

**REMOTE JUSTICE: CONFRONTING THE USE OF VIDEO
TELECONFERENCE TESTIMONY IN MASSACHUSETTS
CRIMINAL TRIALS**

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I. INTRODUCTION

Technological advancement offers unique opportunities to address longstanding issues of accessibility and equality in the criminal justice

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system and to respond to challenges obstructing traditional judicial operating processes. Over the past few decades, courts have adopted electronic discovery, natural language processing for documents, software-enabled exhibits, speech recognition software, and bail prediction models enabled by algorithms. Although these technologies provide benefits, their incorporation has required consideration and implementation of safeguards to protect against associated risks and detriments in the administration of justice. Health crises present a current challenge ushering in another evolution in courtroom procedure.¹ In the face of palpable and grave risks of exposure to the novel SARS-CoV-2 (“COVID-19”) virus, courts across the country have postponed categories of proceedings, notably criminal jury trials.² Alternatively, some courts have responded to delays in court operations by integrating remote platforms such as two-way live video teleconference (“VTC”) into their procedure.³ Notwithstanding vast potential benefits in terms of efficiency and access presented by VTC, the use of this technology raises the specter of waning enforcement of the rights of criminal defendants. Notably, the use of VTC technology within the context of criminal proceedings is ostensibly at odds with

1. The late Chief Justice Ralph D. Gants of the Supreme Judicial Court of Massachusetts, in his letter to the Massachusetts Bar Association and the Boston Bar Association, observed that the COVID-19 pandemic will require “new ways to protect the most vulnerable, preserve individual rights, resolve disputes, and somehow keep the wheels of justice turning in the midst of this frightening pandemic.” Letter to the Bar from Supreme Court Judicial Court Chief Justice Ralph D. Gants (March 19, 2020), <https://www.mass.gov/news/letter-to-the-bar-from-supreme-judicial-court-chief-justice-ralph-d-gants> [<https://perma.cc/U44W-U8KZ>].

2. See *Court Orders and Updates During COVID-19 Pandemic*, U.S. COURTS, <https://www.uscourts.gov/about-federal-courts/court-website-links/court-orders-and-updates-during-covid19-pandemic> [<https://perma.cc/NM2K-N5N7>]; BARRY J. MCMILLION, CONG. RSCH. SERV., IN11346, FEDERAL JURY TRIALS AND COVID-19 1 (Apr. 20, 2020), <https://crsreports.congress.gov/product/pdf/IN/IN11346> [<https://perma.cc/HP2M-FUWP>] (noting that most district courts have continued civil and criminal jury trials). Massachusetts courts have currently postponed jury trials until 2021. Executive Office of the Trial Court, *Courts Extend Start Date for Jury Trials to January 11, 2021*, <https://www.mass.gov/news/courts-extend-start-date-for-jury-trials-to-january-11-2021> [<https://perma.cc/7JFY-2NZG>].

3. See generally Dubin Research & Consulting, *Covid-19's Next Victim? The Rights of the Accused*, 44 CHAMPION 22 (2020), https://www.dubinconsulting.com/pdf/Dubin_COVID-19_p22-45_May_2020_Champion.pdf [<https://perma.cc/5WDZ-MEN7>] (providing an overview of state jury trial restrictions and noting that courts have responded to the health threats of the pandemic by integrating remote procedures into various courtroom procedures); Matt Reynolds, *Could Zoom Jury Trials Become the Norm During the Coronavirus Pandemic?*, A.B.A. J. (May 11, 2020, 8:00 AM), <https://www.abajournal.com/web/article/could-zoom-jury-trials-become-a-reality-during-the-pandemic> [<https://perma.cc/3CPB-B3WF>] (“According to the National Center for State Courts, 16 states and the territory of Puerto Rico have ordered virtual hearings in response to the novel coronavirus In Texas, the public has access to hundreds of proceedings on YouTube, where prosecutors, judges, defendants and public defenders convene on Zoom. In Cook County, Illinois, the public can watch bond hearings online.”). Some jurisdictions have permitted the bench trials via VTC. See, e.g., *Argonaut Ins. Co. v. Manetta Enterprises, Inc.*, No. 19CV00482PKCRLM, 2020 WL 3104033, at *2 (E.D.N.Y. June 11, 2020).

the confrontation rights of criminal defendants, as enshrined in the U.S. Constitution and various state constitutions.⁴

This Note examines the implications of the use of VTC technology for remote witness testimony on the confrontation rights of criminal defendants and as a matter of public policy. In light of limited Supreme Court guidance regarding the permissibility of VTC technology, lower courts have split in their interpretations of the standards governing the use of VTC testimony with respect to defendants' confrontation rights.⁵ Some courts have allowed the use of VTC technology to facilitate witness testimony connected to criminal adjudication, most commonly in the context of child sexual abuse cases, in which the presence of a defendant may be dangerous or traumatic for a victim.⁶ Video teleconferences have also been used in trials due to the disability or illness of a party.⁷ Continued public health risks elevate the question of remote justice in the criminal justice landscape, leading courts to consider the use of VTC in a wide range of proceedings, from administrative matters to criminal trials.⁸

This Note advocates that courts approach cautiously the incorporation of VTC technology within the context of criminal trials. It focuses on the use of VTC in Massachusetts, which provides a case

4. See, e.g., Zak Hillman, *Pleading Guilty and Video Teleconference: Is a Defendant Constitutionally "Present" When Pleading Guilty by Video Teleconference*, 7 J. HIGH TECH. L. 41, 46 (2007) ("The debate over the use of video teleconferencing by the judicial system centers around two groups: those who champion its use citing the numerous benefits it provides to both the court system and the defendant, and those who claim that the use of such technology violates the due process rights of the defendant."); Matthew J. Tokson, *Virtual Confrontation: Is Videoconference Testimony by an Unavailable Witness Constitutional?*, 74 U. CHI. L. REV. 1581, 1582 (2007) (noting that prosecutors have in several cases requested the use of video testimony for unavailable witnesses and that defendants have challenged this use on Sixth Amendment grounds); Nancy Gertner, *Videoconferencing: Learning Through Screens*, 12 WM. & MARY BILL RTS. J. 769, 773, 786 (2004) (noting the benefits of videoconferencing in terms of efficiency and cost but also expressing concerns grounded in the Confrontation Clause).

5. See *infra* Part III (describing the approaches and conclusions of various courts that have addressed the constitutionality of VTC testimony).

6. See, e.g., *United States v. Etimani*, 328 F.3d 493 (9th Cir. 2003) (permitting six-year-old sexual abuse victim to testify via VTC to protect child); *State v. Stock*, 256 P.3d 899 (Mont. 2011) (finding that a defendant's confrontation right was not violated when six-year-old sexual abuse victim testified via VTC). For further discussion of the use of VTC in cases involving child witnesses, see *infra* Parts III and IV.

7. See, e.g., *Horn v. Quarterman*, 508 F.3d 306, 320 (5th Cir. 2007); *United States v. Gigante*, 166 F.3d 75, 78–82 (2d Cir. 1999); *State v. Sewell*, 595 N.W.2d 207 (Minn. Ct. App. 1999) (allowing witness with serious health problems to testify via live video).

8. See Ann E. Marimow, *Federal Courts Shuttered by Coronavirus Can Hold Hearings by Video and Teleconference in Criminal Cases*, WASH. POST (Mar. 31, 2020), https://www.washingtonpost.com/local/legal-issues/federal-courts-shuttered-by-coronavirus-can-hold-hearings-by-video-and-teleconference-in-criminal-cases/2020/03/31/9c831814-7372-11ea-87da-77a8136c1a6d_story.html [https://perma.cc/73XY-5254]; Laura Kusisto, *Coronavirus Forces Courts to Experiment*, WALL ST. J. (Mar. 28, 2020), <https://www.wsj.com/articles/coronavirus-forces-courts-to-experiment-11585387800> [https://perma.cc/D68J-DVXZ].

study of a legal regime providing robust protections for the confrontation right of defendants, as epitomized by the traditional case of a witness testifying live in court. This Note ultimately argues for the very limited use of VTC testimony in the near future, both in the Massachusetts criminal justice system and more generally: its use should be limited to exceptional circumstances based upon a showing of individualized, specific compelling need such as the protection of child witnesses and only upon development of adequate video quality and uniform enforcement standards. The generalized justification of a public health pandemic, while certainly mandating accommodations and postponements in court procedure, consequently should not meet the bar of a sufficiently individualized compelling need for the widespread, accepted use of VTC technology in criminal trials.

The Note proceeds as follows. Part II provides a brief overview of the development and current usage of procedures for remote testimony, including VTC. Part III examines the current state of the law regarding the confrontation issues raised by the use of VTC technology both at the federal level and within other state court systems. Part IV examines Massachusetts state case law governing the use of video testimony. Part V offers a normative argument against rapidly expanding the use of such testimony, primarily based on policy rationales regarding the limited effectiveness of cross-examination and other elements of confrontation. Part VI applies this argument in evaluating the use of VTC in light of the COVID-19 pandemic. A brief conclusion follows. This Note recommends a functional framework for courts adapting courtroom procedure in response to the pandemic and suggests how courts should think about confrontation rights and evidentiary standards in light of evolving technologies with the potential to change courtroom operations.

II. VIDEO TELECONFERENCE TECHNOLOGY

VTC refers to the use of interactive telecommunication technology that features simultaneous video and audio transmission. This Note distinguishes between two-way videoconference technology, termed here VTC, and one-way closed-circuit telecommunication, which provides a one-sided live transmission similar to live television broadcasting.⁹ VTC technology, with its bidirectional video and audio transmission, enables a court to see and hear a witness testifying from a remote location and allows the witness to interact with the presiding

9. While VTC technology allows both sides to see, hear, and interact with each other, one-way closed-circuit telecommunication allows only one side to see and hear the other. See generally Michael S. Quinn, *Written but Not Dead: High Court of New York Signals Legislature to Review Televised Testimony at Criminal Trial*, 21 ALB. L.J. SCI. & TECH. 193, 200–02 (2011). VTC may allow for contemporaneous questioning and for the display of documents, presentations, and other exhibits. See *id.*

judge and attorneys in real time. Despite taking place from a remote location without the physical presence of a witness, VTC testimony occurs contemporaneously with court proceedings and is thus made in court, though virtually. Notably, in contrast to traditional live witness testimony, witness testimony accomplished through VTC lacks the element of physical presence.

Videoconferencing technology has been regularly used by courts since the 1980s.¹⁰ It has been applied in a range of proceedings, including arraignments and bail arguments, for purposes including convenience and protection of participants.¹¹ In the United States, the use of VTC in criminal proceedings has grown in response to federal legislation permitting the use of remote procedures in pretrial, trial, and post-trial proceedings and the natural expansion of computing power and video quality in the last few decades.¹² A handful of states have

10. Michael D. Roth, *Laissez-Faire Videoconferencing: Remote Witness Testimony and Adversarial Truth*, 48 UCLA L. REV. 185, 192 (2000) (tracing judicial experimentation with remote testimony to the administration of remote bail hearings in the early 1970s); Hillman, *supra* note 4, at 50 (noting the use of video teleconference technology in U.S. courts beginning in the early 1980s); Jeffrey M. Silbert, *The Use of Closed Circuit Television for Conducting Misdemeanor Arraignments in Dade County, Florida*, 38 U. MIAMI L. REV. 657, 657–59 (1984) (describing Florida’s process of arraigning misdemeanor defendants via closed-circuit television). For a discussion of how other countries have integrated videoconferencing in the court setting, see generally Riley A. Williams, *Videoconferencing: Not a Foreign Language to International Courts*, 7 OKLA. J.L. & TECH 54 (2011).

11. See Gertner, *supra* note 4, at 772–73; Mike L. Bridenback, *Study of State Trial Courts Use of Remote Technology*, National Association for Presiding Judges and Court Executive Officers (Apr. 2016), <http://napco4courtleaders.org/wp-content/uploads/2016/08/Remote-Technology-Report-April-2016.pdf> [<https://perma.cc/L4PQ-BEQ6>]; Fredric I. Lederer, *Technology Comes to the Courtroom, and . . .*, 43 EMORY L.J. 1095, 1104–05 (1994) (noting that remote arraignments have survived legal challenge except in certain jurisdictions with rules requiring physical presence). A notable case involving the use of VTC technology was the trial of George Zimmerman. During the trial, the prosecution introduced a professor’s testimony over Skype; as the trial was streaming live on national television, pranksters began to call the prosecutor, somewhat derailing the testimony. Evan S. Benis & Audra D.S. Burch, *Social Media, Technology Drove Zimmerman Trial*, MIAMI HERALD (Sep. 8, 2014, 6:48 PM), <https://www.miamiherald.com/news/state/florida/trayvon-martin/article1953243.html> [<https://perma.cc/667L-ED7F>]. Moreover, in May of 2020, actress Lori Loughlin pleaded guilty over Zoom to fraud charges stemming from her role in the college admissions scandal. Kate Taylor, *Lori Loughlin Pleads Guilty via Zoom in College Admissions Case*, N.Y. TIMES (May 22, 2020), <https://www.nytimes.com/2020/05/22/us/lori-loughlin-pleads-guilty.html> [<https://perma.cc/NQL9-WU56>]. *But see* United States v. Bethea, 888 F.3d 864, 867 (7th Cir. 2018) (holding that it is *per se* prejudicial error to host a felony plea and sentencing hearing by videoconference without a defendant’s physical presence in the courtroom, despite the defendant’s attempted waiver of the physical presence requirement of Rule 43 of the Federal Rules of Criminal Procedure).

12. See *Edwards v. Logan*, 38 F. Supp. 2d 463, 466 (W.D. Va. 1999) (noting that the enactment of the Prison Litigation Reform Act of 1995 enhanced the use of video conferencing in judicial proceedings); see also Kacey Marr, *The Right to “Skype”*: *The Due Process Concerns of Videoconferencing at Parole Revocation Hearings*, 81 U. CIN. L. REV. 1515, 1516 (2013) (“By 2002, approximately eighty-five percent of federal district courts had access to videoconferencing equipment in at least one of their courtrooms.”); see generally Molly Treadway Johnson & Elizabeth C. Wiggins, *Videoconferencing in Criminal Proceedings: Legal and Empirical Issues and Directions for Research*, 28 LAW & POL’Y 211, 213–14 (2006).

enacted statutes explicitly permitting VTC testimony in criminal proceedings.¹³ Jurisdictions allowing the use of VTC technology tend to require that witnesses are able to see and hear courtroom proceedings in real time and that key court personnel — including the defendant, judge, jury, and counsel — are able to see and hear the witness’s testimony simultaneously.¹⁴ Jurisdictions may integrate additional safeguards to strengthen security and to reduce the risk of improper influence of the witness during testimony.¹⁵ However, the Supreme Court has partially constrained the general adoption of video testimony, rejecting in 2002 an amendment to Rule 26(b) of the Federal Rules of Criminal Procedure that would have provided a uniform procedure for unavailable witnesses to testify by VTC.¹⁶

In light of the COVID-19 pandemic,¹⁷ Massachusetts courts have integrated VTC technology into criminal proceedings — for example, by conducting evidentiary hearings through the Zoom video platform.¹⁸ The video platform allows parties to litigate and court staff to participate in court events,¹⁹ which may be recorded for public

13. See, e.g., ALA. CODE § 12-21-135.1 (f); ALASKA R. CRIM. P. 38.3(b); GA. UNIF. SUPER. CT. R. 9.2(C); HAW. REV. STAT. ANN. § 801D-7 (West); MICH. COMP. LAWS ANN. § 600.2164a(1); N.H. REV. STAT. ANN. § 516:37; WIS. STAT. § 885.60.

14. Francis A. Weber, *Complying with the Confrontation Clause in the Twenty-First Century: Guidance for Courts and Legislatures Considering Videoconference-Testimony Provisions*, 86 TEMP. L. REV. 149, 152 (2013).

15. *Id.*

16. Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure, 207 F.R.D. 89, 93 (2002) (statement of Scalia, J.) (“I cannot comprehend how one-way transmission (which [*Maryland v. Craig* says does not ordinarily satisfy confrontation requirements) becomes transformed into full-fledged confrontation when reciprocal transmission is added.”).

17. *Jury Management Advisory Committee Report and Recommendations on the Resumption of Jury Trials*, (July 31, 2020) <https://www.mass.gov/doc/jury-management-advisory-committee-jmac-report-and-recommendations-to-the-justices-of-the/download> [<https://perma.cc/8FEK-ZGKS>] (highlighting the risks of the COVID-19 pandemic and providing recommendations regarding how to recommence jury trials in Massachusetts).

18. See, e.g., *Commonwealth v. Masa*, 1981CR0307, 2020 WL 4743019, at *6 (Mass. Super. Ct. Aug. 10, 2020). In the case, a Massachusetts trial court overruled a defendant’s objection to conducting an upcoming evidentiary suppression hearing via the Zoom video conference platform, finding that “denying Mr. Masa his right to a physical, face-to-face confrontation of the witnesses against him during the suppression hearing is necessary to further the important public policy of protecting public health and individual safety and well-being by eliminating avoidable potential exposure to the coronavirus that causes COVID-19.” *Id.* The court found that the use of Zoom technology would not impact the justice of the proceedings because a single judge would perform factfinding. *Id.* at *5. In comparison, the court highlighted the difficulties in continuing on with in-person jury trials in light of the pandemic, noting the “critical” role of juries and the risk of exposure to the disease. *Id.*

19. Zoom provides features such as simultaneous screen-sharing, private chat, breakout rooms that allow designated participants to meet privately, interpreter functionality that allows a simultaneous audio stream for an interpreter, and options to modify video appearance and quality. See Christopher Null, *6 Popular Videoconferencing Tools Compared*, WIRED (Apr. 10, 2020), <https://www.wired.com/story/6-popular-video-conferencing-tools-compared-zoom-skype-houseparty/> [<https://perma.cc/88VF-WPD4>]. Zoom also allows various video layouts, including active speaker view, which will feature the speaker in a large video window, and gallery view, which provides thumbnail displays of all participants in a grid.

viewing.²⁰ The Executive Office of the Trial Court of Massachusetts issued policy guidance governing the use of videoconferencing in evidentiary proceedings, according to which courts weigh several factors including “whether [the proceeding] is civil or criminal” and the “health risks of physical presence.”²¹ Massachusetts requires certain procedural checks before VTC technology may be applied at a court event. The use of VTC must be identified prior to its operation and is subject to confirmation by the court that the equipment is “functional[,] . . . parties are able to see and hear each of the participants . . . [and] the event is being properly recorded.”²² The use of VTC for criminal court events for a person in custody necessitates additional procedural steps to preserve the rights of the accused to consult with an attorney before, during, and after the proceedings.²³

The Massachusetts court system is already grappling with challenges to the use of VTC in light of the COVID-19 pandemic.²⁴ Notably, on December 7, 2020, the Massachusetts Supreme Judicial Court heard oral argument in *Diaz v. Commonwealth*,²⁵ which presents the issue of whether a virtual suppression hearing violates a defendant’s constitutional right to confrontation.²⁶ This issue differs from the more

Change the Video Layout (Active Speaker View and Gallery View), ZOOM, https://support.zoom.us/hc/en-us/articles/201362323-Changing-the-video-layout-Active-Speaker-View-and-Gallery-View-#h_b80d529d-edd7-4486-8c21-bec9c9d55395 [<https://perma.cc/TLT4-Y32A>]. Commentators have raised privacy concerns regarding the video platform. See generally Michael Goodyear, *The Dark Side of Videoconferencing: The Privacy Tribulations of Zoom and the Fragmented State of U.S. Data Privacy Law*, 10 HOUS. L. REV. OFF REC. 76, 77 (2020).

20. Recording is facilitated by the Massachusetts Trial Court “For the Record” recording system. Massachusetts Trial Court, FOR THE RECORD, <https://www.fortherecord.com/massgov/> [<https://perma.cc/Y4M2-LYXN>].

21. Executive Office of the Trial Court, *Trial Court Policy for Videoconferencing*, <https://www.mass.gov/policy-statement/trial-court-policy-for-videoconferencing> [<https://perma.cc/JA56-LAT5>] (listing factors including (a) the nature of a proceeding, including whether it is civil or criminal; (b) any agreement or waiver of any right to physical presence; (c) attempts to secure physical presence, and the cost of that presence versus the importance of the testimony in civil cases; (d) any security or health risks of physical presence, versus corresponding risks at the remote site; and (e) any other factors affecting convenience and safety). The policy is primarily intended for the use of VTC by incarcerated individuals, experts, and witnesses located out of the state. *Id.* (stating that videoconferencing will “reduce costs, address safety concerns and delays associated with transportation of prisoners and detainees as well as provide cost savings and access to justice in cases where experts and witnesses are located out of county or state, thereby improving the efficiency of case management through technology”).

22. *Id.*

23. *Id.*

24. See *supra* note 18.

25. Oral Argument, *Diaz v. Commonwealth*, No. SJC-13009 (Mass. Sup. Jud. Ct. 2020), https://boston.suffolk.edu/sjc/pop.php?csnum=SJC_13009 [<https://perma.cc/9F7F-LYYJ>].

26. A Massachusetts Superior Court ordered John Vazquez Diaz, a defendant facing over a decade of prison time for his indictment on charges of drug trafficking, to submit to an evidentiary hearing on his motion to suppress to be held via the Zoom platform, with Diaz appearing remotely from the Nashua Street Jail, over his objection. Brief for Petitioner at 9,

general incorporation of VTC into criminal trials because Massachusetts has yet to address “whether there is a right to face-to-face confrontation at a motion to suppress.”²⁷ However, the Supreme Judicial Court’s holding may be applicable to the context of remote testimony in criminal cases generally if it finds that the confrontation clause attaches in evidentiary hearings.²⁸

III. FEDERAL CONSTITUTIONAL ISSUES WITH VTC

The Sixth Amendment of the United States Constitution guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him.”²⁹ The primary harm that the Sixth Amendment was meant to cure was the use of ex parte written testimony against criminal defendants who could not cross-examine or otherwise confront their accusers.³⁰ The Confrontation Clause thus ensured the accused an opportunity:

[N]ot only of testing the recollection and sifting the conscience of the witness, but [also] of compelling him to stand face to face with the jury in order that they *may look at him*, and judge by his *demeanor* upon the stand and the *manner* in which he gives his testimony whether he is worthy of belief.³¹

From these foundations, the Supreme Court has nevertheless characterized a literal interpretation of the Sixth Amendment as unrealistic due to the need for out-of-court statements when a witness

Diaz v. Commonwealth, 2020 WL 6596361, No. SJC-13009 (Mass. Sup. Jud. Ct. 2020) [hereinafter Diaz Petitioner Brief]. The evidentiary hearing, which was ordered based on Diaz’s motion to suppress evidence and statements in his case, was postponed in part due to the COVID-19 pandemic. *Id.* at 10. Diaz additionally requires the assistance of a Spanish interpreter. *Id.* at 12.

27. See Commonwealth v. Fontanez, 120 N.E.3d 707, 717 (2019). While the confrontation right may not have been held to attach to motions to suppress, such proceedings are of paramount importance in criminal adjudication as their outcomes often have grave impacts on the outcomes of trials. Another important distinction in *Diaz* is that the defendant was willing to waive his speedy trial rights in order to wait for an in-person trial. See Diaz Petitioner Brief at 9.

28. At oral argument, the potential applicability of a relaxed confrontation right in the context of motions to suppress was discussed. Oral Argument at 29:42–31:05, *Diaz*.

29. U.S. CONST. amend. VI.

30. See Douglas v. State of Alabama, 380 U.S. 415, 418–19 (1965); Crawford v. Washington, 541 U.S. 36, 50 (2004).

31. *Douglas*, 380 U.S. at 419 (emphasis added) (quoting *Mattox v. United States*, 156 U.S. 237, 242–43 (1895)); see also *California v. Green*, 399 U.S. 149, 175 (1970) (“Simply as a matter of English the clause may be read to confer nothing more than a right to meet face to face all those who appear and give evidence at trial.”).

is unavailable.³² Although the Supreme Court has not addressed a Confrontation Clause challenge to the use of VTC, it has ruled that the Sixth Amendment does not mandate face-to-face confrontation and thus does not erect a per se bar against the presentation of witness testimony via video conferencing in a criminal trial.³³ However, in dicta, the Supreme Court has suggested that video testimony broadly does not constitute physical confrontation.³⁴

A. Traditional Preference for Face-to-Face Confrontation

The Confrontation Clause was traditionally understood to protect against the danger of an accused person defending against charges brought by nameless, faceless witnesses by securing face-to-face proceedings in which an accusing witness was physically in court.³⁵ The Supreme Court has stated that the Confrontation Clause “reflects a preference for face-to-face confrontation at trial and that ‘a primary interest secured by [the provision] is the right of cross-examination.’”³⁶ Through the late twentieth century, the Court conveyed a strong view of the presence requirement of the Confrontation Clause, highlighting the importance of physical confrontation.³⁷ The Court stated that “these means of testing accuracy are so important that the absence of proper confrontation at trial ‘calls into question the ultimate integrity of the

32. See *Bourjaily v. United States*, 483 U.S. 171, 182 (1987) (stating that “a literal interpretation of the Confrontation Clause could bar the use of any out-of-court statements when the declarant is unavailable,” which is “unintended and too extreme”).

33. See *Maryland v. Craig*, 497 U.S. 836, 847 (1990). In the context of testimony by child abuse victims, the Court counseled that judges should consider the use of videoconferencing only in response to a specific request from the prosecution and should consider the constitutional importance of the confrontation in determining whether to allow it. See *id.* at 855–57.

34. See *id.* at 857 (concluding that upon a showing of specific compelling need, the adoption of a procedure that does not incorporate face-to-face confrontation does not violate the Confrontation Clause of the Sixth Amendment provided that it has sufficient guarantees of reliability and is subject to adversarial testing).

35. The Confrontation Clause is derived from the English common law tradition of “live testimony in court subject to adversarial testing.” *Crawford*, 541 U.S. at 43 (citing 3 WILLIAM BLACKSTONE, COMMENTARIES *373–74). The Supreme Court has declared the purpose of the clause as guarding against defendants facing accusation from nameless, faceless accusers. See *Mattox*, 156 U.S. at 242 (noting that the “primary object” of the Confrontation Clause “was to prevent depositions or ex parte affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness”). However, the Supreme Court has promulgated a range of other purposes underlying the confrontation right. See, e.g., *Green*, 399 U.S. at 158 (1970) (providing justifications for the confrontation right including the right to cross-examine witnesses and assess credibility by observing demeanor); *Dutton v. Evans*, 400 U.S. 74, 89 (1970) (highlighting the importance of the Confrontation Clause in securing accurate fact-finding).

36. *Ohio v. Roberts*, 448 U.S. 56, 63 (1980), *overruled in part by Crawford*, 541 U.S. 36 (2004) (quoting *Douglas*, 380 U.S. at 418).

37. Mary A. Rittershaus, *Maryland v. Craig: Balancing the Interests of a Child Victim Against the Defendant’s Right to Confront His Accuser*, 36 S.D. L. REV. 104, 109–16 (1991).

fact-finding process.”³⁸ However, such a requirement was never held to be absolute: the Court noted that some situations such as witness unavailability mandate departures from the prototypical model of adversarial parties facing each other.³⁹ While it continued to champion a strong view of the constitutional provision, the Court has declared that “the Confrontation Clause only guarantees ‘an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.’”⁴⁰

A high-water mark for the strong view of the physical presence requirement came in the 1980s, when the Supreme Court expressed disfavor against procedures that would interfere with a defendant’s right to fully observe and interact with a witness within the context of a criminal proceeding. In *Coy v. Iowa*,⁴¹ the Supreme Court addressed a Confrontation Clause challenge to a procedure in which a large screen was placed between a defendant and child sexual assault victims.⁴² The screen blocked the defendant from the children’s sight and the defendant could only perceive the children “dimly.”⁴³ The Supreme Court found that the defendant’s confrontation right had been violated, noting the “obvious [and] damaging violation of the defendant’s right to a face-to-face encounter.”⁴⁴ It reasoned that “[t]he Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusions.”⁴⁵ Confrontation Clause jurisprudence thus stressed the need for an opportunity to observe a witness’s physical demeanor and interaction in the courtroom. The Court also implied that protection of victims of sexual abuse from emotional trauma, while important, did not outweigh the confrontation right of a defendant.⁴⁶ However, the Court explicitly left unanswered whether any considerations could outweigh a defendant’s confrontation interest, stating only that “[w]hatever they may be, they would surely be allowed only when necessary to further an important public policy.”⁴⁷

38. *Roberts*, 448 U.S. 56, 64 (quoting *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (internal quotation marks omitted)).

39. See, e.g., *Mattox*, 156 U.S. at 244 (noting the admissibility of hearsay under certain exceptions).

40. *Pennsylvania v. Ritchie*, 480 U.S. 39, 53 (1987) (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985)).

41. 487 U.S. 1012 (1988).

42. *Id.* at 1015.

43. *Id.*

44. *Id.* at 1020.

45. *Id.* at 1019.

46. *Id.* at 1021 (“It is a truism that constitutional protections have costs.” *Id.* at 1020).

47. *Id.*

B. Maryland v. Craig: The Validity of One-Way Video Testimony

In only one case has the Supreme Court directly addressed the implications of the Confrontation Clause for testimony by live video.⁴⁸ In 1990, in *Maryland v. Craig*,⁴⁹ the Supreme Court diluted the prior strong view of the physical presence requirement by allowing the use of Maryland's one-way television procedure, through which a child witness accusing a defendant of molestation testified from a remote location.⁵⁰ Under the procedure at issue, a child witness, the prosecutor, and the defense counsel withdrew to a separate room to examine and cross-examine the child while the defendant stayed in the courtroom with the judge and jury.⁵¹ The defendant thus could see and hear the testimony of the witness but had no opportunity to observe the witness in person; the witness could not see, hear, or otherwise interact with the defendant. The Supreme Court held that the use of one-way video testimony did not violate the Confrontation Clause, noting the trial court's finding that the child would not otherwise be able to communicate due to serious emotional distress caused by the presence of the defendant.⁵² The Court thus showed that face-to-face confrontation was not an "indispensable" component of the Sixth Amendment confrontation right.⁵³

The Supreme Court thus clarified that the demands of the Confrontation Clause were not absolute — in at least some criminal cases, a face-to-face encounter between the victim and defendant is not mandatory. Rather, the Court adopted a balancing test through which it weighs the potential violation of a defendant's right under the Confrontation Clause against the expected harm to victims of face-to-face presence.⁵⁴ Justice O'Connor, writing for the majority, established a two-part test to evaluate the constitutionality of remote testimony procedures. The right to confront accusatory witnesses may be satisfied "absent a physical, face-to-face confrontation" only where (1) "denial of such confrontation is necessary to further an important public policy" (the public policy prong) and (2) "the reliability of the testimony is otherwise assured" (the reliability prong).⁵⁵ As applied to the procedure used by the trial court in *Craig*, the Court first determined that the protection of minor victims of sex crimes from "further trauma

48. *Maryland v. Craig*, 497 U.S. 836 (1990) (addressing Confrontation Clause implications of testimony by live video). The Supreme Court has never addressed two-way VTC technology.

49. 497 U.S. 836.

50. *Id.* at 840–42.

51. *Id.* at 841.

52. *Id.* at 857–60.

53. *Id.* at 849–50.

54. *Id.*

55. *Id.* at 850.

and embarrassment” was a “compelling” public policy interest.⁵⁶ Second, the Court ruled that the video testimony procedure was reliable.⁵⁷ It determined that the procedure preserved “all of the other elements of the confrontation right:” apart from (1) the reduced risk of a witness “wrongfully implicat[ing] an innocent defendant” by testifying in his presence, the procedure possessed the elements of (2) testimony under oath, (3) witness cross-examination, and (4) the opportunity to view the demeanor of the witness as she testifies in a manner “functionally equivalent to that accorded live, in-person testimony.”⁵⁸ In this way, the *Craig* court promulgated a functional approach to the analysis of the confrontation right, weighing policy goals in light of the purposes of the confrontation right to determine cases in which it is not mandatory to preserve all four elements.

Applying the test, the Court found that live video testimony — at least of the form of Maryland’s one-way, closed-circuit procedure — was constitutional, even though it did not constitute face-to-face confrontation. Live, physical, face-to-face confrontation may be the optimal manifestation of the confrontation right,⁵⁹ but physical, face-to-face confrontation is not the “*sine qua non* of the confrontation right.”⁶⁰ Shifting from a strong view of the physical presence requirement, the Court instead urged lower courts to analyze technological advancements to courtroom procedures in light of the policy goals animating the confrontation right. A defendant’s constitutional confrontation right “is generally satisfied when the defense is given a full and fair opportunity to probe and expose [testimonial] infirmities [such as forgetfulness, confusion, or evasion] through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness’ testimony.”⁶¹ However, the *Craig* Court did state in dicta that it is the absence of a physical face-to-face confrontation that subjects the

56. *Id.* at 852–53 (quoting in part *Globe Newspaper Co. v. Superior Court of Norfolk Cty.*, 457 U.S. 596, 607 (1982)).

57. *Id.* at 845–46.

58. *Id.* at 845–46, 851 (noting that the child witness “must be competent to testify and must testify under oath; the defendant retains full opportunity for contemporaneous cross-examination; and the judge, jury, and defendant are able to view (albeit by video monitor) the demeanor (and body) of the witness as he or she testifies”).

59. *Craig*, 497 U.S. at 846 (“[F]ace-to-face confrontation enhances the accuracy of the factfinding process by reducing the risk that a witness will wrongfully implicate an innocent person.”) (citing *Coy v. Iowa*, 487 U.S. 1012, 1019 (1988)) (“It is always more difficult to tell a lie about a person ‘to his face’ than ‘behind his back.’”).

60. *Id.* at 847.

61. *Id.* (quoting *Delaware v. Fensterer*, 474 U.S. 15, 22 (1985)). Noting that a literal reading of the Confrontation Clause would “abrogate virtually every hearsay exception,” *id.* at 848 (internal citation omitted), the Court ultimately stated, “we have never insisted on an actual face-to-face encounter at trial in every instance in which testimony is admitted against a defendant,” *id.* at 847.

testimony procedure to a heightened standard.⁶² It did not discuss whether more interactive technologies such as VTC could ever constitute physical face-to-face confrontation, despite their virtual form, and therefore be immune to the scrutiny the Court required of testimony that does not occur face-to-face.⁶³

Since *Craig*, the Court has emphasized the importance of adequate cross-examination in addressing the constitutionality of other forms of witness testimony.⁶⁴ However, *Craig* remains the Court's closest discussion of the confrontation issues raised by VTC technology and thus is most relevant in determining the constitutionality of VTC testimony.⁶⁵

C. Consideration of Federal Constitutional Issues with VTC by Federal Appellate and State Supreme Courts

Given that the Supreme Court has not provided definitive guidance regarding the use of video testimony, lower federal and state courts have diverged in their standards relating to VTC testimony.⁶⁶ Courts

62. *See id.* at 850 (“As we suggested in *Coy*, our precedents confirm that a defendant’s right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial *only* where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured.” (emphasis added)).

63. *See infra* Part IV. Massachusetts law explicitly requires “face-to-face” confrontation.

64. In addressing the constitutionality of out-of-court testimonial statements created *prior* to trial in *Crawford*, the Supreme Court held in a categorical fashion that the prosecution could only admit testimonial hearsay if the witness was unavailable and the defendant had a prior opportunity to cross-examine the witness. *See Crawford v. Washington*, 541 U.S. 36, 68 (2004). The Court emphasized that the defendant’s right to adequately cross-examine witnesses is of primary importance within the guarantee of the Confrontation Clause. *Id.* at 57–59. The Court’s expression of a clear preference for face-to-face confrontation is reminiscent of the Court’s earlier reasoning in *Coy*. *See id.* at 54. Although perhaps a different approach from *Craig*, *see* Marc C. McAllister, *The Disguised Witness and Crawford’s Uneasy Tension with Craig: Bringing Uniformity to the Supreme Court’s Confrontation Jurisprudence*, 58 DRAKE L. REV. 481, 510 (2010) (“This balancing-test approach for assessing reliability would likely offend the *Crawford* Court, which declared that ‘replacing categorical constitutional guarantees with open-ended balancing tests . . . do[es] violence to [the constitutional] design.’”), *Crawford* did not overrule *Craig* nor did it address the same type of confrontation issue. While VTC shares some attributes with traditional out-of-court testimony, such as the lack of physical presence, VTC differs in that it enables witnesses to provide in-court contemporaneous testimony with a concurrent rather than prior opportunity for cross-examination.

65. *See* Christine L. Olson, *Accusations from Abroad: Testimony of Unavailable Witnesses via Live Two-Way Videoconferencing Does Not Violate the Confrontation Clause of the Sixth Amendment*, 41 U.C. DAVIS L. REV. 1671, 1689 (2008).

66. *Compare* *United States v. Gigante*, 166 F.3d 75, 81–82 (2d Cir. 1999) (holding that the use of VTC testimony did not violate the Confrontation Clause based on application of the same standard as utilized with depositions), *with* *United States v. Yates*, 438 F.3d 1307, 1313 (11th Cir. 2006) (holding that that use of VTC testimony did violate the Confrontation Clause based on application of the same standard as for one-way closed circuit television). Moreover, contrasting scholarly justifications have been presented in support of and against the use of

that have addressed the constitutionality of the procedure under the Sixth Amendment have split in their determinations of whether the *Craig* framework applies to VTC testimony and the specific policy considerations, if any, that may justify the use of VTC testimony in light of a defendant's confrontation right.

VTC testimony has been held by courts to be constitutional in contexts where a compelling need such as extreme illness has been demonstrated or where a particularized, specific harm, such as emotional or physical trauma in the context of child witness testimony, has been demonstrated.⁶⁷ The Second Circuit was the first to hold the use of VTC for witness testimony constitutional on the grounds that it was reliable and preserved all of the required elements of in-court testimony.⁶⁸ A trial court had permitted an ill witness participating in the Witness Protection Program to provide testimony via VTC.⁶⁹ The Second Circuit extended the Supreme Court's reasoning in *Craig* in allowing the use of the VTC procedure.⁷⁰ However, the court found that it was "not necessary" to apply the *Craig* test in analyzing the issue due to the difference in technology between VTC and one-way video testimony.⁷¹ Instead, it found a more relevant analogue in the admissibility of Rule 15 deposition testimony; based on its comparison, the Second Circuit held that VTC testimony could be permitted "upon a finding of exceptional circumstances" that would make in-person testimony impossible, or nearly impossible, to obtain.⁷² Moreover, it found that VTC technology ensured face-to-face confrontation,⁷³ a premise that was notably rejected by Justice Scalia in his subsequent

two-way live video testimony in criminal trials. *See, e.g.*, J. Benjamin Aguiñaga, *Confronting Confrontation in a FaceTime Generation: A Substantial Public Policy Standard to Determine the Constitutionality of Two-Way Live Video Testimony in Criminal Trials*, 75 LA. L. REV. 175 (2014) (arguing for a substantial public policy standard and discussing alternative proposals).

67. *See* Olson, *supra* note 65, at 1685 n.92 (2008) (collecting cases); *see also* Molina v. State, No. 01-17-00075-CR, 2018 WL 3150419, at *3-4 (Tex. App. June 28, 2018) (allowing VTC testimony in pre-trial hearing due to health risks associated with pregnancy).

68. *Gigante*, 166 F.3d at 80-82.

69. The case involved a witness who was a former inmate with the defendant, who had become terminally ill, and whose doctor found that any movement could risk the witness's life. *Id.* at 81-82.

70. *Id.* at 81.

71. *Id.* ("Because Judge Weinstein employed a two-way system that preserved the face-to-face confrontation celebrated by *Coy*, it is not necessary to enforce the *Craig* standard in this case.").

72. *Id.* at 80-81. The Court highlighted similar features of confrontation preserved through VTC testimony, as did the *Craig* court, but also factored in "the reduced risk that a witness will wrongfully implicate an innocent defendant when testifying in his presence." *Id.* at 80. The Court compared video testimony by an unavailable witness to deposition testimony under Rule 15 of the Federal Rules of Criminal Procedure, which is constitutional though taken outside the presence of a defendant, albeit with less meaningful opportunity for cross-examination. *Id.* at 81.

73. *Id.* at 80-81.

statement against the proposed rule governing VTC testimony in federal courts.⁷⁴

Many other courts that have addressed the matter have applied the *Craig* test to determine the constitutionality of VTC testimony.⁷⁵ Notably, in accepting the use of VTC for unavailable witnesses, the Fifth Circuit interpreted the *Craig* test to provide an exception to the Sixth Amendment confrontation right only where a compelling need has been demonstrated: “Rather, it is possible to view *Craig* as allowing a necessity-based exception for face-to-face, in-courtroom confrontation where the witness’s inability to testify invokes the state’s interest in protecting the witness — from trauma in child sexual abuse cases or, as here, from physical danger or suffering.”⁷⁶

The Fifth Circuit accordingly concluded that VTC testimony could be constitutional in settings outside child abuse and assault, including where a witness is terminally ill.⁷⁷ The Sixth Circuit similarly extended the use of VTC to cases in which an elderly witness was too ill to travel.⁷⁸ In an extremely permissive application of the *Craig* standard, the Florida Supreme Court upheld the use of VTC testimony in a robbery and assault case where the government’s main witnesses were foreign tourists residing in Argentina.⁷⁹ In applying the *Craig* test, it found three public policies outweighing the confrontation right: the witnesses lived beyond the court’s subpoena power, one of the witnesses was in poor health, and the witnesses were essential to the prosecution’s case in chief.⁸⁰ The Court took note of the discrepancies in video quality that accompanied the video format: the visual transmission of the victims’ testimony was not simultaneous with the audio, causing a split-second delay; further, while one of the witnesses was testifying, she repeatedly looked at an individual off-screen.⁸¹ Nevertheless, the court concluded that these problems did not rise to the level of a constitutional violation.⁸² The Supreme Court of Montana similarly found that the significant burden of requiring a witness to travel to testify in-person at three separate trials constituted a sufficient

74. See Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure, 207 F.R.D. at 94 (Scalia, J., statement). Justice Scalia moreover raised the point that, if a witness is unavailable for trial, the prosecution may secure a deposition, at which a defendant is presumptively entitled to appear, through Federal Rule of Criminal Procedure 15; such a right is not guaranteed through the use of VTC. *Id.* at 94–95.

75. See, e.g., *Horn v. Quarterman*, 508 F.3d 306, 310 (5th Cir. 2007); *United States v. Yates*, 438 F.3d 1307, 1315–16 (11th Cir. 2006); *United States v. Bordeaux*, 400 F.3d 548, 554 (8th Cir. 2005); *White v. State*, 116 A.3d 520, 544 (Md. Ct. Spec. App. 2015); *Harrell v. State*, 709 So.2d 1364, 1368–69 (Fla. 1998).

76. *Horn*, 508 F.3d at 320.

77. *Id.* at 318.

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

79. *Harrell*, 709 So. 2d at 1366.

80. *Id.* at 1369–70.

81. *Id.* at 1367.

82. *Id.* at 1372.

compelling need to justify the use of VTC testimony, given the distance and expense.⁸³

Other courts have found that the public policy goals of convenience and efficiency do not outweigh a defendant's confrontation right. In sharp contrast to the Florida Supreme Court, the Eleventh Circuit applied the *Craig* test to hold that similar public policy interests did not overcome the confrontation issues and that VTC testimony correspondingly violated a defendant's Confrontation Clause rights.⁸⁴ *United States v. Yates* involved the use of VTC testimony for two Australian witnesses who were unwilling to travel to the United States and were beyond the government's subpoena powers.⁸⁵ The Eleventh Circuit vacated the convictions of the defendants, holding that the use of VTC testimony by these witnesses during the trial had violated the defendants' confrontation rights.⁸⁶ Applying *Craig*, the Eleventh Circuit found that the public policy prong was not satisfied solely due to the prosecution's interest in presenting their crucial evidence.⁸⁷ The court cautioned that allowing prosecutors to adopt VTC testimony in any case where a witness's evidence was crucial would constitute a slippery slope, which would undermine the import of requiring the physical presence of witnesses.⁸⁸ It emphasized that video testimony must be "necessary," not just convenient.⁸⁹

In a similar vein, courts have rejected generalized allegations of harm, even to vulnerable groups such as children, as sufficient rationales to justify relaxation of a defendant's confrontation right.⁹⁰ In two similar cases — *United States v. Bordeaux* and *United States v. Turning Bear*, the Eighth Circuit rejected the use of VTC procedures motivated by the same public policy rationale as that in *Craig*: to permit an alleged child victim of sexual abuse to testify outside the presence of the defendant.⁹¹ It decided that *Craig* controlled the determination of whether to allow VTC testimony given that both one-way and two-way systems are virtual formats; it concluded that both fell short in terms of the most important factor in analyzing the sufficiency of a procedure in enabling confrontation — "whether it is

83. *City of Missoula v. Duane*, 380 Mont. 290, 296 (2015).

84. *United States v. Yates*, 438 F.3d 1307, 1307–08 (11th Cir. 2006) (en banc).

85. *Id.* at 1309–10.

86. *Id.* at 1318.

87. *Id.* at 1316.

88. *See id.*

89. *Id.* (emphasis in original).

90. *See, e.g.*, *United States v. Bordeaux*, 400 F.3d 548, 548–49 (8th Cir. 2005); *United States v. Turning Bear*, 357 F.3d 730, 730 (8th Cir. 2004); *United States v. Moses*, 137 F.3d 894, 894 (6th Cir. 1998); *Cumbie v. Singletary*, 991 F.2d 715, 715 (11th Cir. 1993).

91. *Bordeaux*, 400 F.3d. at 552; *Turning Bear*, 357 F.3d at 730; *State v. Johnson*, 812 S.E.2d 739, 746 (S.C. Ct. App. 2018), *reh'g denied* (Apr. 26, 2018), *cert. denied* (Aug. 3, 2018). The Eighth Circuit joined the Eleventh Circuit in rejecting the Second Circuit's holding that the VTC medium can provide effective protection of confrontation rights. *Bordeaux*, 400 F.3d. at 555.

likely to lead a witness to tell the truth to the same degree that a face-to-face confrontation does.”⁹² The Eighth Circuit noted, moreover, that the child’s fear of the defendant had not been shown to be the dominant reason why she could not testify, suggesting that a justification beyond general discomfort is needed to outweigh a defendant’s confrontation interest.⁹³ Similarly, in *State v. Thomas*,⁹⁴ the New Mexico Supreme Court, applying the *Craig* test, held that the VTC testimony of a witness via Skype violated the Confrontation Clause.⁹⁵ The court noted that the trial court had not made any specific findings showing that VTC was necessary to advance an important public policy.⁹⁶ In conclusion, while most courts that have applied *Craig* have suggested that VTC testimony may be allowed in certain compelling circumstances upon a particularized showing of need, they have differed regarding which specific public policies justify its use.

IV. VIDEO TESTIMONY IN MASSACHUSETTS

Massachusetts provides stricter protection of a defendant’s confrontation right than is required by federal law. Article 12 of the Massachusetts Declaration of Rights goes farther than the Sixth Amendment Confrontation Clause in providing that “every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defense by himself, or his counsel, at his election.”⁹⁷ This right is

92. *See id.* at 554 (“‘Confrontation’ through a two-way closed-circuit television is not different enough from ‘confrontation’ via a one-way closed-circuit television to justify different treatment under *Craig*.”); *see also Turning Bear*, 357 F.3d at 736 (noting that the trial court’s findings did not satisfy the *Craig* requirement that the child “be traumatized, not by the courtroom generally, but by the presence of the defendant”). The *Bordeaux* court noted that whether a two-way system would preserve the necessary features of face-to-face confrontation would turn on “hard logistical questions” including the size and placement of the monitor and whether the camera angle would “render the theoretical promise of the two-way system practically unattainable.” *Bordeaux*, 400 F.3d. at 555.

93. *Bordeaux*, 400 F.3d. at 555 (citing *Turning Bear*, 357 F.3d. at 737).

94. 376 P.3d 184 (N.M. 2016).

95. *Id.* at 193–95.

96. *Id.* at 195.

97. MASS. CONST. art. XII, pt. 1. Article 12 confrontation protection has been commonly invoked to determine the admissibility of testimonial hearsay. It has been deemed to establish “a rule of necessity” in that the “prosecution [must] either produce, or demonstrate the unavailability of, the declarant.” *Commonwealth v. Dorsica*, 42 N.E.3d 1184, 1189 (Mass. 2015) (citing *Commonwealth v. Housewright*, 25 N.E.3d 273, 280 (Mass. 2015)). A similar statutory right of confrontation is relatedly provided under Massachusetts law. *See* MASS. GEN. LAWS ch. 263, § 5 (“A person accused of crime shall at his trial be allowed to be heard by counsel, to defend himself, to produce witnesses and proofs in his favor and to meet the witnesses produced against him face to face.”).

intended to secure the benefit of face-to-face cross-examination and to allow accurate determination of witness credibility.⁹⁸

The Supreme Judicial Court has emphasized the right of the accused to cross-examine opposing witnesses in person: for example, under Article 12, it has “exclude[d] any evidence by deposition, which could be given orally in the presence of the accused.”⁹⁹ However, it has allowed some exceptions to the face-to-face requirement under specific circumstances.¹⁰⁰ The Supreme Judicial Court has not determined the constitutionality of VTC procedures for witnesses at trial;¹⁰¹ however, in related domains, it has opted to prioritize a defendant’s confrontation right over legitimate, generalized public policy interests.

A. Current Policy Allowing Witness Testimony via Video in Some Criminal Cases

Massachusetts courts have addressed a context similar to that presented by VTC in criminal trials — the use of videotaped testimony in criminal trials. In a handful of cases involving confrontation challenges to the use of video technology by child witnesses, Massachusetts has declined to categorically permit use of the video medium and required individual determinations based on compelling individual circumstances. This approach has been established in spite of Massachusetts’ interest in protecting child witnesses and its creation of processes that would accommodate child witness testimony through

98. See Opinion of the Justices, 547 N.E.2d 8, 10 (1989) (noting that colonial legislators intended to “give the accused the benefit of face-to-face cross-examination of the witness personally and in the presence of the trier of fact who could judge his demeanor and credibility”).

99. Commonwealth v. Slavski, 140 N.E. 465, 467 (Mass. 1923). The court also noted that, “where the witness is not subject to cross-examination or the testimony is given out of the presence of the accused, the violation of Article 12’s mandate is palpable, unless the witness is unavailable or excused by some recognized exception such as the dying declaration.” Commonwealth v. Amirault (*Amirault II*), 677 N.E.2d 652, 664 (Mass. 1997). The Supreme Judicial Court has declared the right to cross-examine witnesses “paramount except in limited circumstances.” Commonwealth v. Bergstrom 524 N.E.2d 366, 373–74 (Mass. 1988) (citing multiple Massachusetts cases emphasizing the importance of the confrontation right and cross-examination); see also Davis v. Alaska, 415 U.S. 308 (1974).

100. Commonwealth v. Johnson, 631 N.E.2d 1002, 1006 (Mass. 1994) (“[T]he right to confrontation . . . may yield in appropriate, although limited, circumstances”); Commonwealth v. Bergstrom, 524 N.E.2d 366, 373–74 (Mass. 1988) (citing *Murphy v. Superintendent, Mass. Correctional Inst., Cedar Junction*, 489 N.E.2d 661, 662–63 (Mass. 1986)) (finding that art. 12 does not grant inmates the right to confront prison informants in prison disciplinary proceedings); Commonwealth v. Pennellatore, 467 N.E.2d 820, 824–25 (Mass. 1984) (holding that the Sixth Amendment right to confrontation must bow to accommodate a witness’s Fifth Amendment right against self-incrimination as to a collateral matter).

101. A Massachusetts federal district court has addressed VTC testimony in the federal criminal context. The District Court for the District of Massachusetts, in a criminal antitrust action against a Japanese federal court, did allow VTC testimony upon the consent of all parties but expressed “serious questions . . . and major concerns” about the use of the technology. *United States v. Nippon Paper Indus.*, 17 F. Supp. 2d 38, 42 (D. Mass. 1998).

electronic means. Recognizing the public policy interest in protecting child witnesses in criminal abuse and sexual assault matters, Massachusetts' child witness statute allows child witnesses to provide testimony in certain circumstances by "simultaneous electronic means," defined as "any device capable of projecting a live visual and aural transmission such as closed-circuit television."¹⁰² The statute provides that "the defendant has a right to be present, absent a showing that the witness is likely to suffer trauma as a result of his presence."¹⁰³ In relevant cases challenging the statute, Massachusetts courts have carefully evaluated the operation of the specific procedures in question and the proffered justifications for their use to ensure adequate protection of a defendant's confrontation rights.

Despite the apparent statutory allowance of video testimony, including VTC, by children in certain cases, the Massachusetts Supreme Judicial Court has barred the application of the statute as a violation of the state's confrontation right.¹⁰⁴ Though the statute has not been repealed or amended, the Supreme Judicial Court has upheld a defendant's confrontation right — particularly the right to be present where the witness gives testimony — against the countervailing interest of the protection of children from emotional and psychological trauma.¹⁰⁵ In a challenge to the child witness statute on Article 12 confrontation grounds in *Commonwealth v. Bergstrom*, the Supreme Judicial Court concluded that trial procedures in which child witnesses provided testimony outside the presence of the defendant violated the defendant's Article 12 confrontation right.¹⁰⁶ The procedure resembled that of *Craig*: two child witnesses provided their testimony in a room separate from the courtroom while the defendant and jury observed from the courtroom.¹⁰⁷

The *Bergstrom* court first characterized the nature of the confrontation right, emphasizing the "paramount" guarantee of cross-examination.¹⁰⁸ It then declared its unwillingness to uphold "broad categorical exemptions from constitutional mandates" and consequently refused to recognize a general exemption for child

102. MASS. GEN. LAWS ch. 278, § 16D (2012). It is within the discretion of a judge to order the use of "a suitable alternative procedure" for presenting the testimony of a child witness at child abuse trials, including "simultaneous visual and aural transmission." *Commonwealth v. Bergstrom*, 524 N.E.2d 366, 367–69 (1988) (citing MASS. GEN. LAWS ch. 278, § 16D (1986)).

103. MASS. GEN. LAWS ch. 278, § 16D (2012).

104. See Katherine W. Grearson, *Proposed Uniform Child Witness Testimony Act: An Impermissible Abridgement of Criminal Defendants' Rights*, 45 B.C. L. REV. 467, 482 (2004).

105. *Bergstrom*, 524 N.E.2d at 370–71.

106. *Id.* at 376.

107. *Id.* at 370. The jury and defendant were located in the courtroom while the child witnesses, judge, prosecutor, defense counsel, a relative of the witnesses, and a video technician were in a separate room. *Id.* The defendant observed the testimony via a television monitor and two-way communication with his defense counsel was permitted. *Id.*

108. *Id.* at 373–74.

witnesses or cases of sexual abuse.¹⁰⁹ Second, the court assessed the ability to observe witness demeanor, finding that the reduction of trial testimony to a television image did not afford an equivalent opportunity for personal observation.¹¹⁰ It highlighted the importance of a juror's personal observations in assessing witness credibility, noting that "[t]he most acute observer would never be able to catalogue the tones of voice, the passing shades of expression or the unconscious gestures which he had learnt to associate with falsehood; and if he did, his observations would probably be of little use to others."¹¹¹ It found that the specific procedures utilized in the case violated the defendant's confrontation right for several reasons, including that one child witness was not made aware that she was giving testimony and the video transmission was of poor quality, with discrepancies resulting from its use.¹¹² According to the court, the prosecution had not made a sufficient showing of a compelling need justifying the procedure.¹¹³ Thus, the court held that protection of the emotional and physical trauma of the child witnesses did not overcome the potential harm to the defendant in the case, although it did not strike down the statute.¹¹⁴

The Supreme Judicial Court thus rejected categorical allowance of video testimony for specific types of crimes. While acknowledging the unique considerations of the context of assault involving children, the court stated that the standard used to determine whether direct or remote confrontation is appropriate should be the same regardless of the particular crime at issue or identity of the witness.¹¹⁵ The court suggested that exceptions to Article 12 protections would be rare, noting that "[it] ha[d] never interpreted art. 12 as permitting introduction of an available witness's testimony outside a defendant's presence."¹¹⁶ The court described in dicta the deficiencies of video testimony in enabling "personal observation" regardless of crime that counseled against its wide adoption:¹¹⁷

109. *Id.* at 375.

110. *Id.* at 375–76; accord *United States v. Nippon Paper Indus. Co., Ltd.*, 17 F. Supp. 2d 38, 42 (D. Mass. 1998) ("While some argue that videotaping is just like the real thing, 'just like' is not, in most situations, good enough.").

111. *Bergstrom*, 524 N.E.2d at 375.

112. *Id.* at 375–76. The court noted that at one point the screen went black, the color and sound were not true, background noises were highly magnified and distracting, the testifying child's face was partially obscured at times or outside of the camera range, the faces of the attorneys and the judge presiding were not shown, and unidentified persons were seen on screen. *Id.*

113. *Id.* at 376.

114. *Id.*

115. *Bergstrom*, 524 N.E.2d at 374 ("The recognized exceptions to the right of direct confrontation at trial are not crime specific. They apply impartially to all situations which the constitutional guarantee governs.").

116. *Id.* at 373.

117. *Id.* at 376.

A video machine does not simply transport evidence from the scene to the monitor. “In reality . . . the camera unintentionally becomes the juror’s eyes, necessarily selecting and commenting upon what is seen ‘Composition, camera angle, light direction, colour renderings, will all affect the viewer’s impressions and attitudes to what he sees in the picture.’ . . . [T]he picture conveyed may influence a juror’s feelings about guilt or believability. For example, the lens or camera angle chosen can make a witness look small and weak or large and strong. Lighting can alter demeanor in a number of ways, misshaping features or, if directed from below, giving witnesses an evil or sinister cast. In fact, for most witnesses to appear natural, as they would in a live trial, the use of makeup may be required.” . . . Subtle indication of a witness’s credibility, such as blush or a nervous twitch, often may not be transmitted.¹¹⁸

As a default, the jury must be able to view the interaction between the witness and others.¹¹⁹ The “subtle nuances of eye contact, expressions, and gestures” may not be completely captured on video but may be crucial in proceedings concerning the culpability of a defendant.¹²⁰ The court also expressed doubt that a fair trial could be realized without the physical presence of a judge in both the courtroom and the location where the witness is testifying, as all parties are entitled to the supervision of a judge, who is tasked with ensuring the fairness of the proceedings.¹²¹

The *Bergstrom* court ultimately promulgated a functional approach in suggesting its willingness to evaluate considerations of need. The court cautioned against interpreting its decision to completely rule out the use of video procedures: it declared that the right of a jury to personally observe a witness should be unrestricted “[a]bsent

118. *Id.* at 375–76 (citing James J. Armstrong, Comment, *The Criminal Videotape Trial: Serious Constitutional Questions*, 55 OR. L. REV. 567, 574–76 (1976)).

119. *Cf.* *Commonwealth v. Amirault (Amirault II)*, 677 N.E.2d 652, 664 (Mass. 1997) (noting that “even where the witness’s testimony is given in a manner which conforms in every respect to what ideally should happen in a proper confrontation within the court room . . . the jury may not witness that confrontation, but only its effect, if any, on the accusing witness”); *Commonwealth v. Tufts*, 542 N.E.2d 586, 591 (Mass. 1989) (noting, in child abuse case with videotaped testimony of child witness, that “[i]t would have been better if jurors could have observed the reactions of the defendants to the child witness’s testimony during the videotaping[.]”).

120. *Amirault II*, 677 N.E.2d at 669.

121. *Commonwealth v. Bergstrom*, 524 N.E.2d 366, 376 (1988). The court posited that a television monitor would not allow the judge to fully observe prejudicial gestures or inappropriate activities. *Id.* at 377.

compelling circumstances” and that “[s]uch a compelling need could be shown where, by proof beyond a reasonable doubt,” recorded testimony was necessary to avoid severe emotional trauma to a child.¹²² The court explicitly left open the possibility that a procedure that both complied with the constitutional requirements of a public trial and permitted the jury a proper opportunity to observe a witness in the presence of the judge, defendant, and attorneys could be upheld.¹²³

In subsequent cases, the Supreme Judicial Court has been amenable to adapting courtroom procedures to leverage videotaping to accommodate children.¹²⁴ In *Commonwealth v. Tufts*,¹²⁵ the Supreme Judicial Court held that videotaping the testimony of a four-year-old child victim of sexual abuse in the presence of the defendant did not violate a defendant’s confrontation right.¹²⁶ It distinguished the procedure in the case from *Bergstrom* — here, motivated by the child’s inability to testify within the courtroom based on *specific* findings of psychological or emotional trauma, the videotaped testimony occurred in a separate room in which the witness, judge, court clerk, court reporter, court officer, and defendants were all present.¹²⁷ The court also noted that the quality of the videotape “far exceed[ed] that of *Bergstrom*.”¹²⁸

The court in *Commonwealth v. Amirault (Amirault I)*¹²⁹ also upheld an arrangement in which a six-year-old child witness was allowed to testify in the judge’s chambers in the presence of the judge, defendant, and defendant’s counsel; the videotape was then presented to the jury.¹³⁰ The court found that a compelling need regarding the psychological and emotional health of the specific child witness had been shown based on the testimony of the child’s mother, therapist, and an expert witness pediatrician.¹³¹ Moreover, the court found that,

122. *Id.* at 376. It declared “we do not say that testimony videotaped outside the physical presence of the jury never can be utilized,” *id.*, and its “decision should not be regarded as prohibiting the development of electronic video technology in litigation,” *id.* at 376 n.18.

123. See *Bergstrom*, 524 N.E.2d at 376; *Commonwealth v. Sanchez*, 670 N.E.2d 377, 380–81 (Mass. 1996); *Commonwealth v. Amirault (Amirault I)*, 535 N.E.2d 193, 207 (Mass. 1989); *Commonwealth v. Johnson*, 631 N.E.2d 1002, 1006–07 (Mass. 1994).

124. See *Amirault II*, 677 N.E.2d at 635 (observing that less intimidating settings for a child’s testimony may be devised: the persons present may be limited, the judge may sit at the same level as the other participants and not wear robes, child-sized furniture may be used, and a parent or favorite toy may be placed nearby).

125. 542 N.E.2d 586 (Mass. 1989).

126. *Id.* at 590.

127. *Id.* at 588–89.

128. *Id.* at 590 (noting that the color was true, the sound was clear, the camera was directly centered on the child, all attorneys were visible, and the child’s movement never caused him to be out of range). The court did note that “[j]t would have been better” if jurors could have observed the reactions of the defendants to the witness’s testimony during the taping, but this fact was not a fatal flaw to an “otherwise satisfactory videotape.” *Id.* at 590–91.

129. 535 N.E.2d 193 (Mass. 1989).

130. *Id.* at 205–06.

131. *Id.* at 206.

although the videotape did not show all the people present in the room during the taping, which would have been “ideal,” it was not “a fatal flaw to an otherwise satisfactory videotape.”¹³²

In examining this analysis almost a decade later in *Commonwealth v. Amirault (Amirault II)*,¹³³ the Supreme Judicial Court did not disturb its prior holding but it reaffirmed that videotaped testimony may be appropriate only in particularized contexts, such as when young children testify.¹³⁴ It noted that where testimony conforming in every way to ideal courtroom testimony is recorded, there remains the difficulty that, “although the confrontation between accused and accuser takes place at the time of the accusation, the jury may not witness that confrontation, but only its *effect*, if any, on the accusing witness.”¹³⁵ The court specifically highlighted the importance of permitting the jury an opportunity to observe the reactions of defendants to witness testimony against them, which may factor into their credibility determination and other fact-finding.¹³⁶ Such an evaluation is not easily made through recorded testimony, which may not fully capture the relevant expressions and demeanor of the parties: the court opined that “[p]erhaps techniques are available to make up even for this defect although it is doubtful that any two-dimensional representation could ever convey all the activity available to the live observer.”¹³⁷

B. State Case-Law Expressing Caution Against Extension

Despite signals of openness regarding the integration of VTC into witness testimony procedure, Massachusetts cases since *Bergstrom* have proceeded cautiously, severely limiting the use of video testimony in light of confrontation challenges and instead emphasizing the importance of face-to-face confrontation. Notably, in *Amirault II*, the Supreme Judicial Court addressed a confrontation challenge to the seating arrangement of child witnesses and ultimately required physical face-to-face confrontation between the defendant and victim.¹³⁸ In a trial involving sex crimes against children, the trial court had permitted an altered seating arrangement for child witnesses in the courtroom based on a finding by a doctor that a more intimate setting would be less traumatic for the children.¹³⁹ The seating arrangement permitted

132. *Id.* at 206–07.

133. 677 N.E.2d 652 (1997).

134. *Id.* at 664–65.

135. *Id.* at 664 (emphasis added).

136. *Id.*

137. *Id.*

138. *Id.* at 668.

139. *Id.* at 657. As the court noted, the situation and motivation resembled that in *Coy v. Iowa*, 487 U.S. 1012 (1988). *Amirault II*, 677 N.E.2d at 661.

the jury to observe the children but obscured the defendants' view of the testimony: they could see only the profile of the child witness while the child was testifying.¹⁴⁰

In response to the defendants' challenge to the use of this testimony, the court held that the seating arrangement violated the defendants' right to face-to-face confrontation.¹⁴¹ First, it noted that the justification for the procedure was based only on generalities from an expert witness regarding children's testimony in sexual abuse cases.¹⁴² Second, it interpreted Article 12 to require not only that a defendant be given an opportunity to observe the faces of all witnesses testifying against the defendant but also that the testifying witness should "give his testimony to the accused's face."¹⁴³ Finding that arguments regarding the angles and view of the witness's eyes and lips "miss the point," it emphasized that the opportunity to observe the demeanor of the witness was only one factor: because the witnesses testified "without ever having the accused in their field of vision," the procedure was unconstitutional.¹⁴⁴

A similar holding was reached in *Commonwealth v. Johnson*,¹⁴⁵ in which the Supreme Judicial Court reversed a defendant's conviction on the grounds of a violation of the Article 12 confrontation right, because the seating arrangement of the child witnesses caused the defendant to be unable to see the face of a particular witness when testifying.¹⁴⁶ Noting that the shielding procedures could cause the jurors to draw negative conclusions and that no particularized showing of compelling need had been provided,¹⁴⁷ the court declared that Article 12 requires that a criminal defendant have the opportunity to "observe the faces of all witnesses testifying against the defendant at trial."¹⁴⁸ The Supreme Judicial Court has never mandated the witness maintain eye contact nor directed any specific positioning to maximize the defendant's ability to

140. *Amirault II*, 677 N.E.2d at 656–57. Each child witness testified at a small table placed directly in front of the jury box while the defendants remained at the defense table, which was behind and to the side of the child witness. *Id.* at 656. Despite some disagreement about which parts of the child witness's face the defendants could view and the exact scope of view from the defense table, the prosecution contended that the defendants could see "almost a full profile view" and that the child witness could make eye contact by turning toward the defendants. *Id.* at 656–57.

141. *Id.* at 662.

142. *Id.* at 664.

143. *Id.* at 662.

144. *Id.*

145. 631 N.E.2d 1002 (Mass. 1994).

146. *Id.* at 1004. The child witnesses sat near the court reporter's table rather than the witness's stand and the questioning attorney sat near the witness and the jury, an arrangement that blocked the defendant's view of the children's faces. *Id.* at 1005.

147. *Id.* at 1006–07.

148. *Johnson*, 631 N.E.2d at 1004–07; see also *Commonwealth v. Souza*, 689 N.E.2d 1359, 1361 (Mass. App. Ct. 1998). *Souza* also invalidated seating arrangements that obstructed the defendant's view of witnesses. *Id.* at 1362.

confront witnesses.¹⁴⁹ Confrontation satisfying Article 12 must be “‘face to face,’ even though it is not ‘eyeball to eyeball[.]’”¹⁵⁰

V. DIRECTION FOR MASSACHUSETTS COURTS

The Supreme Judicial Court has rejected rigid adherence to the “traditional formalities of trial” and expressed a willingness to consider the integration of technological mediums into the trial context, but only where such integration does not violate constitutional rights.¹⁵¹ Accordingly, the path ahead in determining the constitutionality of VTC technology in Massachusetts is forged through understandings of both the federal and state constitutional confrontation rights, as well as general public policy considerations that animate the elements of the confrontation right. In rejecting the application of broad, categorical exemptions to the confrontation right in *Bergstrom*, Massachusetts jurisprudence aligns with *Craig*’s policy-weighting functionalism. The *Craig* approach directs this determination: through its rulings on the confrontation right, the Supreme Judicial Court has cited to *Craig* as an indicator of the status of the federal confrontation right in these circumstances, notwithstanding its reliance on its own case law due to the differences between the Sixth Amendment and Article 12 confrontation rights.¹⁵²

Following *Craig*, the Sixth Amendment’s confrontation right requires at least a significant compelling need to depart from the presumption of face-to-face confrontation.¹⁵³ *Craig* leaves room for the possible extension of video testimony in criminal trials through the use of VTC in cases involving child abuse or assault, in which a child witness may suffer lasting harm from the physical presence of a defendant.¹⁵⁴ Massachusetts, however, has not currently imposed a

149. See, e.g., *Commonwealth v. Sanchez*, 670 N.E.2d. 377, 381 (Mass. 1996) (finding that the positioning of the defendant relative to the witness did not produce an absence of face-to-face contact); *Commonwealth v. Kater*, 567 N.E.2d. 885, 893 (Mass. 1991) (finding no art. 12 violation in the judge’s exercise of his discretion not to order the witness to look at the defendant); *Commonwealth v. Conefrey*, 570 N.E.2d. 1384, 1391 (Mass. 1991) (finding that a witness does not need to look directly at a defendant during their testimony and that a special seating agreement may be allowed if the judge takes care to ensure that the jury does not draw an inference of guilt from the arrangement); *Commonwealth v. Tufts*, 542 N.E.2d. 586, 589–590 (Mass. 1989) (finding no violation of art. 12 where the defendant could have seen child witness by bending slightly).

150. *Johnson*, 631 N.E.2d. at 1006; accord *Coy v. Iowa*, 487 U.S. 1012, 1019 (1988).

151. *Commonwealth v. Bergstrom*, 524 N.E.2d. 366, 377 (Mass. 1988).

152. See, e.g., *Sanchez*, 670 N.E.2d. at 381; *Commonwealth v. Amirault (Amirault II)*, 677 N.E.2d. 652, 662 (Mass. 1997).

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

154. For example, the dissent in *United States v. Yates* argued that the relevance of *Craig* was confined to the situation of one-way video testimony by an abused child against her alleged abuser, because the witnesses in that case were “vulnerable persons” that might have been impaired because of trauma and distress — a situation far removed from the context of

specific test to govern the use of VTC testimony. Indeed, Massachusetts' more robust protection for defendants' confrontation right indicates that departures from the face-to-face mandate should be avoided in all but exceptional cases of particularized compelling need and only upon demonstration of sufficient quality of VTC procedures to guarantee the requisite elements of the confrontation right, including observation of demeanor and an opportunity for cross-examination.

It has been proposed that the current pandemic presents such a compelling need and that enhancements in video quality in the decades since *Bergstrom* provide sufficient safeguards for confrontation.¹⁵⁵ However, while operating procedures for criminal cases in Massachusetts currently accommodate exceptions to the confrontation right at trial — for example, for child witnesses in certain circumstances,¹⁵⁶ these exceptions do not translate to the general use of VTC testimony upon a showing of witness unavailability on the grounds of potential illness. For several reasons, the Massachusetts court system should retain its prioritization of the confrontation rights of individual defendants as a default rule, only to be overcome in exceptional circumstances as determined on a case-by-case basis.

A. “Face-to-Face” Confrontation

While the Supreme Court in *Craig* concluded that face-to-face confrontation is not “an indispensable element” of the Sixth Amendment confrontation right,¹⁵⁷ “face-to-face” confrontation is the bedrock of the Article 12 confrontation right. Massachusetts courts have interpreted the face-to-face requirement to require the physical presence of a witness at trial. *Bergstrom* suggested the propriety of a literal construction of Article 12's guarantee of face-to-face confrontation, noting “[c]onstitutional language more definitively guaranteeing the right to a direct confrontation between witness and accused is difficult to imagine.”¹⁵⁸ The Supreme Judicial Court has

an unavailable witness. *United States v. Yates*, 438 F.3d 1307, 1331 (11th Cir. 2006) (Marcus, J., dissenting).

155. For example, in *Commonwealth v. Diaz*, the government proposed that the COVID-19 pandemic presents as a generalized “compelling circumstance” sufficient to relax a defendant's confrontation right and allow the wide use of VTC technology in motions to suppress. Commonwealth's Brief on Reservation and Report from a Single Justice of the Supreme Judicial Court at 34, *Diaz v. Commonwealth*, No. SJC-13009 (Mass. Sup. Jud. Ct. 2020). [hereinafter *Diaz Appellee Brief*]. It is unclear whether the government would make the same argument with respect to jury trials in general.

156. See MASS. GEN. LAWS ch. 278, § 16D (2012).

157. *Maryland v. Craig*, 497 U.S. 836, 849–50 (1990).

158. See *Commonwealth v. Bergstrom*, 524 N.E.2d. 366, 371–73 (Mass. 1988) (quoting *Commonwealth v. Gallo*, 175 N.E. 718, 724 (Mass. 1931)); see also *Commonwealth v. Amirault (Amirault II)*, 677 N.E.2d 652, 666 (Mass. 1997) (highlighting the Supreme Judicial Court's “emphatic embrace of the literal meaning of art. 12 in *Commonwealth v. Bergstrom*”).

gone as far as to state that “unmistakable insistence” on face-to-face confrontation bars consideration of countervailing factors.¹⁵⁹ Moreover, the federal constitutional right, as construed by the Massachusetts Supreme Judicial Court, requires “the physical presence of a witness.”¹⁶⁰ Although violation of the right to face-to-face confrontation does not automatically provide a ground for reversal of a defendant’s conviction in itself, Massachusetts has underscored that face-to-face confrontation is an indispensable component of the criminal proceeding.¹⁶¹

Virtual confrontation upends traditional notions of the confrontation right. In *Craig*, the Supreme Court noted that the one-way video procedure at issue did not constitute face-to-face confrontation; for this reason, it would not have met the face-to-face requirement as provided in Article 12.¹⁶² *Craig* critically left unanswered several questions relevant to whether the use of VTC testimony constitutes face-to-face confrontation — chief among them whether the element of face-to-face confrontation may be satisfied through methods that, though virtual, allow bidirectional communication and interaction. Did the Maryland one-way closed-circuit procedure fall short of face-to-face confrontation simply because of its one-sidedness (the witness could neither view the defendant nor could the defendant and witness interact directly with each other) or because of its virtual form?

It has been suggested that the Zoom platform, while not an ideal analogue to in-person testimony, provides a “comfortable” and “natural” approximation of face-to-face confrontation due to features enabling participants to see each other and procedural steps that could be taken by courts to ensure that audio and video quality remain clear.¹⁶³ However, this reasoning misses the mark. It is not likely that

The Supreme Judicial Court has noted that the incorporation of the explicit language “face-to-face” in the Massachusetts Declaration of Rights was made purposely in response to previously enacted state constitutions that did not contain such a provision. *Amirault II*, 677 N.E.2d at 660.

159. *Amirault II*, 677 N.E.2d at 662.

160. See, e.g., *Commonwealth v. Sanchez*, 670 N.E.2d 377, 380 (Mass. 1996) (“The defendant’s right of confrontation requires the physical presence of a witness testifying against him[.]”) (citing *Craig*, 497 U.S. at 846); *Commonwealth v. Kater*, 567 N.E.2d 885, 893 (Mass. 1991) (noting “physical presence” as one of the elements of confrontation presented by *Craig*).

161. See *Commonwealth v. Johnson*, 631 N.E.2d 1002, 1004 (Mass. 1994) (“We conclude that the words ‘face to face’ as used in art. 12 mean, literally, ‘face to face.’”). In certain cases, despite finding the absence of face-to-face confrontation in violation of Article 12, the Supreme Judicial Court has held that such error, when not timely raised by a defendant, does not create substantial likelihood of miscarriage of justice. See, e.g., *Amirault II*, 677 N.E.2d at 674.

162. See *Craig*, 497 U.S. at 857.

163. Memorandum and Order at 13, *Commonwealth v. Vazquez-Diaz*, 1984CR0029 (Docket. 29) (Mass. Super. Ct. Sept. 1, 2020). The court specifically highlighted the views on

Massachusetts' "face-to-face" requirement as interpreted by the Supreme Judicial Court would be satisfied by the virtual form. First, the Supreme Judicial Court has never treated video testimony as occurring face-to-face. Rather, it has highlighted that other states that have similar "face-to-face" confrontation provisions in their constitutions have invalidated testimonial proceedings facilitated by one-way closed-circuit video on the grounds that this procedure prevented a witness from seeing the defendant while testifying.¹⁶⁴

Second, the policy rationales underlying the face-to-face requirement in Massachusetts are not satisfied by the virtual form. The Massachusetts Declaration of Rights incorporated the "face-to-face" requirement due to the importance of observing witness demeanor in credibility determinations and the impact of face-to-face confrontation on witness recollection, veracity, and communication.¹⁶⁵ Although both aspects can be mimicked to some extent via video testimony, such reference to the psychological effects of having a witness testify face-to-face with the defendant suggests that the Massachusetts confrontation right requires the physical presence of a witness. Thus, in determining the circumstances under which VTC may be permitted in Massachusetts, courts should evaluate whether the attributes of the VTC medium secure the essential elements of the confrontation right, with a particular focus on cross-examination and demeanor.

B. Preserving Elements of Cross-Examination

The Supreme Judicial Court has declared effective cross-examination to be the heart of the confrontation right.¹⁶⁶ Proponents of the use of VTC have argued that testimony conducted via the medium

Zoom that permit "the defendant and the witnesses to see and face each other, and each of them to see the judge" and the court's plan to order witnesses to "keep their screens turned on/undimmed," to "make sure that everyone has clear audio and video," and to "inquire and order that the witnesses show the Court the room . . . to insure [sic] that no one else is present." *Id.*

164. The Supreme Court of Pennsylvania held that a closed-circuit television procedure that allowed the defendant to see the witness but kept the witness from seeing the defendant violated the requirement of face-to-face confrontation in the Pennsylvania Constitution. *See Amirault II*, 677 N.E.2d at 662 n.8 (citing *Commonwealth v. Ludwig*, 594 A.2d 281, 281-82 (Pa. 1991)). Moreover, the Supreme Court of Illinois invalidated a similar closed-circuit testimonial procedure under the Illinois Constitution, which also has a face-to-face requirement. *People v. Fitzpatrick*, 633 N.E.2d 685, 687 (Ill. 1994). The Supreme Judicial Court suggested that the only way to get around its face-to-face provision would be by amending the state constitution, as Pennsylvania and Illinois did subsequent to these challenges. *Amirault II*, 677 N.E.2d at 662.

165. *See Commonwealth v. Johnson*, 631 N.E.2d 1002, 1006 (Mass. 1994).

166. *See Commonwealth v. Bergstrom*, 524 N.E.2d 366, 373 (Mass. 1988). The Supreme Court has relatedly stated: "Our cases construing the clause hold that a primary interest secured by it is the right of cross-examination; an adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation." *Douglas v. Alabama*, 380 U.S. 415, 418 (1965).

is per se constitutional because it preserves the elements of confrontation by providing an effective forum for cross-examination and reliable testimony.¹⁶⁷ Indeed, VTC testimony today differs significantly from the one-way closed-circuit video testimony upheld in *Craig* by allowing bidirectional observation in which participants can interact with each other in real time.¹⁶⁸ Courts have suggested that counsel could effectively cross-examine through video platforms such as Zoom, which would allow for observation and interaction with witnesses and the use of documents and other exhibits for impeachment.¹⁶⁹

While VTC does provide an opportunity for cross-examination, the effectiveness of this element of trial is greatly undermined through the medium due to the limited ability to translate or allow non-trivial evaluation of elements of live, in-court testimony. It is true that an ideal opportunity for cross-examination is not guaranteed by either the Sixth Amendment or Article 12 of the Massachusetts Declaration of Human Rights. However, this is simply not a case of the perfect being an enemy of the good: the negative impacts on demeanor and the right to cross-examine witnesses presented by VTC technology collectively counsel against its widespread use as a reliable medium within the court system. When considering disparities regarding technological access, opportunity to confer with counsel, and the ability of a defendant to face a testifying witness, VTC testimony, of the quality that could be applied in the near future, falls far short in terms of effective cross-examination. Moreover, there are many reasons to doubt the reliability of VTC testimony given the inherent features of the medium that deny court participants and the defendant the opportunity to interact and confront a witness to the same degree as permitted in standard, in-person testimony.

C. Observation of Witness Demeanor

Effective cross-examination not only entails an ability to ask a witness questions but also to interact with them, observe their responses, and adapt style accordingly. With respect to this element of interaction, VTC technology proves lacking as it does not permit parties to effectively observe fluctuations and discrepancies in the process of

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

168. See Tokson, *supra* note 4, at 1587, 1599–600.

169. Memorandum and Order at 14–15, *Commonwealth v. Vazquez-Diaz*, 1984CR0029 (Docket. 29) (Mass. Super. Ct. Sept. 1, 2020).

providing testimony.¹⁷⁰ Studies have shown that, while facial expressions are the most controllable aspect of nonverbal communication,¹⁷¹ other nonverbal cues may lead jurors to question a witness's stated testimony.¹⁷² A full opportunity to view these nonverbal signals and interactions requires full-body camera angles, large screens, and quality audio and video.¹⁷³ Otherwise, VTC testimony may lead to the loss of intangible qualities that cannot be captured well on camera.

It has been suggested that VTC sufficiently accommodates such observation. For example, in evaluating the propriety of using VTC for a motion to suppress hearing, a Massachusetts trial court concluded that the Zoom platform effectively provides for observation of demeanor.¹⁷⁴ The court found that, through use of Zoom, “the images were crisp,” “there were no discernable delays in the audio,” “the Court could clearly see the eyes, facial reactions, and other non-verbal cues of the participants” and “the Court observed that the defendant was attentively following every aspect of the hearing.”¹⁷⁵ The court thus concluded that it could see the participants clearly, “easily observing even subtle changes in their facial expressions or vocal intonation” and could see “multiple participants at once.”¹⁷⁶

However, despite the benefits of the platform in facilitating interaction, the video medium is inherently limited in important ways that constrain the ability to effectively observe demeanor. Firstly, many aspects of a witness's behavior are obscured or hidden by the VTC medium, which usually does not present a full view of body or behavior due to typical camera orientation and placement; the difficulty in

170. Richard L. Marcus, *E-Discovery & Beyond: Toward Brave New World or 1984?*, 236 FED. RULES DECISIONS 598, 630 (2006). Compare Fredric I. Lederer, *The Road to the Virtual Courtroom? A Consideration of Today's — and Tomorrow's — High-Technology Courtrooms*, 50 S.C. L. REV. 799, 820 (1999) (reporting that experiments have indicated that jurors perceive remote witnesses just as they perceive in-court witnesses), with Michael D. Roth, Comment, *Laissez-Faire Videoconferencing: Remote Witness Testimony and Adversarial Truth*, 48 UCLA L. REV. 185, 201–02(2000) (arguing that remote witness testimony does not provide jurors the same freedom to choose the elements on which they would like to focus as is afforded through in-person testimony).

171. Jeremy A. Blumenthal, *A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 NEB. L. REV. 1157, 1190 (1993).

172. Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 TUL. L. REV. 1089, 1106–13 (2004). Gertner, *supra* note 4 at 784.

173. See Dubin Research & Consulting, *supra* note 3, at 31; Bernadette Mary Donovan, *Deference in a Digital Age: The Video Record and Appellate Review*, 96 VA. L. REV. 643, 672–75 (2010); Poulin, *supra* note 172, at 11105–11.

174. Memorandum of Decision and Order on Defendant's Motion to Continue and Objection to Conducting the Evidentiary Hearing on His Motion to Suppress Via Zoom Videoconference at 5, *Commonwealth v. Vazquez-Diaz*, 1984CR0029 (Docket. 29) (Mass. Super. Ct. Sept. 1, 2020) [hereinafter “Memorandum and Order”] (“Exhibits can be shared effectively; no masks are required so that expressions are easily viewed without risk; the defendant, attorneys, and witnesses are all easily able to see one another face to face.”).

175. *Id.* at 7.

176. *Id.* at 13–14.

controlling the range of behaviors of parties present in a courtroom is exacerbated through the virtual medium, which forces supervisory parties to scan thumbnails and infer as to behaviors and interactions taking place off-screen.¹⁷⁷ As the Supreme Judicial Court has emphasized, subtle changes in demeanor and nonverbal interactions are significant for parties' observation and decision-making: "What a juror's personal observation brings to bear is 'the natural and acquired shrewdness and experience by which an observant man forms an opinion as to whether a witness is or is not lying[.]'"¹⁷⁸

Moreover, although the general quality of video technology has significantly improved in recent decades, the VTC medium may still diminish the opportunity for accurate observation of witness behavior.¹⁷⁹ Courts using VTC testimony will have to grapple with inherent technological issues, including intermittent connection issues that may delay or otherwise interfere with a witness's testimony. Relating to one-way video testimony, the Supreme Judicial Court has upheld video as reliable when of good quality — the sound was clear, the tape clearly showed all persons in the room, the camera was directly centered on the witness, and the witness's movements never caused him to be out of the camera range.¹⁸⁰ Relatedly, a federal district court in Massachusetts, in pointing out the inferior qualities of the video medium, has noted that much of the interaction of the courtroom is crucial and can be missed on video.¹⁸¹ However, such quality is hard to control in a generalized way, with expected negative outcomes for

177. Diaz Petitioner Brief at 13, *Diaz v. Commonwealth*, 2020 WL 6596361, No. SJC-13009 (Mass. Sup. Jud. Ct. 2020) (noting that much of people's bodies are not visible on Zoom).

178. *Commonwealth v. Bergstrom*, 524 N.E.2d 366, 375 (Mass. 1988). Notwithstanding studies suggesting the decreased importance of face-to-face interaction in many social contexts in the current era, Marcus, *supra* note 170, at 635, such interaction remains a hallmark of the trial process.

179. Frank M. Walsh & Edward M. Walsh, *Effective Processing or Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Hearings*, 22 GEO. IMMIGR. L.J. 259, 268 & n.65 (2008) (noting that "video transmission may exaggerate or flatten an applicant's affect and audio transmission may cut off the low and high frequencies of the applicant's voice" — anomalies which may "impair the fact finder's ability to assess the veracity of the applicant's story" — and collecting studies that have found that VTC communication is "not as rich as face-to-face communications and diminishes the ability to generate positive feelings among participants").

180. *Commonwealth v. Tufts*, 542 N.E.2d 586, 590 (Mass. 1989).

181. Notably, a federal district court in the District of Massachusetts referenced a "telling" scene in the movie "Twelve Angry Men," in which the jurors discussed the testimony of an old man who had claimed to have heard a fight in the apartment above him and ran to the door. *United States v. Nippon Paper Indus. Co., Ltd.*, 17 F. Supp. 2d 38, 42 n.9 (D. Mass. 1998). One of the jurors, who was an elderly man, pointed out to the others that the elderly witness had walked in a labored fashion, dragging his feet to the stand and walking with some disability. *Id.* The court found noteworthy that such "an observation . . . would have been missed if the only aspect of the witness that the jurors saw was his face." *Id.*

marginalized populations in the criminal justice system.¹⁸² Studies have shown that Internet usage and quality vary with factors such as socioeconomic status and race¹⁸³ — factors that also tend to be disproportionately correlated with involvement in the criminal justice system.¹⁸⁴ Administrative and procedural safeguards are not always sufficient. In *Bergstrom*, although a video operator was present to ensure the quality of video in the matter, the court found many “troublesome” aspects of the sound and video quality.¹⁸⁵ The video format thus takes away a lot of the discretion provided to observers in the courtroom regarding which details on which to focus or whether to take in a more general impression of defendants and witnesses, with potentially grave implications for categories of defendants.¹⁸⁶

D. Courtroom Strategy

The use of VTC furthermore creates difficulties relating to defense strategy. Few resources have been dedicated to assessing the impact of videoconferencing on the experiences and psychological responses of defendants and other courtroom participants.¹⁸⁷ However, the use of VTC has been suggested to contribute to negative impacts on criminal justice outcomes for defendants: for example, one study on the impact of VTC hearings on bail decisions in Cook County concluded that defendants were significantly disadvantaged by VTC bail

182. Reynolds, *supra* note 3 (“Those with lower-quality internet are going to be the ones who are more likely to have interruptions in their audio or in their video feed, which, of course, could impact how they’re viewed by the judge or the jury[.]”).

183. See Lauren Chambers, *Internet Deserts Prevent Remote Learning During COVID-19*, ACLU of Mass.: Data for Justice Project, ACLU (May 13, 2020), <https://data.aclum.org/2020/05/13/internet-deserts-prevent-remote-learning-during-covid-19/> [<https://perma.cc/2LC5-75WU>]; *Internet/Broadband Fact Sheet*, PEW. RES. CTR. (June 12, 2019), <https://www.pewresearch.org/internet/fact-sheet/internet-broadband/> [<https://perma.cc/W7SP-N3LZ>]; Brief of *Amici Curiae* at 17–28, *Diaz v. Commonwealth*, No. SJC-13009 (Mass. Sup. Jud. Ct. 2020) [hereinafter *Diaz Amici Brief*]. Moreover, users accessing video platforms such as Zoom on mobile devices may have a more limited and detrimental experience than on laptops and larger-screen devices. See Sasha Lekach, *Zoom Is Different on Your Phone, So Here’s When to Use It*, MASHABLE (Apr. 6, 2020), <https://mashable.com/article/zoom-mobile-desktop-video-calls/> [<https://perma.cc/29W4-7QG6>].

184. *Diaz Amici Brief* at 33.

185. *Commonwealth v. Bergstrom*, 524 N.E.2d 366, 375 (Mass. 1988) (noting that (1) the color and sound were not true, (2) the court and court reporter had difficulty hearing the proceedings, (3) the screen went blank at one point, (4) minor sound was distracting, and (5) the camera angle at times obscured the face of the witness); see also Poulin, *supra* note 172, at 1104–11 (listing weaknesses including technological constraints, quality, camera shots, nonverbal cues, and eye contact).

186. See Poulin, *supra* note 172, at 1108.

187. *Id.* at 1156 (arguing for additional studies). Studies have reported that court interpreters appearing via VTC “become tired faster and suffer inferior performance.” Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NW. U. L. REV. 933, 982 & n.218 (2015); see also Pooja R. Dadhanian, *Language Access and Due Process in Asylum Interviews*, 97 DENV. L. REV. 707, 739–40 n.215 (2020).

proceedings.¹⁸⁸ Moreover, when live hearings are replaced with videoconferencing, the perceived gains have been shown to inure primarily to the government and those presiding, benefiting judges, court personnel, and prosecutors.¹⁸⁹

These consequences are likely due in part to the impact of the VTC medium on the perception of parties in the courtroom. For example, the video medium can be inherently persuasive and communication through a large screen may provide an unwarranted boost to the credibility of accusing witnesses.¹⁹⁰ On the other hand, cameras may make some people more nervous during testimony, affecting perceptions of their credibility.¹⁹¹ Moreover, attorneys may struggle to capture the attention of a judge and jury due to the location, angle, and prominence of the screen providing video transmission of an accusing witness.¹⁹² In a study of witnesses testifying via videoconferencing, researchers found that gaze aversion may be produced by the location of the camera and give the appearance of deception.¹⁹³ It has also been suggested that the VTC medium may prevent defendants from establishing an emotional connection with a judge due to the sense of distance created by the virtual medium.¹⁹⁴ Studies also report the frustration of defendants stemming from the limitations of the video medium in allowing them to present a compelling narrative.¹⁹⁵ These concerns undoubtedly impact the government as well; however, they are all the more concerning for defendants given the harms of false accusations, a concern that animates the confrontation right. Counsel

188. Shari Seidman Diamond, Locke E. Bowman, Manyee Wong & Matthew M. Patton, *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. CRIM. L. & CRIMINOLOGY 869, 897–98 (2010) (showing that the average bond amount for offenses that shifted to televised hearings increased by an average of 51% across all cases examined). Studies have similarly showed the negative impact of the video medium on outcomes in the immigration context. See Eagly, *supra* note 187, at 957–71 (showing that the use of videoconferencing in removal proceedings is associated with higher rates of deportation and other negative outcomes for litigants, including depressed engagement with the adversarial process and lower rates of submitting applications and finding lawyers); Dane Thorley & Joshua Mitts, *Trial by Skype: A Causality-Oriented Replication Exploring the Use of Remote Video Adjudication in Immigration Removal Proceedings*, 59 INT’L REV. L. & ECON. 82, 93 (2019) (finding that “[r]elative to respondents who have to appear before an immigration judge through a video feed, in-person respondents are advantaged throughout the removal process”); Walsh & Walsh, *supra* note 179, at 271 (showing that “the grant rate for asylum applicants whose cases were heard in-person is roughly double the grant rate for applicants whose cases were heard via VTC”).

189. *Id.* at 1098. This is not to discount the interests of victims or family members in the administration of their cases. However, pronounced effects on the outcomes of criminal cases must be weighed against the impact of delaying a case until a meaningful forum that adequately safeguards defendants’ rights is available.

190. See 58 Am. Jur. Trials 481 § 10 (1996).

191. Johnson & Wiggins, *supra* note 12, at 216.

192. Poulin, *supra* note 172, at 1122–23.

193. Johnson & Wiggins, *supra* note 12, at 222.

194. See Walsh & Walsh, *supra* note 179, at 269–70.

195. See Eagly, *supra* note 187, at 982.

must thus address the potential impact of the VTC medium in terms of the credibility of witnesses and the government in presenting a defense.

Furthermore, effective representation, as guaranteed by the Sixth Amendment, may be undermined by the reduction in client-attorney contact enabled by VTC technology, implicating immeasurable factors associated with close proximity to a lawyer and the ability to think and respond on the spot.¹⁹⁶ A defendant is not guaranteed an ideal opportunity to meet and discuss with an attorney.¹⁹⁷ However, private conferral with counsel during a proceeding via private chat or video breakout functionality,¹⁹⁸ even at its best, constitutes a significant downgrade in accessibility to counsel for defendants.¹⁹⁹ The combination of the virtual forum, lack of proximity to an attorney, video issues impacting a defendant's ability to engage with court proceedings, and related factors may impact a defendant's perception of the gravity of court proceedings in a detrimental way.²⁰⁰ For example, defense attorneys have expressed concerns that having a defendant "appear for a proceeding from a remote location, rather than in the courtroom, will diminish his or her sense of the seriousness of the proceedings and the justice he or she is receiving[.]" which could negatively affect the defendant's behavior and due process rights.²⁰¹

E. Courtroom Barrier

The use of videoconferencing technology also inherently creates a barrier in the court that reduces the quality of the confrontation. In *Bergstrom*, the Supreme Judicial Court noted the "troublesome" aspect of the absence of the "physical" presence of a judge in the same place where a witness is giving testimony.²⁰² The court has, moreover,

196. Poulin, *supra* note 172, at 1104–13; Reynolds, *supra* note 3. See Anthony Garofano, Comment, *Avoiding Virtual Justice: Video-Teleconference Testimony in Federal Criminal Trials*, 56 CATH. U. L. REV. 683, 701 (2007) (noting that the separation of a witness from a cross-examining lawyer decreases the adversarial impact of proceedings).

197. See *Abbott A. v. Commonwealth*, 933 N.E.2d 936, 944–45 (2010) (finding that a juvenile with limited cognitive abilities was sufficiently able to meet and confer with his attorney).

198. Memorandum and Order at 15, *Commonwealth v. Vazquez-Diaz*, 1984CR0029 (Docket. 29) (Mass. Super. Ct. Sept. 1, 2020).

199. Such breakout functionality may more closely approximate private meetings in domains such as education and private enterprise than in the trial setting, in which responsive meeting and conferral with counsel may affect trial strategy and the psychological experience of a defendant.

200. See *White v. State*, 116 A.3d 520, 544 (Md. Ct. Spec. App. 2015) ("Even the most cutting-edge technology cannot wholly replace the weight of in-court testimony, for the electronic delivery of that testimony — no matter how clearly depicted and crisply heard — is isolated from the solemn atmosphere of the courtroom and compromises human connection to emotions like fear, apprehension, or confusion.").

201. Johnson & Wiggins, *supra* note 12, at 215.

202. *Commonwealth v. Bergstrom*, 524 N.E.2d 366, 376 (Mass. 1988) (noting the duty of the judge to "be present and to be the directing mind over whatever goes on").

acknowledged the harmful risk of manipulation or inappropriate activities present when a witness testifies outside of the judge's control.²⁰³ Noting that the presence of the judge is “a matter of fundamental fairness, and not of technological degree[,]” the confrontation right of the defendant includes the “right to be tried and adjudged in a courtroom in which no spectators, jurors, or court personnel may influence inappropriately the final judgment.”²⁰⁴ Such supervisory control by a judge is undermined by the complications of presiding over thumbnail images of multiple participants via video.

VI. VTC ONLY IN INSTANCES OF “COMPELLING NEED”

Constitutional rights such as the confrontation right are rarely absolute, and it is the goal of the courts to imbue such rights with normative values in light of contemporary needs. The VTC medium offers benefits for the present circumstances, which are often framed in terms of convenience and efficiency, particularly to the government and those presiding over the justice system. Such benefits can be very meaningful in the administration of justice.²⁰⁵ Videoconferencing reduces the costs of transportation and security — proponents tout that judges, defendants, and court personnel may attend proceedings remotely.²⁰⁶ It also may allow for faster administration of cases, positively impacting a defendant's right to a speedy trial.²⁰⁷ Whether these advantages constitute “compelling needs” remains an open question in Massachusetts courts. This Note argues that, due to the potential harms impacting defendants' rights, these advantages alone rarely should suffice to meet the “compelling need” standard adopted in Massachusetts.

Despite the benefits of the video medium to incarcerated people including avoiding the discomfort of transport and faster processing,²⁰⁸ the confrontation right is an important procedural safeguard that should not be outweighed simply due to convenience or the value of a

203. *Id.* (“It is simply inadequate to substitute for the judge's personal presence a television monitor allowing her a view of the defendant, the jury, the clerk, and the reporter. . . . In such circumstances, a judge could not observe any prejudicial gestures or inappropriate activities on the part of spectators. Nor is it likely that a judge could hear any improper mutterings in response to ongoing testimony[.]” *Id.* at 377).

204. *Id.* at 377.

205. For example, the government raises the difficulty of presenting a case after an extended delay, which may create difficulties in coordinating witnesses or gaining access to evidence. *See* Diaz Appellee Brief at 19–21, *Diaz v. Commonwealth*, No. SJ-13009 (Mass. Sup. Jud. Ct. 2020).

206. *See* Poulin, *supra* note 172, at 1099; *see, e.g.*, *United States v. Navarro*, 169 F.3d 228, 235 (5th Cir. 1999) (“The Government . . . argues that [videoconferencing] is widely used, that it is beneficial because it increases productivity by reducing travel time, and that it is less costly and more safe than transporting prisoners.”).

207. *See* Poulin, *supra* note 172, at 1100.

208. *Id.*

witness's testimony. Witness coordination can undoubtedly be difficult; there are often serious issues relating to a witness not being able to attend trial, forgetting to attend trial, or expressing reluctance to being in the courtroom at a specified time.²⁰⁹ However, as has been acknowledged by other courts addressing the subject, mere convenience should not satisfy the standard for permitting VTC testimony.²¹⁰ Speed and efficiency have never been recognized as controlling constitutional values.²¹¹ Thus, finding VTC testimony per se constitutional in Massachusetts courts would be at odds with the foundations of the confrontation right established in the Sixth Amendment and Massachusetts Declaration of Rights. Critically, blanket constitutionality would render superfluous the requirement to allow remote testimony only when justified by a public policy, as mandated by *Craig*.

Given the importance of the confrontation right and the discrepancies related to use of the video medium, it is recommended that the Massachusetts court systems continue to recognize that the mere convenience of the justice system does not satisfy the compelling need for determining when to permit VTC — such testimony should require not only witness unavailability but also a specific finding of compelling need as has been demonstrated in some cases involving child witnesses. Already, the Supreme Judicial Court has been unwilling to categorically allow the use of the video medium based on generalized findings or assumptions regarding nonspecific harm to witnesses.²¹² A compelling need standard thus naturally comports with Massachusetts jurisprudence's functional approach to protection of a defendant's confrontation right; evaluating the particular harms raised by a specific case allows courts to monitor and control the scope of exemptions to the fundamental rights of defendants.

209. See Bill Delmore, *Cameras in the Courtroom: Limited Access Only*, 67 TEX. B.J. 782, 784 (2004); *Deposition Dilemmas: Vexatious Scheduling and Errata Sheets*, 12 GEO. J. LEGAL ETHICS 1, 9 (1998); Major Vaughan E. Taylor, *USAR Individual Mobilization Augmentee, Witnesses: The Ultimate Weapon*, ARMY LAW., May 1987, at 12.

210. See, e.g., *United States v. Yates*, 438 F.3d 1307, 1316 (11th Cir. 2006) (“[T]he prosecutor’s need for the video conference testimony to make a case and to expeditiously resolve it are not the type of public policies that are important enough to outweigh the Defendant’s rights to confront their accusers face-to-face”); *State v. Smith*, 308 P.3d 135, 138 (2013) (stating that a “witness’s convenience or the convenience of his employer are not situations that demonstrate necessity” to justify remote testimony through VTC); *Commonwealth v. Atkinson*, 987 A.2d 743, 751 (2009) (“[C]onvenience and cost-saving are not sufficient reasons to deny constitutional rights.”).

211. See *Stanley v. Illinois*, 405 U.S. 645, 656 (1972) (“[T]he Constitution recognizes higher values than speed and efficiency.”); see also Ronnie Thaxton, *Injustice Telecast: The Illegal Use of Closed-Circuit Television Arraignments and Bail Bond Hearings in Federal Court*, 79 IOWA L. REV. 175, 187 (1993) (noting that “no court has deemed judicial efficiency, relative to the right to confrontation, an important governmental interest”).

212. See *supra* text accompanying note 91.

A. Evaluating VTC in Light of COVID-19 Pandemic

The compelling need standard advanced in *Craig* and embraced in *Bergstrom* is implicated by health crises such as the COVID-19 pandemic. To date, the *Craig* court and others that have considered the constitutionality of remote testimony have primarily limited its use to the context of child abuse cases and other cases of extreme illness or risk.²¹³ Despite the fundamental health concerns raised by the crisis, the context of potential exposure to an illness does not necessarily merit broad allowances for the use of VTC testimony. *Craig*'s public policy prong urges courts to evaluate the import of considerations that affect a witness's ability to appear in court — such considerations are far from uniform with respect to COVID-19 factors, which may disparately impact individuals based on age and health status.²¹⁴ A generalized categorical exemption on the basis of risk of exposure would greatly approximate the standards rejected by Massachusetts for the use of video testimony, including the protection of child witnesses from emotional and psychological trauma. For such generalized risk as presented by the pandemic, the appropriate procedure is not the general adoption of VTC testimony but rather that which was undertaken by Boston courts and other court systems around the country — to limit access to the court system until public health and safety concerns are alleviated.²¹⁵ Once such generalized risk has abated, Massachusetts courts may then evaluate the use of VTC in particular cases based on individual determinations of compelling need. Such determinations are confounded in the context of jury trials, which may involve multiple different witnesses and defendants; however, courts must equip themselves to make individual determinations or delay judicial proceedings in cases where the presentation of testimony through a blend of mediums may bias or provide unwarranted credibility gains to certain parties.

Delay, of course, raises concerns regarding a defendant's right to a speedy trial, which is separately guaranteed under both the Sixth Amendment of the United States Constitution and Article 11 of the Massachusetts Declaration of Rights.²¹⁶ In Massachusetts, a criminal

213. See, e.g., *United States v. Gigante*, 166 F.3d 75, 80–82 (2d Cir. 1999).

214. For example, even permitting court operators to set up the VTC medium in a witness's presence may create an unacceptable risk with respect to health status for certain people.

215. As demonstrated in *Commonwealth v. Dorsica*, the determination of unavailability is a case-specific inquiry not intended for generalized risks that affect many people in the same way. See 42 N.E.3d 1184, 1189 (Mass. App. Ct. 2015). In the aftermath of the COVID-19 pandemic, Massachusetts courts may use the guidance of *Commonwealth v. Housewright* to evaluate whether a witness has a particular risk of harm that would allow them to be classified as unavailable and thus utilize VTC procedures. See 25 N.E.3d 273, 281 (Mass. 2015)

216. See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial”); MASS. CONST. pt. 1, art. XI (“He ought to obtain

defendant's right to a speedy trial is codified under state criminal procedure Rule 36, which ensures that "cases do not languish on the docket."²¹⁷ The "primary burden" of ensuring a speedy trial falls "on the courts and the prosecutors[.]"²¹⁸ The use of VTC testimony may expedite trials. However, given the potential harms and complications of VTC testimony to a defendant's confrontation right, it is inadvisable to prioritize the need for speedy resolution of cases over the protections of a safe and fair trial. Constitutional protections generally do not give way to the accused's right to ensure that their matters are resolved in a timely matter, even though lack of timeliness may mandate dismissal of an otherwise constitutional court procedure. In the context of the COVID-19 pandemic, the right to a speedy trial is less of a consideration given that court-ordered delays do not typically factor into the calculation of speedy trial time under Rule 36.²¹⁹ Moreover, some defendants may be willing to waive speedy trial rights in order to delay proceedings until they may be held safely in-person.²²⁰ Safe adjudications that do not require the presence of witnesses or many other court personnel, such as administrative hearings, may still be amenable to the VTC format without implicating a defendant's confrontation right.

As Justice Scalia acknowledged with respect to jurisprudence surrounding a defendant's confrontation right, "constitutional protections have costs."²²¹ In the context of the COVID-19 pandemic, that cost should not be the safety and health of the public. Only once the general public's risk from the virus has abated can particularized considerations of harm and risk to individual witnesses be taken into account in making specific rulings regarding whether to permit a witness to testify via VTC.

VII. CONCLUSION

On its surface, VTC technology presents an efficient path forward in response to health crises as it preserves the safety and health of witnesses while allowing defendants to address their matters more promptly in court. However, the interests of justice counsel against the

right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.").

217. *Commonwealth v. Gibbons*, 46 N.E.3d 114, 114 (Mass. App. Ct. 2016); Mass. R. Crim. P. 36.

218. *Barker v. Wingo*, 407 U.S. 514, 529 (1972).

219. *See* Mass. R. Crim. P. 36(b)(2)(F) (excluding from consideration of speedy trial delay "[a]ny period of delay resulting from a continuance granted by a judge . . . if the judge granted the continuance on the basis of his findings that the ends of justice served by taking such action outweighed the best interests of the public and the defendant in a speedy trial").

220. *See, e.g.*, Diaz Petitioner Brief at 9, 2020 WL 6596361, No. SJC-13009 (Mass. Sup. Jud. Ct. 2020).

221. *Coy v. Iowa*, 487 U.S. 1012, 1020 (1988).

wide applicability of VTC testimony in criminal cases. The use of VTC should be limited to instances where individual circumstances demonstrate a compelling need. As noted, the federal court system does not have the same demands of face-to-face confrontation as the Massachusetts Declaration of Rights. But as Justice Scalia expressed, there is a clear preference for the physical presence of a witness even in the federal system.²²² Thus, the approach discussed here may be considered widely in other states and the federal system. Moreover, although this Note mainly focuses on the case of witness testimony during criminal trials, similar policy considerations apply to proceedings such as motions to suppress and other matters that typically involve the presence of a defendant, judge, or other witnesses. Thus, this Note's recommendations urging serious caution regarding the use of VTC technology apply to non-administrative criminal matters in general.

222. *See Crawford v. Washington*, 541 U.S. 36, 57 (2004); Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure, 207 F.R.D. at 94 (statement of Scalia, J.).