970).

[8] *See* THE DECLARATION OF INDEPENDENCE (U.S. 1776) (declaring the states and people of the United States "are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved.").

[9] Rising Lake Morrow, *The Early American Attitude Toward the Doctrine of Expatriation*, 26 AM. J. INT'L L. 552, 552–55 (1932).

[10] DOUGLAS BRADBURN, THE CITIZENSHIP REVOLUTION: POLITICS AND THE CREATION OF THE AMERICAN UNION, 1774-1804 105 (Jan Ellen Lewis et al. eds., University of Virginia Press 2009).

[11] *Id*. at 105.

[12] *Id*. at 106.

avoided the issue.[13] Similarly, the Supreme Court during that time delivered inconsistent opinions on whether expatriation was the right of the individual, the state, or some combination of the two.[14]

The reluctance of early presidential administrations to recognize naturalized Americans' right to individual expatriation changed with the administration of President Buchanan, a long-time advocate of the individual's right of expatriation. In 1859, Buchanan's administration issued an opinion, written by Attorney General Jeremiah Black, codifying the position that naturalized Americans of foreign origin had the "natural right" to expatriate the "natural allegiance" to their country of origin and substitute it with another.[15] Shortly after President Buchanan's address, Congress reinforced the individual expatriation doctrine with the passage of the Expatriation Act of 1868.[16] The Act declared expatriation to be a "natural and inherent right of all people . . . "[17] This initial step by Congress started a long process that solidified the predominance of the individual expatriation doctrine between 1868 and 1937. One step in that process was the ratification of a collection of bilateral treaties ("Bancroft Conventions,") which defined and set forth the rules governing expatriation and naturalization.[18] The Bancroft Conventions cemented the idea that expatriation required the individual's specific intent to expatriate herself.[19] Despite this long tradition of individual expatriation, circumstances around the world soon tested America's commitment to individual-focused doctrine.

C. The Post-War Years

Resulting from massive immigrant inflows during the 19th century and an expanded global presence, the United States would soon be forced to confront issues of citizenship not considered in ages. Influenced by the innumerable challenges arising from naturalization and expatriation before and during the Second World War, Congress expanded the grounds for loss of nationality and started a shift from the doctrine of individual expatriation

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[13] *See* Right of Expatriation, 8 Op. Att'y. Gen. 139 (1856) (Attorney General Cushing stating the right to expatriation was subject to limitations "in the interest of the State, as the law of nations or acts of Congress may impose.").

[14] *See* Inglis v. Tr. of Sailor's Snug Harbor, 28 U.S. 99 (1830) (noting that a man whose country of birth was unclear had nevertheless failed to disaffirm the allegiance of his British father); *but see* Shanks v. Dupont 28 U.S. 242, 246 (1830) (holding no person can by an act of her own can "put off" her allegiance without the consent of the government).

[15] Right of Expatriation, 9 Op. Att'y Gen. 356, 357 (1859).

[16] An Act Concerning the Rights of American Citizens in Foreign States, 15 Stat. 223 (1868).

[17] *Id*.

[18] *See* U.S. Dep't of State. *Treaties and Other International Agreements of the United States 1776-1949.* Compiled by Charles. I. Bevans. Washington, D.C.: Government Printing Office, 1970.

[19] *See* Naturalization Convention Between the United States and Portugal, 35 Stat. 2082, 2083 (1908).

to state expatriation.[20] Following the outbreak of the global conflict, Congress made its first comprehensive codification of American naturalization law with the passage of the Nationality Act of 1940.[21] No longer was expatriation solely the prerogative of the individual; under the new act, the state gained the power to expatriate citizens on a variety of grounds, including service in the government or armed forces of another state, and voting in the election of another state.[22] The period after the Second World War would further refine this tectonic shift from individual to state expatriation.

American expatriation law entered its modern form with the passage of the Immigration and Nationality Act ("INA") of 1952.[23] The INA made sweeping changes to United States immigration policy, as well as naturalization and expatriation law. Building on the foundation laid by the 1940 Act, Section 349 of the INA, as it was originally passed, specified ten expatriating acts, including voting in an election of a foreign state, making a formal renunciation of nationality, deserting the armed forces of the United States, acts of treasons, and living outside of the United States during a time of war.[24] These additions marked the high-water point for the state expatriation doctrine. However, this about-face of American expatriation law soon elicited serious legal challenges.

In 1958, the Supreme Court handed down two opinions, *Nishikawa* and *Schneider*, which called into question the validity of the state expatriation doctrine that underwrote some provisions within Section 349. At issue in *Nishikawa v. Dulles* was whether Mitsugi Nishikawa had effectively expatriated himself.[25] During the Second World War, Nishikawa, a native-born American citizen, traveled to Japan where he was subsequently conscripted into the Japanese Imperial Armed Forces.[26] After the war, Nishikawa applied for a United States passport, but was instead issued a certificate of loss of nationality.[27] Nishikawa, who was the only party to testify at his appeal, maintained that he was conscripted against his will.[28] Recalling the "precious right of citizenship" and the "drastic consequences" arising from denaturalization, the Supreme Court held that the government had the burden of proving with "clear, convincing, and unequivocal evidence" the citizen's intent to expatriate.[29] Nishikawa prevailed on procedural grounds because the government failed to meet the "clear,

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[20] Shaub, *supra* note 2, at 384.
[21] 54 Stat. 1137 (1940).
[22] Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163.
[23] *Id*.
[24] *Id*. at 165.
[25] Nishikawa v. Dulles, 356 U.S. 129, 133 (1958).
[26] *Id*. at 131.
[27] *Id*.
[28] *Id*. at 132.
[29] *Id*. at 133–35, 143–44.

convincing" standard by failing to appear at his original hearing.[30] After delivering this first blow to the doctrine of state expatriation, the Court was poised to transition American law back to the individual expatriation doctrine.

In its next step to re-center American law with the individual expatriation doctrine, the Court needed to address the citizen's subjective intent to expatriate. The defining issue in *Schneider v. Rusk* was whether living abroad for a period of three years was grounds for expatriation.[31] Schneider, a naturalized citizen, had returned to Germany and lived there for eight years when she applied for a new American passport.[32] Her application was denied because she had violated INA Section 352(a)(1), which at that time expatriated an individual who lived in a foreign state continuously for three years, if that foreign state was the individual's country of origin or place of birth.[33] At trial, the Court found that the government had met the "clear, convincing" standard put forth in *Nishikawa*. However, there had been no evidence that Schneider had actually intended to expatriate herself. The Court rejected the government's argument that Schneider's continuous residence in Germany created a presumption of intent by holding that her continuous residence in Germany "in no way evidences a voluntary renunciation of nationality."[34] The Court would continue to develop this focus on the citizen's intent to expatriate in subsequent cases.

With the foundation laid in *Nishikawa* and *Schneider*, the Court moved to severely limit state expatriation in *Afroyim v. Rusk*. Beys Afroyim, a naturalized United States citizen, voted in an in Israeli election in 1951.[35] At the time, INA Section 349(a)(5) expatriated individuals who voted in the elections of foreign states.[36] Consequently, the State Department denied Afroyim's application for a passport, as it found he had been expatriated pursuant to section 349.[37] Using this case as an opportunity to consolidate nearly a decade of development of expatriation case law since *Nishikawa*, the Court directly overruled an earlier decision[38] by holding that the Fourteenth Amendment prohibited the state from expatriating citizens unless citizenship was voluntarily relinquished.[39] The holding in *Afroyim* marked a pivotal moment in the shift of American expatriation law to the doctrine of individual expatriation. The Court would later refine its interpretation of the

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[30] *Id*. at 131.
[31] Schneider v. Rusk, 377 U.S. 163, 167 (1964).
[32] *Id*. at 164, 169 (Clark, J., dissenting).
[33] Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163, 166.
[34] Schneider, 377 U.S. at 169.
[35] Afroyim v. Rusk, 387 U.S. 253 (1967).
[36] Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163, 165.
[37] Afroyim, 387 U.S. at 254.
[38] Perez v. Brownell, 356 U.S. 44 (1958).
[39] Afroyim, 387 U.S. at 262.

voluntary relinquishment element in *Vance v. Terrazas*.[40]

In 1970, Laurence Terrazas, a natural-born citizen of the United States, applied for a certificate of Mexican nationality while enrolled at a university in Monterrey, Mexico.[41] As part of the application process, Terrazas swore to "expressly renounce [his] citizenship... especially to that of the United States of America."[42] Later, Terrazas' application for a new United States passport was denied.[43] In administrative proceedings, the State Department found Terrazas' statements made during his application for Mexican nationality adequately demonstrated his voluntarily relinquishment of his United States citizenship.[44] However, the Supreme Court found that Terrazas' expatriation did not conform with the Constitution.[45] In arriving at its decision, the Court focused its reasoning on the citizen's voluntary assent to the expatriating act. Elaborating on its earlier its decision in *Afroyim*, the Court held that assent to the expatriating act is not effective unless also accompanied by "conclusive evidence" of the citizen's intent to relinquish citizenship, proven by a preponderance of the evidence.[46] The Court found that Terrazas' statements during his application for Mexican nationality were not conclusive evidence that he had intended to relinquish his American citizenship.

The Court's decision in *Terrazas* marked the last substantial development in American expatriation law. While the *Afroyim-Terrazas* framework represents the strongest support for the individual expatriation doctrine in recent decades and places serious limits on the state's power to expatriate citizens, it does not prohibit all forms of state expatriation. Under the current framework, the state may theoretically establish that performance of one of the specified expatriating acts creates a presumption of the burden of proof as required by *Terrazas*.[47] This rebuttable presumption would shift the burden of proof from the party asserting loss of nationality to the party asserting retention of nationality. Recently, the growing prevalence of terrorism in American public discourse has prompted many in Congress to utilize this presumption mechanism.

The historical back-and-forth of the doctrine of expatriation is not confined to the past. Today, a similar shift is underway. Indeed, the consequences of the ongoing redefinition of the doctrine of expatriation will reach far beyond our own borders. As Europe and the United States struggle to cope with the rise of FTOs across the world, the ability of governments to

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[40] *See generally* Vance v. Terrazas, 444 U.S. 252 (1980).
[41] *Id*. at 255.
[42] *Id*.
[43] *Id*. at 263.
[44] *Id*.
[45] *Id*. at 270.
[46] *Id*.
[47] *Id*.

influence the choices of their citizens will simultaneously become harder to control. If such factors remain unaddressed through other means, the government may resort to the doctrine of state expatriation once again.

II. CONTEMPORARY EXPATRIATION

A. "Homegrown" Terrorism

The spectacular intelligence failures during the years preceding the attacks of September 11, 2001 demonstrated the need for an overhaul of American counter-terrorism capabilities. Toward these ends, Congress passed the USA PATRIOT Act ("Patriot Act") hardly two months after the attacks.[48] Riding a wave of national unity that swept through the United States in the wake of 9/11, the Patriot Act passed by a wide majority in the House of Representatives and a near-majority in the Senate.[49] The Patriot Act marked the creation of a comprehensive statutory scheme involving new tools to aid law enforcement, intelligence collection, anti-money laundering efforts and immigration. Congress would subsequently modify some of the Patriot Act's sweeping powers to avoid constitutional challenges.[50] Despite court challenges against the Patriot Act, the government would continue to produce legislation to confront emerging terror threats.

Initially, terrorism was largely perceived as exclusively the product of foreign perpetrators.[51] This is likely due to the fact that all nineteen of the hijackers on 9/11 were foreign-born temporary visa holders.[52] As the years passed, a perceived increase of the proportion of terror attacks perpetrated by American citizens (both naturalized and natural-born) has emerged.[53] This increase of "homegrown" terrorists has likely led to the increase in proposed legislation which provides for the expatriation of citizenship for Americans involved in terrorism.

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[48] USA Patriot Act of 2001, Pub. L. No. 107–56, 115 Stat. 272.

[49] U.S. SENATE, *U.S. Senate Roll Call Votes 107th Congress – 1st Session* (Oct. 25, 2001) https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=107&session=1&vote=00313; U.S. HOUSE OF REPRESENTATIVES., *FINAL VOTE RESULTS FOR ROLL CALL 398*, H.R. 3162 (Oct. 24, 2001), http://clerk.house.gov/evs/2001/roll398.xml.

[50] *See, e.g.*, Doe v. Ashcroft, 334 F. Supp. 2d 471 (S.D.N.Y. 2004) (striking down a provision which authorized the Federal Bureau of Investigation to issue National Security Letter subpoenas to internet service providers but did not contain an implied right to initiate a court challenge. The provision was later modified to allow for a right to challenge national security letter subpoenas, which would avoid constitutional challenges.).

[51] C-SPAN, *They Hate Us for Our Freedoms* (Mar. 9, 2013), https://www.c-span.org/video/?c4379586/hate-freedoms.

[52] U.S. CENTRAL INTELLIGENCE AGENCY, *DCI Testimony Before the Joint Inquiry into Terrorist Attacks Against the United States* (June 18, 2002), https://www.cia.gov/news-information/speeches-testimony/2002/DCI_18_June_testimony_new.pdf.

[53] Notable individuals include Omar Mateen, Florida-born perpetrator of the Pulse Nightclub Shooting; Syed Rizwan Farook, Chicago-born perpetrator of the San Bernardino Attack; and Dzhokhar Tsarnaev, naturalized co-conspirator of the Boston Marathon Bombing.

The first terror-related expatriation legislation was the Domestic Security Enhancement Act of 2003, colloquially referred to as the Patriot Act II.[54] Section 501 of the draft bill provided for the amendment of INA Section 349 to include "joining or serving in, or providing material support... [to] a terrorist organization."[55] In addition, the draft sought to adjust the standard of proof for expatriation such that "the voluntary commission or performance" of one or more of the enumerated acts shall be "prima facie evidence that the act was done with the intention of relinquishing nationality."[56] Due to the proposed inclusion of an *Afroyim-Terrazas*–compliant rebuttable presumption of the individual's voluntary commitment of an expatriating act, the proposed statutes within the Patriot Act II would have likely stood up to constitutional review. However, a definitive answer to that question never materialized. The intense media backlash that followed the draft bill's premature leak to the press ultimately led the drafters to indefinitely shelve the proposed bill.[57] While not as wide-ranging as the Patriot Act II, members of Congress have continued to submit other terror-related proposals that utilize state expatriation doctrine.

In 2010, Representative Altmire (D-PA) introduced the Terrorist Expatriation Act.[58] The bill largely mirrored the Patriot Act II's amendments to Section 349 by adding to the enumerated expatriating acts, "material support or resources to a foreign terrorist organization," though, it remained silent on the standard of proof.[59] Later that same year, Representative Sander Levin (D-MI) submitted a House Resolution urging a certificate of loss of nationality be issued for famed al-Qaeda propogandist Anwar al-Awlaki.[60] Interestingly, the House Resolution mirrored language from *Afroyim* in stating that al-Awlaki had "voluntarily relinquished his status as a United States citizen" for various reasons—none of which were expatriating acts under Section 349.[61] Soon, innovations by terror groups would cause the number of proposed terror-related bills advocating the state expatriation doctrine to explode.

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[54] Domestic Security Enhancement Act of 2003 § 501 (Jan. 9, 2003), http://www-tc.pbs.org/now/politics/patriot2-hi.pdf.

[55] *Id*.

[56] *Id*. at § 503.

[57] *Id*. at § 501; AM. CIVIL LIBERTIES UNION, *How "Patriot Act 2" Would Further Erode the Basic Checks on Government Power that Keep America Safe and Free*, https://www.aclu.org/other/how-patriot-act-2-would-further-erode-basic-checks-government-power-keep-america-safe-and-free (last visited Mar. 5, 2020).

[58] Terrorist Expatriation Act of 2010, H.R. 5237, 111th Cong. (2d Sess. 2010).

[59] *Id*. at § 2(1)(C).

[60] H.R.J. Res. 1288, 111th Cong. (2010) (urging the "issuance of a certificate of loss of nationality for Anwar al-Awlaki.").

[61] *Id*.

B. ISIS and State Expatriation

The United States' invasion of Iraq in 2004 was a pivotal moment for the Middle East. The initial success of the U.S. forces was matched only by the gravity of the insurgency that tore through Iraq over the next decade. Further complicating the reconstruction efforts was the growing conflict in Syria, which had raged since 2011. Straddling the neglected borderlands between Iraq and Syria, an incipient terror group gathered strength in relative obscurity until its leader—Abu Bakr al-Baghdadi—declared himself Caliphate of a new Islamic State of Iraq and the Levant ("ISIS") in 2014.[62] Even though the proclamation was widely condemned by Muslim community leaders across the globe as having no basis in Islamic jurisprudence, ISIS wasted no time in trying to recruit adherents.[63] Unlike media-shy terror organizations like al-Qaeda, ISIS masterfully exploited global telecommunications networks by streaming its propaganda directly to the smart phones of sympathizers across the world. The professional-level production quality of its videos reflected the group's organizational sophistication, alarming both American intelligence officials and lawmakers.[64] Not long after the slick propaganda videos, pictures, and tweets began spreading over the internet, American fighters started appearing on the front lines with ISIS.[65]

The influx of American citizens among ISIS ranks spurred Congress into action with the submission of no less than five terror-related bills advocating the state expatriation doctrine between 2014 and 2017.[66] The Expatriate Terrorists Act of 2014 and both Enemy Expatriation Acts of 2015 largely copied the proposed changes from the Terrorist Expatriation Act of 2010 by including membership or material support of a foreign terrorist organization within the proposed expatriating acts.[67] To avoid the standard of proof required by the *Afroyim-Terrazas* framework, the proposed Expatriate Terrorist Acts of 2015 and 2017 also included provisions regulating the issuance and revocation of United States passports.[68] These proposed regulations provided the Secretary of State the authority to revoke or deny

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[62] SITE INTELLIGENCE GROUP, *ISIS Spokesman Declares Caliphate, Rebrands Group as "Islamic State"* (June 29, 2014), https://news.siteintelgroup.com/Jihadist-News/isis-spokesman-declares-caliphate-rebrands-group-as-islamic-state.html.

[63] *Open Letter to Baghdadi*, http://www.lettertobaghdadi. com/pdf/Booklet-Combined.pdf.

[64] COUNCIL ON FOREIGN RELATIONS, *Countering ISIS Extremism in Cyberspace: Time for Clear, Hold, and Build?* (March 12, 2015), https://www.cfr.org/blog/countering-isis-extremism-cyberspace-time-clear-hold-and-build.

[65] Lee Ferran et al., *FBI Wants You to Identify American ISIS Fighters*, ABC NEWS (Oct. 7, 2014), https://abcnews.go.com/International/fbi-identify-american-isis-fighters/story?id=26025141.

[66] Expatriate Terrorist Act, S. 361, 115th Cong. (2017); Expatriate Terrorist Act, S. 247, 114th Cong. (2015); Enemy Expatriation Act, H.R. 545, 114th Cong. (2015); Enemy Expatriation Act, H.R. 4186, 114th Cong. (2015); Expatriate Terrorists Act, S. 2779, 113th Cong. (2014).

[67] *See generally id.*; *see* Terrorist Expatriation Act, *supra* note 58.

[68] Expatriate Terrorist Act, S. 361, 115th Cong. (2017); Expatriate Terrorist Act, S. 247, 114th Cong. (2015).

the passport of any "member . . . of a foreign terrorist organization . . ."[69] Perhaps in response to the likelihood of procedural due process claims, the proposed legislation also amends the Passport Act of 1926 to prohibit the Department of State from issuing a passport to any FTO member and directs the State Department to revoke such persons' passports.[70] Aware of constitutional concerns surrounding the amended passport revocation provisions and eager to avoid constitutional challenges similar to those that hampered the Patriot Act, the bill also includes a right to "request a due process hearing" after passport nonissuance or revocation.[71]

C. Hoda Muthana: A Case Study on the Limits of Modern State Expatriation

So called "ISIS brides," particularly the story of Hoda Muthana, have captivated Western media in recent months.[72] Born in New Jersey in 1994, Muthana grew up in the United States.[73] Her father had entered the United States as a diplomat in the Yemeni Mission to the United Nations and eventually settled with his family in Alabama.[74] At just 20 years old, Muthana secretly made her way to Syria and joined the ranks of ISIS.[75] Shortly after arriving in Syria, Hoda adopted the nom de guerre, Umm Jihad, and tweeted a picture of several ISIS members' passports with the caption "Bonfire soon, no need for these anymore..."[76]

By 2017, Muthana had married her third husband (her first two husbands having been slain on the battlefield) and had borne a child from the second.[77] As ISIS lost territory in Syria and Iraq, Hoda surrendered herself and her child to Kurdish forces and formally requested repatriation to the United States.[78] Kurdish forces currently have Muthana in custody along with several hundred other women associated with ISIS.[79] At that point, several major news outlets picked up Muthana's story, which sparked a national debate about her repatriation to the United States. Wading into the debate in February 2019, President Trump tweeted, "I have instructed the Secretary of

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[69] Expatriate Terrorist Act, S. 247, 114th Cong. (2015).

[70] Expatriate Terrorist Act, S. 361, 115th Cong. (2017).

[71] *Id*.

[72] Rukmini Callimachi & Catherine Porter, *2 American Wives of ISIS Militants Want to Return Home*, N.Y. TIMES (Feb. 19, 2019), https://www.nytimes.com/2019/02/19/us/ islamic-state-american-women.html.

[73] Rukmini Callimachi & Alan Yuhas, *Alabama Woman Who Joined ISIS Can't Return Home, U.S. Says,* N.Y. TIMES (Feb. 20, 2019), https://www.nytimes.com/2019/02/20/world/middleeast/isis-bride-hoda-muthana.html.

[74] *Id*.

[75] *Id.*

[76] Ellie Hall, *Gone Girl: An Interview with An American in ISIS,* BUZZFEED NEWS (April 17, 2019), https://www.buzzfeednews.com/article/ellievhall/gone-girl-an-interview-with-an-american-in-isis.

[77] *Id*.

[78] Callimachi & Yuhas, *supra* note 73.

[79] *Id*.

State . . . not to allow Hoda Muthana back into the Country!"[80] Shortly thereafter, the State Department informed Muthana's attorney that it would not issue her a new passport.[81]

Muthana's situation is multifaceted and strikes at the heart of many issues surrounding expatriation. Several circumstances surrounding her birth and her actions during her time in Syria require examination. Muthana's United States citizenship is a threshold issue in this case and must be addressed first in any discussion concerning her expatriation. The government has argued that Muthana is not a natural-born citizen despite her birth in New Jersey. Generally, anyone born in the United States is a natural-born citizen pursuant to the Fourteenth Amendment.[82] However, under limited circumstances, birth within the United States may not automatically entitle one to citizenship.[83] One such circumstance applies to the children of diplomats.

The privileges and immunities of diplomatic status apply to representatives of foreign governments living and working in the United States.[84] These special protections are designed to allow diplomats to effectively and efficiently conduct their official duties.[85] These protections also extend to the families of diplomats.[86] Consequently, the privileges and immunities enjoyed by diplomats are passed to their children born in the United States.[87] After a diplomat's official status has been terminated, the former diplomat enjoys "residual" diplomatic immunity, which lasts until "the moment he leaves the country, or on expiry of a reasonable period in which to do so. . ."[88]

Muthana argues that she was born after her father had lost his diplomatic status. Indeed, in her original application for a United States passport (which was granted), Muthana had produced evidence from the United States

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[80] Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 20, 2019, 3:05 PM), https://twitter.com/realDonaldTrump/status/.

[81] Expedited Complaint for Declaratory Judgment, Injunctive Relief and Petition for Writ of Mandamus at 9-10, Muthana v. Pompeo et al, No. 1:2019cv00445 (D.D.C. Feb. 21, 2019) [hereinafter *Muthana Case*].

[82] *See* U.S. CONST. amend. XIV. ("All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.").

[83] *See* Elk v. Wilkins, 112 U.S. 94 (1884) (holding that Native Americans do not gain birthright citizenship from the Fourteenth Amendment; only after passage of the Indian Citizenship Act of 1924, 43 Stat. 253, was Native American birthright citizenship guaranteed).

[84] The Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227.

[85] *Id*.

[86] *Id*.

[87] *See* United States v. Wong Kim Ark, 169 U.S. 649, 649 (1898) (noting that, under the Fourteenth Amendment, all children born within the United States, except the children of diplomats, enjoy birth right citizenship).

[88] *See* Swarna v. Al-Alwadi, 622 F.3d 123, 133 (2d Cir. 2010) (quoting Article 39(2) of the Vienna Convention).

Mission to the United Nations that indicated that Mr. Muthana's diplomatic status ended on September 1, 1994 (Hoda was born on October 24, 1994).[89] The government argues the opposite—that Muthana was born while her father still enjoyed residual diplomatic immunity.[90] The government contends that the United States had not received notice of Mr. Muthana's release from his official duties at the United Nations until after Hoda's birth.[91] Consequently, the government avers, Muthana was born while her father still effectively enjoyed the privileges and immunities of diplomatic status and was therefore not subject to the jurisdiction of the United States.[92] This matter is currently making its way through the courts. The issue of whether the United States had effective notice of Mr. Muthana's status will likely play a significant role in the question of Hoda Muthana's citizenship.

Proceeding on the assumption that Muthana is a United States citizen, the analysis of her situation can move to the next phase: expatriation. Under the current version of INA Section 349, any expatriation challenge Muthana faces will probably arise from the provision stating that nationality is lost by "making a formal renunciation of nationality..." or that her actions amount to treason.[93] However, Muthana certainly did not meet the requirements of these provisions.

An effective renunciation of nationality must conform perfectly with Section 349 and regulations prescribed in the Federal regulations.[94] This includes various signed forms, notice of the consequences of expatriation, and an oath witnessed by a diplomat or consular officer.[95] Muthana's tweet, which implied that she would burn her passport, would not meet any of those requirements. State expatriation through treason presents an even higher threshold.

Pursuing expatriation for treason has two main problems: It would require Muthana to be convicted of treason, which would itself require Muthana to be tried within the territory of the United States.[96] Additionally, a treason conviction requires the sworn testimony of two witnesses.[97] Indeed, in an effort to get around this high burden, Congress has enacted similar crimes with lower thresholds, which have caused treason convictions to be a relatively rare occurrence in the United States.[98] While Muthana's

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[89] *Muthana Case, supra* note 81, at 8.

[90] *Id.* at Exhibit B, Declaration of James B. Donovan.

[91] *Id*.

[92] *See Wong Kim Ark*, 169 U.S. at 87.

[93] Immigration and Nationality Act § 349(a)(2) (codified as amended at 8 U.S.C § 1481(a)(2)); Immigration and Nationality Act § 349(a)(5) (codified as amended at 8 U.S.C § 1481(a)(5)); Immigration and Nationality Act § 349(a)(7) (codified as amended at 8 U.S.C 1481(a)(7)).

[94] 22 C.F.R. § 50.50 (2020).

[95] *Id*.

[96] *Id*.

[97] U.S. CONST. art. III.

[98] *See generally* Espionage Act of 1917, 40 Stat. 217 (1917).

conduct may justifiably outrage many Americans, it has not yet met the legal requirements for expatriation.[99] Furthermore, the Supreme Court has stated that expatriation is "not a weapon that the Government may use to express its displeasure at a citizen's conduct."[100] Arguments for Muthana's violation of the other expatriation provisions are similarly weak.

Ancillary arguments that Muthana expatriated herself through one of the remaining Section 349 provisions are weak because those provisions require a "foreign state."[101] To date, the United States has never recognized ISIS as a "foreign state."[102] However, the government may explore other avenues to deny Muthana reentry into the United States in order to overcome Muthana's ineffective expatriation and its inability to expatriate her.

United States passports remain the property of the government even after issuance[103] and the State Department is permitted to deny passport issuance where "the Secretary [of State] determines that the applicant's activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States."[104] Under this provision, one could argue that Muthana's alleged membership in ISIS was sufficient evidence to deny her a passport because her actions caused serious damage to national interests. Still, the same regulation provides that, even where an applicant's passport has previously been revoked or denied, the State Department may issue a direct return passport.[105] Despite these accommodations, the Supreme Court seems unlikely to curtail citizens' "absolute" right to enter the borders of the United States.[106] Additionally, that Muthana was previously issued two United States passports likely gives rise to a separate procedural due process claim as well.[107]

A subtle variation on Muthana's story could raise even more difficult questions regarding the validity of the proposed legislation. Consider the following hypothetical: While residing in the United States, an American citizen (who has no other nationality), pledges allegiance to ISIS and conspires to attack a worship center in Ohio. Pursuant to the language of the pending Expatriate Terrorist Act, this conduct would be grounds for

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[99] *See* Hall, *supra* note 76 (Muthana's tweet stated, "Americans wake up! [...] Go on drive-bys and spill all of their blood [...] rent a big truck n drive all over them. Kill them.").

[100] Trop v. Dulles, 356 U.S. 86, 92–93 (1958).

[101] 8 U.S.C. § 1101-1178 (2014).

[102] DEPT. OF STATE, INDEPENDENT STATES IN THE WORLD (Mar. 27, 2019), *available at* https://www.state. gov/s/inr/rls/4250.htm.

[103] 22 C.F.R. § 51.7 (2020).

[104] 22 C.F.R. § 51.60(c) (2020).

[105] 22 C.F.R. § 51.60(h)(2)(i) (2020).

[106] Tuan Anh Nguyen v. I.N.S., 533 U.S. 53, 67 (2001).

[107] Steve Vladeck, *Unpacking (Some of) the Legal Issues Surrounding Hoda Muthana* JUST SECURITY (Feb. 20, 2019), https://www.justsecurity.org/62659/unpacking-some-of-issues-surrounding-hoda-muthana/.

expatriation.[108] Having no other nationality to claim, the person could be rendered stateless as the United States is not a signatory of the Convention on the Reduction of Statelessness.[109] Though the result of this hypothetical may seem far-fetched, the hypothetical has already occurred.[110] An uncritical view of the proposed legislation risks jeopardizing a key aspect of American identity and all the privileges and obligations it entails.

III. CONCLUSION

Whether protected as an individual right or utilized by the government to further state interests, expatriation remains a topic worthy of discussion. From the formation of the new Republic's citizenry to questions surrounding those who join armed groups across the globe, the doctrine defies mere historical or theoretical analysis. As in the case of Hoda Muthana, the real-world application of the doctrine of expatriation has consequences that go straight to the meaning of citizenship and touch the lives of Americans more broadly. Muthana's case has grabbed headlines in recent months, but her story is not unique. As the United States continues to manage FTO recruitment, leaders will increasingly turn to expatriation as an anti-terror mechanism.

However, the use of state expatriation in counterterrorism efforts must comply with the *Afroyim-Terrazas* framework, as was proposed in the 2017 ETA.[111] Similarly, the government should not use passport issuance prohibitions as an alternative to expatriation in the hope of blocking citizens from returning to the United States. In addition, the prohibition of the use of expatriation as a weapon against citizens should remain ever-present in the minds of our elected leaders.[112] While these recommendations seek to limit the use of state expatriation, only if the Supreme Court definitively adopts the individual expatriation doctrine will elected leaders be forced to abandon state expatriation as a counterterrorism tool.

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[108] *See* Expatriate Terrorist Act, S. 361, 115th Cong. (2017) ("making a declaration of allegiance to a foreign terrorist organization.").

[109] *See generally* Convention on the Reduction of Statelessness, Dec. 13, 1975, 989 U.N.T.S. 175.

[110] *See* U.S. DEPT. OF JUST., *Ohio Man Arrested and Charged in Federal Court After Planning an Attack on a Synagogue in the Toledo Area* (Dec. 10, 2018), *available at* https://www.justice.gov/usao-ndoh/pr/ohio-man-arrested-and-charged-federal-court-after-planning-attack-synagogue-toledo-area (Damon Joseph, an Ohio native who complained that his mosque was too critical of ISIS, was arrested for planning attack on a synagogue. Federal agents confiscated two semi-automatic rifles.).

[111] Expatriate Terrorist Act, S. 361, 115th Cong. (2017).

[112] Trop v. Dulles, 356 U.S. 86 (1958).

It's Time to Extend *Maryland v. Craig*: Remote Testimony by Adult Sex Crime Victims

CAITLIN ERIN MURPHY[†]

"In all criminal prosecutions, the accused shall enjoy the right… to be confronted with the witnesses against him…."[1]

The Confrontation Clause of the United States Constitution is one of many procedural rights given to criminal defendants.[2] It guarantees to every person tried for a crime the right to be confronted with the witnesses against him.[3] Ideal confrontation requires the prosecution's witnesses to testify in court, under oath, subject to cross-examination, and in view of the jury.[4] These safeguards provide confidence that the government's testimony is as reliable as possible. Sometimes, however, a witness is unable to appear at trial due to illness or death; sometimes a witness is too psychologically fragile to testify in court. May testimony from witnesses like these be introduced against a criminal defendant absent a face-to-face, physical confrontation and still comply with the Confrontation Clause?

In *Maryland v. Craig*, the Supreme Court allowed a child sexual assault victim to testify remotely, via live one-way video conference.[5] The court reasoned that it is both acceptable and within the bounds of the Constitution to dispense with face-to-face confrontation when it is necessary to further an important public policy and when other tests guarantee the testimony's reliability.[6] Since *Craig*, the constitutionality of live remote testimony has been extended to witnesses in a variety of situations where public policy warrants dispensing with traditional face-to-face confrontation.[7] Adult witnesses who are too elderly or ill to travel, those who cannot be brought to the country to testify, and those who are too mentally vulnerable to testify have been allowed to utilize two-way video testimony.[8] In these situations a

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[1] U.S. CONST. amend. VI.

[2] U.S. CONST. amend. I–X.

[3] U.S. CONST. amend. VI; incorporated against the states through U.S. CONST. amend. XIV.

[4] California v. Green, 399 U.S. 149 (1970).

[5] Maryland v. Craig, 497 U.S. 836 (1990).

[6] *Id.*

[7] *See* People v. Burton, 219 Mich. App. 278 (1996); *see also* State ex rel. Montgomery v. Kemp, 239 Ariz. 332 (2016); *see also In re* R.T. (Maria O.), 53 N.Y.S.3d 889 (Family Court, Bronx County, 2017).

[8] *In re* R.T. (Maria O.), 53 N.Y.S.3d.

preliminary hearing is held to determine if 1) remote testimony is necessary and 2) if the evidence is reliable.[9]

Several jurisdictions have already decided that adult victims of sexual crimes should also be offered the opportunity to testify via live, two-way closed-circuit television. For reasons similar to those the Court offered in *Craig* to allow remote testimony from child sex crime victims, remote testimony by adult sex crimes victims is justified where necessary to promote the psychological well-being of the witness. These individuals are particularly vulnerable, suffering at a high rate from post-traumatic stress disorder, major depression, and suicidal ideation. Furthermore, testimony via live, two-way, closed-circuit television does not make the trial unfair to the defendant and it enhances fairness to the victim.

This note explores the Confrontation Clause as it applies to the use of two-way closed-circuit television to present the testimony of adult victims of sex crimes. Part I of this note explores the recent history of the Confrontation Clause, setting out the basic doctrine and principles. Part II discusses the landmark *Craig* case, which upheld a statute allowing remote testimony by a child victim of sexual abuse. Part III explains the circumstances under which the holding of *Craig* has already expanded to child witnesses and adult witnesses in a variety of criminal cases. Finally, Part IV explains why expanding *Craig* to adult victims of sexual assault is desirable. Courts or legislatures in several states have already done so, recognizing these witnesses' vulnerability and the risks of forcing them witnesses to testify live in court. This note argues that extending *Craig* as these states have done makes sense because 1) there is an important public policy interest in prosecuting perpetrators and 2) it is important to protect victims of sexual assault, regardless of age.

I. THE CONFRONTATION CLAUSE: HISTORY, REQUIREMENTS, AND PREFERENCES

A. Requirements and Benefits

Through the Bill of Rights, criminal defendants are afforded many procedural rights. One of these is the right to confront the witnesses presented against them.[10] This right, found in the Confrontation Clause, applies only in criminal cases where the prosecution seeks to put testimonial statements before the trier of fact.[11] Statements are testimonial when there is a reasonable expectation by the person giving the statement that it will be used in a prosecution setting, or more simply in a criminal trial.[12]

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[9] United States v. Yates, 438 F.3d 1307 (11th Cir. 2006).

[10] U.S. CONST. amend. VI.

[11] *Id.*; *see also* Crawford v. Washington, 541 U.S. 36 (2004).

[12] *Crawford*, 541 U.S. at 51; As opposed to statements made to disinterested third parties where the

The Confrontation Clause also provides benefit by testing the reliability of testimonial evidence used to prove guilt.[13] Because the prosecution bears the burden of proving the crimes charged beyond a reasonable doubt[14] and the defendant's liberty is on the line, ensuring reliability of trial evidence is of utmost importance. Confrontation does this in three ways: 1) by requiring the witness to be placed under oath prior to giving testimony, 2) by permitting the accused to cross-examine the witness to expose infirmities in the testimony, and 3) by permitting the finder of fact to observe the witness' demeanor while he or she testifies.[15]

These protections, however, are not absolute. For one, cross-examination is only permissible, it is not required.[16] Further, testimonial hearsay can be used against the accused, absent confrontation, in situations where the declarant is truly unavailable and opposing counsel had the opportunity to cross-examine at an earlier time.[17] In this situation, the current finder of fact will be unable to judge the demeanor of the witness because he or she would have testified at an earlier time.

In most situations, however, the witness will be called into court to testify, it is in this situation that the evidentiary benefits of confrontation can be seen. When the witness is testifying in court, the Confrontation Clause enhances reliability by requiring the witness to take an oath to tell the truth upon penalty of perjury.[18] The seriousness of telling the truth on the stand is expressed through the threat of a criminal charge if the witness lies, thus deterring untruthfulness.[19]

Permitting defense counsel to cross-examine the testifying witness enhances reliability because it allows counsel to expose any infirmities, like forgetfulness, confusion, or evasion, that could cause the witness to give untrustworthy or inaccurate evidence.[20] In *California v. Green*, the Supreme Court of the United States allowed the admission of a witness's prior

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declarant has no expectation that the statement will be used in a prosecution; *see also* Ohio v. Clark, 576 U.S. 1 (2015).

[13] *Craig,* 497 U.S. at 845 ("The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.").

[14] *Id.*

[15] California v. Green, 399 U.S. 149 (1970).

[16] U.S. CONST. amend. VI.

[17] *Id.* at 51, 54.

[18] Jessica Brooks, *Two-Way Video Testimony and the Confrontation Clause: Protecting Vulnerable Victims after Crawford*, 8 STAN. J. C.R. & C.L. 183, 192 (2012).

[19] Robert C. Sorenson, The *Effectiveness of the Oath to Obtain a Witness' True Personal Opinion,* 47 J. OF CRIM. L. AND CRIMINOLOGY 284, 285-286 (1956); *see also* Joseph N. Sacca, *Criminal Procedure—The Constitutionality of Testimony by Closed-Circuit Television in Criminal Prosecutions—Commonwealth v. Ludwig,* 594 A.2D 281 (Pa.1991), 65 TEMP. L. REV. 699, 710 (1992) ("A witness at trial is required to testify under oath. Some courts equate the oath with all of the trappings of a courtroom, such as the judge, jury, and flags, which can instill in a witness respect for the court and the truth").

[20] *Green,* 399 U.S. at 158.

statements.[21] The witness contradicted himself on the stand, and the prosecution sought to enter excerpts from his preliminary hearing testimony to explain the inconsistency with the testimony offered in court.[22] The defense objected on the grounds that because the witness was not cross-examined at the time he made the prior statements, allowing them into evidence violated Green's Confrontation Clause rights.[23] The Court disagreed, reasoning that when witnesses are *currently* available at trial to be cross-examined, testimony is reliable enough to satisfy the Confrontation Clause.[24] *Crawford v. Washington,* put heavy emphasis on cross-examination, more or less making it the *sine qua non* of confrontation.[25] Here, the Supreme Court dealt with a prior statement of a witness unavailable to testify at trial.[26] The Court held that admitting a pretrial statement of a woman unavailable to testify at trial violated the accused's Confrontation Clause rights, but only because of the lack of an opportunity for cross-examination.[27] The woman made her statement to the police in the course of an interrogation and the court found it testimonial in nature, thus invoking the Confrontation Clause protections.[28]

Lastly, providing the finder of fact the ability to observe the witness's demeanor enhances reliability because fact-finders who can see the witness testify are better able to decide, by observing the witness's face and body language and by listening to the witness's tone of voice, if the witness is telling the truth.[29]

B. Face-to-Face Confrontation: A Long-Standing Preference

The courts have long preferred physical, face-to-face confrontation, though the Confrontation Clause does not mandate it.[30] This preference grows from the belief that such confrontation provides the witness with a certain level of "benign intimidation" which encourages recollection, truth, and communication.[31] The underlying logic is that it is easier to make false

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[21] *Id.* at 151–52.

[22] *Id.*

[23] *Id.*

[24] *Id.* at 158.

[25] *Crawford*, 541 U.S. at 36.

[26] *Id.*

[27] *Id.* at 38.

[28] *Id*. at 52 (Finding that "Statements taken by police officers in the course of interrogation are also testimonial under even a narrow standard.").

[29] 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. 1158 (1993); *see also* Sacca, *supra* note 19, at 712 (Regarding demeanor evidence, "[t]his nonverbal communication is essential, because in communicating, people rely to a great extent on nonverbal cues").

[30] *See* Ohio v. Roberts, 448 U.S. 56, 63 (1980).

[31] Maria H. Bainor, *The Constitutionality of the Use of Two-Way Closed-Circuit Television to Take Testimony of Child Victim of Sex Crimes*, 53 FORDHAM L. REV. 995, 1008 (1985).

accusations about someone behind his back than to do it in his presence.[32] If that is so, then testifying in the defendant's physical presence will deter witnesses from making false accusations, thus enhancing the reliability of their testimony.

In *Coy v. Iowa,* the Supreme Court analyzed the preference for physical, face-to-face confrontation. The Court held that the use of a screen placed between the testifying victims and the defendant violated the defendant's Confrontation Clause rights.[33] The Court read a right to physical face-to-face confrontation into the Confrontation Clause and then found that the use of a protective screen blocking the view between the defendant and the victims violated the Confrontation Clause.[34] The Supreme Court soon recognized, though, that this is only a preference, not a requirement.[35]

II. WHO CAN CONSTITUTIONALLY TESTIFY FROM A REMOTE LOCATION?

A. Allowing Remote Testimony: Maryland v. Craig

Along similar lines to *Coy*, in *Maryland v. Craig* the Supreme Court heard arguments on a case that allowed a child witness to testify from outside the courtroom and the defendant's presence, using a live-stream to project her testimony into the courtroom.[36] The prosecutor intended to call a six-year-old child abuse victim as a witness at trial. Due to the serious emotional distress that testifying in the defendant's presence would cause the child, the government sought to invoke a state statute allowing the victim to testify from outside of the courtroom, via one-way closed-circuit television.[37] The statute required that the witness, the prosecutor, and the defense attorney withdraw to a separate room for the examination while the judge, the jury, and the defendant remained in the courtroom.[38] The judge, the jury, and the defendant in the courtroom would be able to see and hear the witness, and the defendant would stay in electronic communication with his or her counsel.[39] The testifying witness, however, would be unable to see or hear anyone in the courtroom.

The defendant claimed that allowing the taking of testimony in this manner would violate his Confrontation Clause rights.[40] The Supreme Court disagreed, holding that the witness's inability to see him while testifying did

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[32] *Id.* at 1011.
[33] Coy v. Iowa, 487 U.S. 1012 (1988).
[34] *Id.* at 1017.
[35] *Craig*, 497 U.S. at 849.
[36] *Id.* at 836.
[37] *Id.* at 843.
[38] *Id.* at 840.
[39] *Id.* at 842.
[40] *Id.*

not violate his right to confront her. The Court found that forcing the witness to testify in court would result in emotional distress so severe that she would not be able to communicate effectively.[41] This, coupled with the important and recognized public policy interest in protecting victims of child abuse, led the Court to permit the witness to testify via closed-circuit television.[42]

Remote testimony, under the specific conditions in *Craig*, satisfies the central purpose of the Confrontation Clause: to ensure testimonial reliability through oath, cross-examination, and demeanor evidence.[43] *Craig* set out a two-part test to ensure compliance with the Confrontation Clause without physical, face-to-face confrontation. The Court ruled that it is constitutional to dispense with direct confrontation when the testimony is sufficiently reliable and when there is a case-specific finding of the need for remote testimony in order to promote an important public policy.[44]

To test reliability, the Court required: (1) taking the testimony under oath, (2) allowing for cross-examination by opposing counsel, and (3) taking the testimony in full view of the fact finders so that they may make use of demeanor evidence.[45] *Craig* met the first prong, reliability, because the remote testimony satisfied all three indicia of reliability: testimony under oath, opportunity to cross-examine, and the judge, jury, and defendant's ability to see her testify and judge her demeanor.[46] Contrast this to *Coy* where the defendant had his view of the witness entirely for the examination's duration.[47] In *Coy*, the defendant's inability to see the witness hindered his ability to exercise his right to confront witnesses and defend himself. While physical, face-to-face confrontation provides the most effective means of guaranteeing reliability, when the other three *Green* components are met, as they were in *Craig*, the court can rest assured that the testimony is as reliable as it would have been had the witness testified in the courtroom.[48]

Craig met the second prong (the need to dispense with face-to-face testimony in order to further public policy) for two reasons: the thought of testifying in open court would have caused this young witness serious emotional distress; and if witnesses are traumatized, they will not want to testify, and if they do not want to testify, then attackers may go unpunished.[49] About 1 in 10 children will be sexually abused before their 18th birthday, yet less than two in five victims disclose their abuse.[50] Given these statistics,

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[41] *Craig*, 497 U.S. at 842.
[42] *Id.* at 852.
[43] *Id.* at 845.
[44] Brooks, *supra* note 18, at 199.
[45] *Craig,* 497 U.S. at 837.
[46] *Id.*
[47] *Coy*, 487 U.S. at 1012.
[48] *Craig*, 497 U.S. at 850.
[49] *Id.* at 860.
[50] *Child Sexual Abuse Statistics,* DARKNESS TO LIGHT, http://www.d2l.org/wp-content/uploads/2017

assuring that the victim feels safe coming forward to tell his or her story in court is a necessity. Instances of child abuse typically occur in private, such that the child and the alleged abuser are the only ones who can testify about it.[51] Subsequently, the court very rarely has third party testimony. Furthermore, physical evidence may not be obtainable because injuries may have already healed by the time the abuse is reported.[52] The victim's testimony is therefore crucial.

The trauma of forcing the child witness to recount the abuse in the alleged abuser's presence may render the child "functionally incompetent" as a witness.[53] The adversarial setting has actually been found to discourage truthfulness amongst children. One study indicated that correct identification occurs only half as often when the victim is face-to-face with the alleged abuser as it does when the victim is not in the alleged abuser's physical presence.[54] In *Craig*, an expert witness testified that the six-year-old witness would not be able to communicate if she were made to testify in the defendant's presence.[55] Without her testimony, the prosecution's case would have been substantially compromised. Therefore, *Craig* satisfied the second prong of the test, and court deemed the use of live, one-way closed-circuit television testimony constitutional.

B. Why Craig *Made the Correct Decision*

Given that sex crimes often have few witnesses beyond the attacked and the attacker, allowing for testimony via closed-circuit television may result in more witnesses being comfortable with and agreeing to testifying. Sex crimes are unique in that there are often no witnesses other than the victim and the accused.[56] The accused has the right to refuse to testify and cannot be compelled to do so[57]; therefore, the victim's testimony is crucial. Without it, the chances of successful prosecution drop. In these sorts of situations, the prosecutor has three options: she can forego calling the witness altogether; she can rely on prior statements if the prosecutor can convince the judge that the witness is truly unavailable and that the statements are non-testimonial,[58]or, if the statements are testimonial, that the defendant had an opportunity to cross-examine the witness; or she can call the witness and hope that the witness can answer the questions and not be too traumatized

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/01/all_statistics_20150619.pdf (last visited Mar. 31, 2019).

[51] U.S. CONST. amend. V (Self Incrimination Clause).

[52] Brian L. Schwalb, *Child Abuse Trials and the Confrontation of Traumatized Witnesses: Defining Confrontation to Protect both Children and Defendants*, 26 HARV. C.R.-C.L. L. REV. 185, 186 (1991).

[53] *Id.* at 187.

[54] *Id.* at 191.

[55] *Craig*, 497 U.S. at 836.

[56] Bainor, *supra* note 31, at 1000.

[57] U.S. CONST. amend. V. (Self-Incrimination Clause).

[58] Ohio v. Clark, 576 U.S. 1 (2015) (Discussing the emergency exception to testimonial statements).

by the situation. None of those options are ideal. *Craig*, however, recognized a fourth alternative: remote testimony. Remote testimony allows the witness to be placed under oath, gives the defense the opportunity to cross-examine, and gives the finder of fact an opportunity to observe the witness as he or she testifies.

This is far better for the defendant than the alternative of introducing the witness's prior statement, even if that statement was subjected to cross-examination when made. [59] For one, the defense's strategy may have changed since the earlier proceeding, so the defense attorney may wish to cross-examine the witness now on matters not touched upon previously. Further, current finders of fact will not be able to judge the demeanor of a witness whom they never have the chance to see. In contrast, when the witness testifies via closed circuit television, the finders of fact can watch the testimony and evaluate the witness's demeanor. *Craig* recognized the importance of protecting witnesses from traumatization and protecting the defendant's Confrontation Clause rights and implemented a rule that allows for protection of both of those interests.[60]

III. THE RESPONSE TO CRAIG: NATIONWIDE EXTENSIONS

Both Congress and most state legislatures and most courts have adopted the holding in *Craig* as the basis for codifying the right of child victims of certain crimes to testify remotely.

A. Federal Law

In 2001 Congress enacted a statute based on a modified version of the holding of *Craig*.[61] The statute provides two alternatives to live, in-court testimony for children under the age of eighteen who are victims of a crime of physical abuse, sexual abuse, or exploitation or who are witnesses to a crime committed against another person.[62] The two alternatives are live, two-way closed circuit television and videotaped depositions.[63]

An attorney (either for the Government or the child) or a guardian ad litem may move the court to order that the child witness testify via live, two-way closed circuit television.[64] The court will make an order if it finds that the child is unable to testify in the defendant's presence due to fear, substantial likelihood of emotional trauma, mental or other infirmities, or wrongful conduct by the defendant or his counsel.[65] The court may question

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[59] *See* FED. R. EVID. 801.
[60] *Craig*, 497 U.S. at 836.
[61] 18 U.S.C. § 3509 (2001).
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*

the minor in chambers or elsewhere to determine the child's ability to testify in court.[66] Similarly, the attorney for the Government, the attorney for the child, a guardian ad litem, or the parent of the child may move for a court order allowing the child's testimony to be taken by videotaped deposition.[67] Before allowing a videotaped deposition, the court must make a preliminary finding that the child is unable to testify.[68] The statute also lays out exactly who is and is not allowed in the room during the taking of the testimony.[69]

In 2017, the Second Circuit Court of Appeals upheld this statute in *U.S. v. Graham*.[70] In this sex trafficking case, the district court judge allowed the seventeen year old victim to testify remotely after reviewing a psychiatric report confirming that the witness would be unable to communicate reasonably due to mental trauma if forced to testify in front of her attacker.[71] The defendant appealed, claiming that a simple claim that the victim felt nervous, uncomfortable, and fearful did not meet the necessity requirement of *Craig*.[72] The court disagreed and affirmed the trial court's decision to allow the victim to testify remotely because of her apprehension of testifying in front of the defendant.[73]

B. State Law

Almost every state has enacted a law similar to the federal counterpart allowing remote testimony in particular instances. Some states statutes are more restrictive than federal law; others are broader.

Two states that have codified more restrictive statutes are Washington and Connecticut.

In Washington, the prosecutor must move for a child under fourteen to testify via live, one-way closed circuit television.[74] This statute is applicable to physical abuse, sexual abuse, trafficking, and violent offenses either committed against the child or witnessed by the child.[75] The court must find by substantial evidence that the defendant's presence would cause the child to suffer serious emotional or mental distress that will prevent the child from being able to reasonably communicate at trial.[76] *State v. Foster* confirmed

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[66] *Id.*

[67] 18 U.S.C. § 3509 (2001).

[68] *Id.*

[69] *Id.*

[70] United States v. Graham, 707 Fed. Appx. 23 (2d Cir. 2017).

[71] *Id.* at 28.

[72] *Id.*

[73] *Id.* (Affirming use of closed-circuit television testimony through examination of a psychiatric report confirming that the witness would suffer trauma so severe that she would not be able to reasonably communicate).

[74] WASH. REV. CODE ANN. § 9A.44.150 (West 2013).

[75] *Id.*

[76] *Id.*

this statute's constitutionality.[77] In this child abuse case, the Supreme Court of Washington held, similarly to *Craig*, that the right to confront witnesses "face to face" is not absolute and may be limited when necessary to further an important state interest and procedures are used that adequately ensure the reliability of the remote testimony.[78]

In Connecticut, only children under the age of twelve who are victims of sexual assault, assault, or child abuse may benefit from the remote testimony option.[79] Either party's attorney may move for this, and remote testimony will be allowed only upon a showing:

> [b]y clear and convincing evidence, that the child would be so intimidated, or otherwise inhibited, by the physical presence of the defendant that a compelling need exists to take the testimony of the child outside the physical presence of the defendant in order to insure the reliability of such testimony.[80]

The Connecticut Supreme Court in *State v. Snook* affirmed the constitutionality of this statute.[81] In this child sexual assault case, the court upheld the use of videotaped testimony upon a finding by clear and convincing evidence that allowing remote testimony would be necessary to maintain the victim's well-being.[82]

On the other end of the spectrum are states like Iowa and Massachusetts, which have adopted rules more relaxed than the federal requirements. In Iowa, the court may order that the testimony of a minor (someone under the age of eighteen) be taken outside the defendant's physical presence via closed circuit television upon a specific finding that such measures are necessary to protect the minor from trauma.[83] The Iowa Court of Appeals in *State v. Hicks* upheld this statute.[84] On motion to have the victim testify remotely via closed circuit television, the State offered evidence from a clinical social worker that the victim would likely regress in therapy due to the trauma of testifying in front of the defendant and that the defendant's presence during the testimony would render the victim unable to communicate.[85] The court agreed, affirming using closed circuit television to deliver testimony under these circumstances.[86] In Massachusetts a victim

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[77] State v. Foster, 957 P.2d 712 (Wash. 1998).
[78] *Id.* at 714.
[79] CONN. GEN. STAT. § 54-86g (1990).
[80] *Id.*
[81] State v. Snook, 555 A.2d 390 (Conn. 1989).
[82] *Id.* at 394.
[83] IOWA CODE § 915.38 (2013).
[84] State v. Hicks, 913 N.W.2d 628 (Table) (Iowa Ct. App., 2018).
[85] *Id.*
[86] *Id.*

or witness of sexual abuse, physical abuse, or other named crimes under the age of fifteen may use a "suitable alternative procedure" for the taking of testimony if the court finds by a preponderance of the evidence that the witness is likely to suffer psychological or emotional trauma as a result of testifying in open court or in the defendant's presence.[87] Although Massachusetts courts have not yet ruled on the statute's constitutionality, the state has allowed the videotaped testimony of child victims of sexual abuse on several occasions.[88]

IV. EXTENDING CRAIG TO ADULTS

A. Current Extensions

Craig held that criminal defendants' right to confrontation sometimes needs to bend to accommodate the demands of public policy – in that case, the need to obtain testimony from child sex abuse victims and to avoid further traumatizing those victims by forcing them to testify in open court in the presence of their alleged abusers.[89] Following *Craig*, federal and state courts have identified several additional public policies important enough to allow for remote testimony by adults.[90]

For example, in *United States v. Gigante*, the Second Circuit Court of Appeals held that the preference for face-to-face confrontation must yield to protect the public policy interest in safeguarding victims who are too ill to travel.[91] Almost a decade later, the Fourth Circuit upheld the use of remote testimony deemed necessary to a prosecution involving the protection of the nation and its citizens from international terrorist attacks.[92] Finally, a federal district court in the state of Washington allowed remote testimony in a prosecution for international drug smuggling.[93] Under all three of these policies, the witnesses were subject to the three traditional testimonial safeguards (oath, cross-examination, and demeanor evidence), so that the courts could be assured of the testimony's reliability.

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[87] MASS. GEN. LAWS ch. 278, § 16D (2012).

[88] Commonwealth v. Amirault, 677 N.E.2d 652 (Mass. 1997); *see also* Commonwealth v. Tufts, 542 N.E.2d 586 (Mass. 1989).

[89] *See Craig*, 497 U.S. at 836 (Holding that protecting child victims of sexual abuse was a public policy important enough to outweigh the defendant's preference for a face-to-face confrontation).

[90] *See* United States v. Gigante, 166 F.3d 75 (2d Cir. 1999); *see also* United States v. Abu Ali, 528 F. 3d 210 (4th Cir. 2008); *see also* United States v. Rosenau, 870 F. Supp. 2d 1109 (W.D. Wash. 2012).

[91] *Gigante*, 166 F.3d at 75 (Allowing a fatally ill witness to testify remotely via two-way closed-circuit television); *see also* United States v. Benson, 79 Fed. Appx. 813 (6th Cir. 2003) (Allowing an elderly and ill woman, too sick to travel, to testify via live two-way video conference).

[92] *Abu Ali*, 528 F.3d at 210 (Allowing witnesses in a terrorism trial to testify remotely from Riyadh via live two-way closed-circuit television, while the defendant remained in America).

[93] *Rosenau*, 870 F. Supp. 2d at 1109 (Allowing the remote testimony of witnesses to a drug smuggling case, holding that this better preserves the defendant's confrontation clause rights as opposed to a Rule 15 deposition).

Most recently, in 2011, a state court in Ohio extended *Craig* to allow intimidated witnesses in a murder trial to testify via two-way, closed-circuit television.[94] The court in *State v. Johnson* reasoned that, under *Craig*, prosecuting murderers is an important public policy and allowing the intimidated witnesses to testify remotely ensured that they would in fact testify, because without their testimony the case would have been seriously compromised.[95]

The Eleventh Circuit Court of Appeals in particular has decided to limit *Craig*'s expansion so that physical confrontation can be dispensed with only after a finding in a preliminary hearing that it is truly necessary that the testimony is taken remotely and that the testimony is sufficiently reliable.[96] In *United States v. Yates*, the government claimed it was necessary to use live, two-way video to take the testimony of two witnesses in Australia due to the witnesses' unwillingness to travel to the United States.[97] In this case, the court held neither an evidentiary hearing nor found a showing of an important public policy.[98] Simply expediting a case, convenience, and unwillingness of the witness to travel are not enough to satisfy this test and allow for remote testimony.[99] *Yates* thus limited the use of remote testimony so that it does not become a commonplace alternative to live, in-court testimony. These holdings show that the courts must undertake a balancing test when the prosecution seeks to allow a witness to testify remotely.[100] The defendant and his right to confrontation rest on one side of the scale; the interests of the government and the public, on the other. Both the defendant's and the government's interests are important, but one side must outweigh the other. *Craig* identified one governmental interest sufficient to outweigh the defendant's right to direct confrontation – not discouraging child sex abuse victims from testifying [and not re-traumatizing them].[101] Since *Craig*, lower federal and state courts have expanded the list of governmental interests that override the defendant's right to live, face-to-face confrontation to include elderly and ill witnesses, witnesses in cases of national security – and, in some jurisdictions, adult witnesses of sex

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[94] State v. Johnson, 958 N.E.2d 977 (Ohio App. 1 Dist. 2011).

[95] *Id.* at 989.

[96] United States v. Yates, 438 F.3d 1307 (11th Cir. 2006) (Allowed only when there is (1) an evidentiary hearing and (2) find: (a) that the denial of physical, face-to-face confrontation at trial is necessary to further an important public policy and (b) that the testimony's reliability is otherwise assured.); *see also* United States v. Carter, 907 F.3d 1199 (9th Cir. 2018) (holding that the right to face-to-face confrontation is not absolute. Inability to travel due to pregnancy does not create a necessity for remote testimony).

[97] *Yates*, 438 F.3d at 1310.

[98] *Id.*

[99] *Rosenau*, 870 F. Supp. 2d at 1113 (citing *Yates*, 438 F.3d at 1316–17).

[100] Sacca, *supra* note 19, at 712 ("Alternatively, the court could have utilized an interest-balancing approach. Both the federal and Pennsylvania courts have viewed the right to confrontation as fundamental. This right, however, can be subrogated to significant competing public policy interests").

[101] *Craig,* 497 U.S. at 836.

crimes.[102] The next section(s) of this note discusses the admissibility of remote testimony by this last category of witnesses.

B. Another Class of Witnesses Worthy of Protection: Extending Craig to Adult Victims of Sexual Crimes

Protecting children victims of sex crimes,[103] protecting the ill and elderly,[104],and prosecuting terrorists[105] have all been deemed to justify modified confrontation via closed-circuit television testimony, without violating the defendant's Confrontation Clause rights.[106] Protecting adult victims of sexual assault and encouraging prosecution of attackers is an important public policy also worthy of that option. Several jurisdictions have already permitted remote testimony by these witnesses.[107] These courts and legislatures have been correct to extend *Craig* to this class of victims because these witnesses, like child victims, are particularly vulnerable.[108] Further, empirical studies have demonstrated that testimony via live videoconference has little to no detrimental effect on the defendant's Confrontation Clause rights.[109]

1. Jurisdictions Allowing Adult Victims of Sex Crimes to Testify Remotely

Several jurisdictions have already recognized the importance of both protecting adult victims of sexual assault and domestic violence and prosecuting alleged attackers and have responded by extending the holding in *Craig*.[110] In Michigan, *People v. Burton* extended the holding of *Craig* to an adult victim of physical and sexual abuse.[111] In this case the defendant had brutally attacked his adult victim, knocking her unconscious, beating her, stabbing her in the breast repeatedly with a fork, raping her, and ripping her eye from its socket.[112] At trial, the victim requested to testify via closed-circuit testimony after she found it too difficult to testify in the courtroom.[113] In an evidentiary hearing, the witness made it clear that a combination of the jury pressure, the media coverage, and her fear of the defendant rendered her

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[102] *Gigante,* 166 F.3d 75; *see also infra* notes 111, 117, 121.
[103] *Craig,* 497 U.S. at 836.
[104] *Gigante,* 166 F.3d. 75.
[105] *Abu Ali,* 528 F. 3d.
[106] U.S. CONST. amend. VI.
[107] *Infra* section IV.B.1.
[108] *Infra* section IV.B.2.
[109] *Infra* section IV.C.
[110] *Infra* notes 111, 117, 121.
[111] People v. Burton, 556 N.W.2d 201 (Mich. App. 1996).
[112] *Id*. at 202–03.
[113] *Id*. at 204.

unable to testify.[114] The court noted that although this particular victim suffered from various mental and emotional disabilities as a consequence of the attacks, the heinous circumstances of this case alone were enough to frighten even a completely healthy and mentally stable individual.[115] The physical and mental well-being of the victim and the need to obtain her testimony were found to be sufficiently important so as to limit the defendant's right to face his accuser in open court.[116]

In Arizona, the Court of Appeals addressed this issue in *State ex rel. Montgomery v. Kemp*, a trial for the kidnapping, assault, and rape of a twenty-year-old woman.[117] The victim suffered from "major depressive disorder" with psychotic features, exacerbated by the post-traumatic stress disorder (PTSD) she developed after her rape, as well as non-epileptic seizures and other medical problems.[118] The court applied the *Craig* test,[119], finding that allowing the victim to testify via two-way videoconferencing would not violate the defendant's Confrontation Clause rights because it was necessary to protect the victim and secure her testimony.[120]

The Family Court for Bronx County New York addressed the issue of two-way video testimony in the case of *R.T. v. Maria O.*[121] Although this case concerns a child neglect proceeding and not a criminal case, the witness, now an adult, had been sexually abused by the respondent as a minor.[122] Her attorney explained the victim's hesitancy to testify and argued that if she were made to testify in the same room as the defendant, she would suffer potentially significant psychological trauma.[123] The court found the witness "sufficiently vulnerable to justify testimony by CCTV" and allowed her to testify that way.[124]

These cases allowing adult victims and adult witnesses of sexual abuse and domestic violence to testify via closed circuit testimony are supplemented by two state statutory provisions. In 2017, the New Jersey Legislature enacted a statute allowing a victim or witness, regardless of age, to testify via closed circuit television in prosecutions for a rape or other listed sexual offense or crime involving domestic violence[125] if, on motion and after having a hearing in camera, the judge decides by clear and convincing

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[114] *Id*.

[115] *Id*. at 205.

[116] *Id*. at 206.

[117] *See* State *ex rel.* Montgomery v. Kemp, 371 P.3d 660 (Ariz. 2016).

[118] *Id.* at 661.

[119] *Craig,* 497 U.S. at 850 ("State must show that (1) the detail of face-to-face confrontation is necessary to further an important public policy; (2) the reliability of the testimony is otherwise assured; and (3) there is a case specific showing of necessity for the accommodation.").

[120] *Kemp,* 371 P.3d at 666.

[121] *In re* R.T. (Maria O.), 53 N.Y.S.3d 889 (N.Y. Fam. Ct. 2017).

[122] *Id*. at 891.

[123] *Id*. at 892.

[124] *Id.* at 896.

[125] *See id*.

evidence that there is a substantial likelihood that the victim or witness would suffer severe emotional distress upon being made to testify in front of the spectators, defendant, jury, or any combination of them.[126] No courts have yet ruled on the statute's constitutionality.

Similarly, in 2015, Delaware enacted a statute allowing victims, regardless of age, to testify via secured video connection provided certain criteria are met.[127] The individual must be a victim of sexual assault or domestic violence and the judge must determine that the victim would suffer serious emotional distress such that they cannot reasonably communicate for videoconference testimony to be allowed.[128] Like New Jersey's law, this statute has yet to be contested in court.

2. Vulnerability of Adult Sex Crime Victims: Health Issues

Protecting victims of sex crimes is an important public policy concern regardless of the age of the victim.[129] Sexual assault crimes are some of the most underreported crimes in the United States.[130] A study by the Rape, Abuse, and Incest National Network (RAINN) found that out of every 1,000 sexual assaults only 310 are reported to the police.[131] That same study found that of those polled who chose not to report, 20% listed fear of retaliation as a reason for not reporting.[132] And only six out of every thousand reported sexual assaults leads to the conviction and incarceration of the perpetrator.[133] Two fears faced by women that impact their decision to testify are fear of the legal system and fear of appearing in court.[134] The basis for these fears is in part due to the inherently intimate nature of sexual assault allegations and the pain and embarrassment that can accompany upon public disclosure.[135] While the intimate nature of the crime cannot be avoided or changed by allowing the victim to testify outside the defendant's presence and away from the public nature of a courtroom may alleviate some of the embarrassment.

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[126] *Id.* at 896.

[127] DEL. CODE ANN. tit. 11, § 3514 (2015).

[128] *See id*.

[129] Carolyn W. Kenniston, *You May Now "Call" Your Next Witness: Allowing Adult Rape Victims to Testify Via Two-Way Video Conferencing Systems*, 16 J. HIGH TECH. L. 96, 113 (2015).

[130] Lisa Hamilton Thielmeyer, *Beyond* Maryland v. Craig*: Can and Should Adult Rape Victims be Permitted to Testify by Closed-Circuit Television?* 67 IND. L. J. 797, 810 (1992).

[131] *The Criminal Justice System: Statistics*, RAINN, https://www.rainn.org/statistics/criminal-justice-system (last visited Mar. 31, 2019).

[132] *Id.*

[133] *Id.*

[134] Thielmeyer, *supra* note 130, at 810.

[135] *Id*. at 811. ("For the victim, the criminal justice system can be 'torturous, vexing, embarrassing, and uncertain'. The experience of publicly testifying about the rape and facing the rapist in court can add to the already devastating emotion effect of the attack.").

Victims of sexual assault and domestic violence are prone to a barrage of continuing mental health issues that far outlast the physical pain.[136] One of these issues is post-traumatic stress disorder (PTSD), a disorder which develops after witnessing or experiencing a traumatic event.[137] Symptoms of PTSD include unpleasant intrusive thoughts, resisting talking about what happened, and negative thoughts and feelings.[138] Generally, symptoms appear in the first three months after the event, but they may last for months or years.[139] A study by the National Violence Against Women Prevention Research Center found that almost one-third of all sex crime victims developed PTSD at some point after their attack.[140] Sex crimes victims were over six times more likely to develop PTSD than women who were not victims of sex crimes.[141] Victims who suffer from PTSD often experience flashbacks which could leave them feeling helpless and unable to discern flashback from reality.[142]

Certain stressful situations, like coming face to face with an attacker, may trigger these painful flashbacks. The Diagnostic and Statistical Manual of Mental Disorders ("DSM-V") identifies four criteria for understanding and diagnosing PTSD and under criterion B, exposing a victim to her attacker may cause distressing memories, flashbacks, and psychological distress.[143] Requiring a victim suffering from PTSD to testify in the defendant's presence would potentially trigger these symptoms. Under criterion C, the victim will avoid places, people, and feelings that cause him or her to remember their attack.[144] Forcing a victim to testify before his or her attacker, may lead to hesitation when it comes to opening up and answering questions about the attack.

Victims of sexual assault are also at increased risk of suffering from major depression.[145] Major depressive disorder is a mood disorder which affects how one feels, thinks, and handles daily activities.[146] Symptoms include the inability to sleep, loss of appetite, persistent sad, anxious, or empty mood, and decreased interest in hobbies and activities.[147] While

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[136] *See infra* notes 137, 145, 152.

[137] Ranna Parekh & Felix Torres, *What is Post Traumatic Stress Disorder?*, AM. PSYCHIATRIC ASS'N (Jan. 2017), https://www.psychiatry.org/patients-families/ptsd/what-is-ptsd.

[138] *Id.*

[139] *Id.*

[140] Dean G. Kilpatrick, *The Mental Health Impact of Rape*, NAT'L VIOLENCE AGAINST WOMEN PREVENTION RESEARCH CTR., https://mainweb-v.musc.edu/vawprevention/research/mentalimpact.html, (last visited Mar. 31, 2019).

[141] *Id.*

[142] Kenniston, *supra* note 129, at 104.

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] *Depression*, NAT'L INST. OF MENTAL HEALTH, https://www.nimh.nih.gov/health/topics/depression/index.shtml, (last visited Mar. 31, 2019).

[147] *Id.*

anyone can develop depression, trauma raises the chances that someone will suffer from it.[148] The statistics are similar to those for PTSD; women who have been victims of sex crimes suffer from major depression at much higher levels.[149] Thirty percent of sex crime victims suffered from at least one major depressive episode after their attack, compared to ten percent of women who had not been a victim.[150] Major depression also leads to heightened risk of suicide: Sex crime victims were thirteen times more likely than non-crime victims to attempt suicide.[151] Stress and major depressive disorder are intertwined, and stressful events can cause worsened symptoms. Removing the victim from stressful situations, such as testifying in front of his or her attacker, will likely lessen the harmful effects of major depressive disorder.

Sex crime victims suffer even further though through what is known as "rape trauma syndrome."[152] This syndrome, unique to victims of sexual assault, causes a two-phase effect.[153] In the first phase, which occurs immediately after the assault, the victim suffers from a variety of emotions.[154] Physically, victims can experience muscle tension, sleeping disorders, and fatigue among other things.[155] The second phase brings with it phobias, including sexual fears, and nightmares.[156] A poll of sexual assault victims revealed fear of offender retaliation, anxiety, and depression as consistently cited side effects of the attack they experienced.[157]

Protecting the well-being of victims of sex crimes, regardless of age, and prosecuting sexually violent individuals are both important public policies. Removing the victims from the physical presence of their attackers by allowing them to testify via closed-circuit television can help not only shield them from developing PTSD, major depressive disorder, and rape trauma syndrome but it can lessen any aggravation of already present symptoms.

C. Use of Two-Way CCTV Creates Minimal Negative Effects on the Defendant

As explained above, the Confrontation Clause enhances testimonial reliability in three ways: 1) placing the witness under oath and the penalty of perjury, 2) subjecting the witness to cross-examination for exposure of testimonial infirmities, and 3) allowing the finder of fact to observe the

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[148] *Id.*
[149] *Id.*
[150] Kilpatrick, *supra* note 140.
[151] *Id.*
[152] *Id.*
[153] Sue Schnepf, *Rape Trauma Syndrome in the Rape Trial*, 8 CRIM. JUST. J. 427, 429 (1986).
[154] *Id.* at 430.
[155] *Id.*
[156] *Id.*
[157] *Id.* at 431.

witness' demeanor.[158] Remote testimony does not jeopardize the defendant's right to have witnesses testify under oath or the defendant's right to cross-examine the witness. It is unclear what affect remote testimony has on demeanor evidence, but evidence shows that jurors' ability to detect true from false testimony is not affected by the manner in which the witness testifies.[159]

A juror may view a witness begin to perspire during questioning, for instance, and equate that with deception or untrustworthiness, regardless of whether the witness is giving truthful testimony.[160] The behavioral cues that juries use to determine true from false correlate more with judgments of truth or lie rather than legitimate truth or lie.[161] If observing demeanor does not help jurors differentiate true from false testimony, then it follows observing it via closed-circuit television as opposed to live in person is not likely to impair those judgments much.[162]

A study of mock jurors' judgments of the credibility of child witnesses found no significant differences between the perceived credibility of live children witnesses as opposed to videotaped children witnesses.[163] The researchers pointed out that, holding testimonial content constant, mode of presentation (whether live or by closed circuit video) did not significantly affect credibility judgments. Since testifying in front of the alleged attacker may render vulnerable witnesses functionally uncommunicative, not allowing remote testimony may well lead to fewer witnesses testifying and for those that do testify, they may be perceived to be less honest than they really are.[164]

Fairness to the defendant, a concern in all trials, is not compromised by allowing remote testimony. The study discussed above showed that the jury did not think that testimony via closed-circuit television impacted fairness to the defendant in either way, nor did they experience significantly different emotional responses towards the defendant or the complainant.[165] In yet another study, empathy with the complainant and empathy with the accused did not vary significantly depending on whether the witness testified live or via closed-circuit television.[166]

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[158] *See Green*, 399 U.S. at 149.

[159] Blumenthal, *supra* note 29, at 72.

[160] *Id.*

[161] *Id.* (Watching the witness give testimony as opposed to just listening to it or reading written testimony actually lowered the mock jury's ability to tell true from false.).

[162] Jacqueline Joudo & Natalie Taylor, *The Impact of Pre-Recorded Video and Closed-Circuit Television Testimony by Adult Sexual Assault Complainants on Jury Decision-Making: An Experimental Study*, 68 AUSTL. L. INST. OF CRIMINOLOGY 1, 62 (2005).

[163] Gail S. Goodman, et al., *Face-to-Face Confrontation Effects of Closed-Circuit Technology on Children's Eyewitness Testimony and Juror's Decisions*, 22 L. AND HUM. BEHAV. 165, 170 (1998).

[164] *Id.* at 171.

[165] *Id.* at 191, 198.

[166] Joudo & Taylor, *supra* note 162, at 34-35.

Jury deliberations are also shown to be more or less unaffected by the manner in which testimony is presented.[167] An English study set up a mock trial in which an individual accused of raping his ex-girlfriend put forth a consent defense.[168] In this study, juries viewed both direct- and cross-examinations in a variety of variations: live in person, via live-link video, and with the use of a protective screen between the witness and the defendant.[169] The method by which testimony was delivered was not mentioned in their deliberations.[170] No evidence suggested that the manner of presenting the testimony had any bearing on how the individual jurors decided the case.[171]

D. Protecting Crime Victims

Crime victims are afforded rights, including the right to be reasonably protected from their alleged assailant.[172] The data discussed above shows that protecting sex crime victims goes beyond incarcerating the attacker pre and during trial; it involves shielding the victim from their attacker in court.[173]

Sexual assault victims are at high risk for developing PTSD.[174] "The lifetime prevalence of PTSD for women who have been sexually assaulted is 50%. Moreover, sexual assault is the most frequent cause of PTSD in women, with one study reporting that 94% of women experienced PTSD symptoms during the first two weeks after an assault." When a sexual assault survivor is made to recount the events of their attack they may suffer from additional psychological distress, physiological reactions, or dissociative reactions.[175]

While victims may suffer these symptoms regardless, participating in a criminal trial causes trauma in a unique way for sexual assault victims: they must face the person who attacked them in close quarters, they must discuss the assault in detail, and they must publicly discuss private, sexual information.[176] These traumas could cause an individual to not want to

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[167] Louise Ellison & Vanessa E. Munro, *A 'Special' Delivery?: Exploring the Impact of Screens, Live-Links and Video-Recorded Evidence on Mock Juror Deliberation in Rape Trials*, 23 SOC. & LEGAL STUD. 3, 4 (2014).

[168] *Id.* at 7.

[169] *Id.* at 3.

[170] *Id.*

[171] *Id.* at 15.

[172] 18 U.S.C. § 3771 (2015).

[173] *See infra* section IV B.

[174] Kaitlin A. Chivers-Wilson, *Sexual assault and posttraumatic stress disorder: A review of the biological, psychological and sociological factors and treatments*, 9 MCGILL JOURNAL OF MEDICINE 111, 112 (2006).

[175] Substance Abuse and Mental Health Services Administration, *Trauma-Informed Care in Behavioral Health Services* 1, 81 (2014).

[176] Joudo & Taylor, *supra* note 162.

testify, and while prosecuting a sexual assault case without the victim's testimony is possible, it is difficult.[177] By allowing victims to testify remotely, the courts can give victims a more shielded and private environment to testify in while still making sure the jury is seeing the testimony in live-time and the defense is afforded an opportunity to cross-examine fully.

E. Limits on Extension

The burden of proof in a criminal case, beyond a reasonable doubt, is deliberately set high. To prove guilt, the fact finder must use only reliable evidence, and the Confrontation Clause provides a safeguard against unreliable evidence.[178] *Craig* extends the spectrum of permissible "confrontation," but not without limits. The criteria that the Court established for allowing children to testify via closed-circuit television should apply to adults as well.[179] Both the 9th and the 11th Circuit Courts of Appeals have decided to limit *Craig*'s expansion so that dispensing with physical confrontation happens only after a preliminary hearing to show both the necessity for remote testimony and the testimony's reliability.[180] The Eleventh Circuit, in particular, held that before dispensing with face-to-face confrontation, the court must: "(1) hold an evidentiary hearing and (2) find: (a) that the denial of physical, face-to-face confrontation at trial is necessary to further an important public policy and (b) that the testimony's reliability is otherwise assured."[181] This places a necessary limit on who can testify remotely via video conference to prevent abuse of the right.

Permitting remote testimony must be decided on a case-by-case, fact-intensive basis. Not every sex crime victim will benefit from testifying outside the presence of his or her alleged attacker. Moreover, not every sex crime victim will *want* to testify outside the presence of his or her alleged attacker. It is important that the courts analyze the facts, hold a preliminary hearing, and allow remote testimony only for the witnesses who genuinely need it.

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[177] *Id.* at 3.

[178] *See generally* U.S. CONST. amend. VI.

[179] *Craig*, 497 U.S. at 855-856 ("The trial court first has to determine that the procedure is necessary to protect the child who seeks its use. Second, there must be evidence that the child would suffer emotional distress from testifying in front of the defendant. Third, the trauma that the child would suffer has to be more than de minimis.").

[180] *Yates*, 438 F.3d at 1307; *see also* United States v. Carter, 2018 U.S. App. LEXIS 31119 (9th Cir, Nov. 2, 2018) (holding that the right to face-to-face confrontation is not absolute. Inability to travel due to pregnancy does not create a necessity for remote testimony.).

[181] *Yates*, 438 F.3d at 1315 (citing *Craig*, 497 U.S. 836, 850, 855).

V. CONCLUSION

The Confrontation Clause provides criminal defendants with the right to confront witnesses against them and guarantees the reliability of testimonial evidence used at trial through oath, cross-examination, and demeanor evidence.[182] Like other constitutional provisions, its contours have changed over time, in part in order to recognize the competing claims of public policy. *Maryland v. Craig* allowed child witnesses to testify via live, two-way videoconference when it is both necessary to the well-being of the witness and in furtherance of important public interests.[183] The courts have since extended *Craig* to allow other classes of witnesses to testify remotely.[184] Recently, courts have begun to allow adult victims of sex crimes to testify via closed-circuit television due to the particularly heinous character of the crime and the effects that testifying in court in front of the alleged assailant would have on the victim.[185] Allowing remote testimony in these circumstances, subject to the requirements of *Craig,*[186] protects both the victim's well-being and the defendant's Confrontation Clause rights.

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[182] *Craig*, 497 U.S. at 836.
[183] *Id.*
[184] *Id.*
[185] *Id.*
[186] *Id. at* 837 (Necessity and Public Policy).