Pepperdine Law Review

Volume 36 | Issue 3 Article 4

4-20-2009

Confronting the Shadow: Is Forcing a Muslim Witness to Unveil in a Criminal Trial a Constitutional Right, or an Unreasonable Intrusion?

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I. INTRODUCTION

"He's been stabbed." Her voice sounded weak and distraught over the phone. "Please send help. My husband is dying." On the other side of the call, the Los Angeles Police Department responded immediately. Minutes later, two patrol cars screeched into a grocery store parking lot to find a small crowd gathering around a white SUV in the 11:00 p.m. darkness.

A woman kneeled on the ground, sobbing and clutching her stomach. She was covered from head to toe in loose black cloth, with a veil cast over her face. Sprawled next to her, a man lay facedown in a pool of blood. He did not move.

A small group of spectators stood nearby, horrified. One of the officers immediately attempted to calm the sobbing woman, but as he did so she spun around wildly, as if her life was still in danger. Her eyes dashed from person to person, until finally they found their target. Frantically, she extended a trembling finger in the direction of a middle-aged man standing in the center of the crowd.

"Him! It was him! That man killed my husband!"

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Silence filled the courtroom. It seemed like just yesterday Fatima Hassan had pointed her finger in that parking lot. Yet here Brian Taylor found himself sitting in the defendant's chair facing murder charges. Here he found himself waiting for Hassan to take the witness stand. All because he ended up on the other side of that finger.

Upon entering the courtroom, she appeared the same way she did on that fateful night—the black garment draped over her body and the veil pulled tightly over her face, covering all but her wandering eyes. She would be the first witness and the last witness. No one else had seen anything. No other evidence existed. No fingerprints, no weapon. It was his word against hers.

Taylor nudged his attorney. "She can't wear that up there. Make her take it off." He didn't know why, but the thought of Hassan testifying in the veil made him uncomfortable.

Taylor's attorney pleaded for the veil's removal, but before the judge could even respond, Hassan's voice penetrated the room. "I'd rather die. You already took my husband. You will not take my dignity." Despite Taylor's arguing and the judge's requests, Hassan would not budge. She pulled her garments tighter. Steadily the judge's sympathy grew, and finally he relented. Hassan, cloaked in black, took the stand. Her religion was honored. Reluctantly, Taylor braced for trial.[1]

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1. This is a fictional story created by the author.

For criminal defendants like Brian Taylor, a single witness's testimony can be life altering.[2] It is for this very reason that the American criminal justice system puts so much emphasis on the jury's ability to evaluate the reliability of witness testimony.[3] It is also for this reason that criminal defendants like Brian Taylor have good cause for concern when a veiled witness testifies against him in court.[4] As the jury attempts to evaluate the witness's credibility, what might the veil conceal? A vindictive smile? A twitch of the mouth? A forehead dotted with beads of sweat?[5] The

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2. The two most dramatic consequences of a criminal conviction are the defendant's loss of liberty and the "criminal stigma" attached to the defendant's name. *See* Margaret H. Lemos, *The Commerce Power and Criminal Punishment: Presumption of Constitutionality or Presumption of Innocence?*, 84 TEX. L. REV. 1203, 1228 (2006). These consequences are "typically much worse than those that follow from an unfavorable verdict in a civil case. Given the significance of those consequences our society has made a 'fundamental value determination' . . . that it is far worse to convict an innocent man than to let a guilty man go free." *Id.* (citing *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring)). As a recent article describes:

> The label of "convicted felon" strips an individual of the right to vote, serve on juries, own firearms, or hold public office. In many states, convicted felons are prohibited from obtaining student loans, employment in state-licensed occupations, or employment with state-licensed companies. In addition, the label of convicted felon may contribute to various informal exclusions that can make access to noncriminal activities more difficult and criminal alternatives more attractive.

Ted Chiricos, Kelle Barrick, William Bales & Stephanie Bontrager, *The Labeling of Convicted Felons and Its Consequences for Recidivism*, CRIMINOLOGY, Aug. 1, 2007, at 548 *available at* http://www3.interscience.wiley.com/cgi-bin/fulltext/117996466/PDFSTART?CRETRY=1&SRETRY=0 (also revealing a study that shows the "criminal" label may actually contribute to subsequent criminal recidivism). Heightened concern arises when the jury bases a conviction on the testimony of only very few witnesses or even a single witness. *See* Carmell v. Texas, 529 U.S. 513, 542 n.30 (2000) (noting that "[o]ne single Witness, if credited by Twelve Jury-men, is sufficient" to convict a defendant of a crime).

3. The U.S. Supreme Court has described the jury's ability to make credibility determinations as "[a] fundamental premise of our criminal trial system." United States v. Scheffer, 523 U.S. 303, 313 (1998). The jury serves as a "lie detector," and this function has "long been held to be the part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men." *Id.* (internal quotations omitted).

4. "The jury's inability to see the *entire* witness may limit its ability to evaluate that witness' credibility and value as evidence," which may impair "an important function of the jury in criminal trials." Anthony Garofano, *Avoiding Virtual Justice: Video-Teleconference Testimony in Federal Criminal Trials*, 56 CATH. U. L. REV. 683, 702 (2007) (emphasis added). As a result, the U.S. Supreme Court has "noted the fundamental importance of avoiding the wrongful implication of defendants by witnesses and the efficacy of face-to-face confrontation in achieving this." *Id.*

5. These aspects of a witness's testimony are described as "demeanor evidence," which refers to outward appearances such as facial expressions, gestures, tone of voice, and hesitation or readiness to answer questions. *See* BLACK'S LAW DICTIONARY 463 (8th ed. 2004). "Under our common law system of litigation, the trier of fact uses the witness's demeanor to determine the truth of the testimony." James P. Timony, *Demeanor Credibility*, 49 CATH. U. L. REV. 903, 904 (2000). The use of demeanor evidence has long existed as an integral part of our legal system:

> For hundreds of years, judges or juries have decided the credibility of testimony on the

defendant may also raise concerns over his counsel's ability to effectively read the veiled witness's expressions and mannerisms during cross-examination.[6] Still, even putting these legal technicalities aside, the defendant may just want the opportunity to stare at his accuser face-to-face as his liberty hangs in the balance.[7] Whether it is for one or all of the above reasons, the criminal defendant will likely demand the witness to unveil.[8] This demand has constitutional backing, as the Sixth Amendment's Confrontation Clause expressly guarantees a criminal defendant the right to "confront" those witnesses against him.[9]

> demeanor of the witness, including the witness's appearance, attitude, and manner. The process is subjective and difficult to describe. Jurors usually do not have to elucidate the reasons for their verdict, but the trial judge who specifies a negative physical characteristic of the witness's demeanor risks reversal on appeal.

Id. at 904–05. Recent empirical studies are beginning to suggest that our legal system should become less reliant on such evidence. *Id.* at 905. For a discussion on the value of demeanor evidence in trial and how the Muslim veil affects this evidence, *see infra* notes 207–29 and accompanying text.

6. The jurors aren't the only people in the courtroom who need to assess an adversarial witness's demeanor. During trial, the defense counsel uses a witness's demeanor to conduct effective cross-examination, "an integral part of [the] system in order to penetrate all of the conflicting impulses or obstacles to lay bare the whole truth." CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES 491 (Aspen Publishers 5th ed. 2004) (quoting Degelos v. Fidelity & Casualty Co., 313 F.2d 809, 814 (5th Cir. 1963)). Due to the unpredictable nature of cross-examination, it is impossible for an attorney to fully prepare himself for the questioning. *See* THOMAS A. MAUET, TRIAL TECHNIQUES 251 (Aspen Publishers 7th ed. 2007) ("Copying a model cross-examination from a 'how to' text rarely helps, because every witness, in the context of a particular trial, is unique and must be treated as such."). As a result, it is recommended that trial attorneys pay close attention to the witness's demeanor:

> Witnesses constantly surprise you. Unless you are watching and listening, you will miss nuances and gradations in the witness' testimony. Reluctance and hesitation in answering will be overlooked. Don't bury your face in your notes, worrying about the next questions while the witness is answering the last one. . . . This way you can *watch* the witness as he listens and answers, *gauge* the witness' reaction to your question and the tone of his answer, and intelligently formulate follow-up questions.

Id. at 256 (emphasis added). Thus, a defendant will likely raise objections when his counsel is unable to fully read the veiled witness's demeanor.

7. The U.S. Supreme Court has examined the importance of "face-to-face" confrontation, often supported by historical references dating back to the time of the ancient Romans. *See* Coy v. Iowa, 487 U.S. 1012, 1015–16 (1988). Part III of this Comment takes a detailed look at the right of "face-to-face" confrontation and its role in American jurisprudence. *See infra* notes 84–157 and accompanying text.

8. However warranted, this demand to unveil may unfortunately be presented in a harsh and unjustified manner. For example, in a New Zealand criminal case where two women attempted to testify while wearing their veils, the opposing counsel engaged in "an attack on Islamic fundamentalism by reference to terrorist activities." Police v. Razamjoo, [2005] D.C.R. 408, 2005 N.Z.D.C.R. LEXIS *3, *55 (D.C. Jan. 14, 2005). The judge in that case described the defense submissions as "extravagant, and often needlessly offensive in both scope and expression." *Id.* at *64. Even though this dialogue occurred in another country, American courts will likely face similar discriminatory remarks in trials that involve veiled witnesses. It is for this reason that American courts must be cautious when dealing with such a controversial and sensitive issue.

9. The Sixth Amendment guarantees that a criminal defendant shall "enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. This part of the Sixth

Yet Muslim women like Fatima Hassan may also demand constitutional protection in an effort to protect their free exercise of religion.[10] Given America's heavy emphasis on individual rights,[11] this argument is not surprising, nor is it trivial.[12] The witness may also argue that the veil in no way abridges the defendant's right to physically confront her, and that there is no valid reason to unveil in trial because the Confrontation Clause is not implicated.[13] American criminal courts must therefore deal with both challenging constitutional interpretations and a clash of constitutional interests when a Muslim witness demands the court to respect her religion.

Amendment has come to be known as the "Confrontation Clause." *See infra* note 85. With a history "trac[ing] back to the beginnings of Western legal culture," the true meaning and proper interpretation of the Clause has been challenging for the Supreme Court. *See Coy*, 487 U.S. at 1015; *see also* California v. Green, 399 U.S. 149, 174 (1970) (Harlan, J., concurring) (describing the Confrontation Clause as "com[ing] to us on faded parchment"); Cornelius M. Murphy, *Justice Scalia and the Confrontation Clause: A Case Study in Originalist Adjudication of Individual Rights*, 34 AM. CRIM. L. REV. 1243, 1244 (1997) (describing Confrontation Clause history as "unclear"). When looking to see whether a Muslim woman's veil interferes with this right, the analysis becomes even more difficult because much of the Supreme Court's Confrontation Clause precedent deals with hearsay issues and restrictions on the scope of cross-examination, rather than the defendant's literal right to "face" his accusers. *See infra* notes 93–95 and accompanying text. Yet the Confrontation Clause still governs this legal question and is the defendant's strongest weapon against veiled testimony.

10. Such a demand would be made under the First Amendment, which guarantees that "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. CONST. amend. I. The First Amendment therefore prohibits the government from making any rules or laws that interfere with or attempt to regulate any citizen's religious beliefs or practices. *See generally* Karl A. Menninger, 63 AM. JR. 3D *Proof of Facts* § 195 (2001). Because certain Muslim women consider the veil to be a religious obligation, a court ruling that forces a witness to unveil in trial can arguably be seen as an abridgment of First Amendment rights. *See infra* notes 247–85 and accompanying text.

11. Embedded in our nation's history are struggles over such issues as freedom of speech, association and assembly, freedom of the press, equal treatment regardless of race, sex, religion, or national origin, due process rights, and rights to privacy. *See generally* American Civil Liberties Union, http://www.aclu.org/about/index.html. Free exercise of religion is a debate that continues today. For a forward-looking discussion of the interplay between religion and the law, see generally Claire McCusker, *When Church and State Collide: Averting Democratic Disaffection in a Post-*Smith *World*, 25 YALE L. & POL'Y REV. 391 (2007).

12. "The Constitution places beyond the reach of the law the affirmative pursuit of one's convictions about the ultimate mystery of the universe and humanity's relation to it." 16A AM. JUR. 2D *Constitutional Law* § 424 (1998). "The Free Exercise Clause withdraws from legislative power, both state and federal, the exertion of any restraint on the free exercise of religion." *Id.*

13. The Muslim witness may argue that the Confrontation Clause only requires her to be physically present in the courtroom, and nothing more. *See infra* notes 180–90 and accompanying text. The witness may also argue that the veil in no way prevents the jury or defense counsel from properly evaluating her testimony in trial. *See infra* note 218–29 and accompanying text. Further, the witness may argue that various policy reasons exist for preventing the Confrontation Clause from unveiling her in trial. *See infra* notes 230–45 and accompanying text.

The truth is, no American criminal case has ever dealt with this precise issue.[14] While similar cases have arisen in this country[15] and abroad,[16] nothing on the books is binding in the situation where a veiled Muslim woman testifies against a criminal defendant. Unsettling as this may be, the good news is that the United States Supreme Court has already laid out all of the rules necessary to formulate an answer.[17] Yet in reaching that answer we tread on fragile grounds. The inevitable clash still remains: on one side we may have a Muslim woman who would rather sacrifice her liberty than remove her veil,[18] while on the other we have a defendant who deserves the constitutional protection that this country's laws guarantee. This Comment will analyze the veiled witness's effect on the criminal defendant's right to confrontation and will ultimately argue that such veiled testimony violates the Confrontation Clause.[19]

Part II will give the reader a general overview of Islam and its followers, describe the history and purposes of the veil, and discuss the veil's current impact in America and worldwide.[20] Part III will examine the Confrontation

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14. In no recorded American case has a criminal defendant brought a Confrontation Clause claim as a result of a Muslim woman's veiled testimony.

15. In America at least one Muslim woman has refused to unveil in a Michigan small claims court. *See* Muhammad v. Enterprise Rent-a-Car, No. 06-41896-GC (Mich. 31st Dist. Ct. Oct. 11, 2006). In Florida, a Muslim woman refused to remove her veil in a driver's license photo and a court of appeal upheld the state's decision denying issuance. *See* Freeman v. Dep't of Highway Safety & Motor Vehicles, 924 So. 2d 48 (Fla. Dist. Ct. App. 2006).

16. In countries around the world, courts and legislatures have placed certain bans on Muslim veils. For example, the Dutch government recently implemented a "total ban" of face veils in public. *See infra* note 79 and accompanying text. The Italian government has also forbidden women to wear the veil in public. *See infra* note 78 and accompanying text. And in New Zealand, a criminal court was recently faced with two Muslim witnesses who refused to remove their veils in trial. *See infra* notes 158–67 and accompanying text.

17. These rules have arisen out of American cases where witnesses somehow attempt to shield themselves from the view of the defendant. *See infra* notes 96–157 and accompanying text. For example, some of the most prominent Confrontation Clause cases that deal with "face-to-face" confrontation involve child sexual abuse cases. *See, e.g.*, Coy v. Iowa, 487 U.S. 1012 (1988); Maryland v. Craig, 497 U.S. 836 (1990). In these cases the child witness is removed from the defendant's view through such means as a screen or a closed-circuit television, which has resulted in Sixth Amendment Confrontation Clause violation claims. *See Coy*, 487 U.S. 1012; *Craig*, 497 U.S. 836. Other cases involve witnesses who wear "disguises" on the witness stand in order to prevent the defendant from learning their identity. *See* Morales v. Artuz, 281 F.3d 55 (2d Cir. 2002); *see also* People v. Sammons, 478 N.W.2d 901 (Mich. Ct. App. 1991); Romero v. State, 173 S.W.3d 502 (Tex. Crim. App. 2005). Although these lines of precedent do not directly deal with the issue at hand, they involve the same rules that a court would use to analyze a case involving a veiled witness. *See infra* notes 96–157 and accompanying text.

18. *See infra* notes 61–64 and accompanying text.

19. *See infra* notes 168–246 and accompanying text. This Comment will strive to take a thoughtful and open-minded approach. Absent thoughtful discussion, it is too easy for a non-Muslim-American to simply say, "Remove your veil." While it is true we can only do so much to place ourselves in the shoes of another, it is necessary to first fully *attempt* to understand the importance of the veil to certain Muslim women. Once that is accomplished, the law can be applied in a less-biased fashion, and we can reach an answer rooted more in justice than in discrimination.

20. *See infra* notes 26–83 and accompanying text.

Clause, its history, and key decisions that have contributed to its development.[21] Part IV will address the question of whether the Confrontation Clause is violated when a veiled witness testifies against a criminal defendant.[22] Part V will discuss First Amendment concerns that arise when a Muslim woman is forced to unveil.[23] Part VI will offer some possible methods of reducing the intrusion caused by unveiling,[24] and part VII will conclude the Comment.[25]

II. THE "VEIL"[26]

A recent dialogue between a Michigan district court judge and a woman by the name of Ginnnah Muhammad illustrates the potential clash between courtroom procedure and a Muslim woman's demand to wear her veil:

> THE COURT: Okay. Well, first of all tell me what you wish to do.
> MUHAMMAD: I wish to respect my religion and so I will not take off my clothes.
> THE COURT: Well, it's not taking off your clothes. All I am trying to do is ask you to take off the part that's covering your face so I can see your face and I can hear you and listen to you when you testify, and then you can put the veil back on. That's all I am asking [you] to do, ma'am.

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21. *See infra* notes 84–167 and accompanying text.
22. *See infra* notes 168–245 and accompanying text.
23. *See infra* notes 246–85 and accompanying text.
24. *See infra* notes 286–87 and accompanying text.
25. *See infra* notes 288–99 and accompanying text.
26. The word "veil" is not technically accurate in describing all forms of face-coverings worn by Muslim women, as there are many differing varieties with different specific names. *See infra* note 53. As one author describes:

> All [the] complexity reflected and expressed in the [Arabic] language is referred to by the single convenient Western term "veil," which is indiscriminate, monolithic, and ambiguous. The absence of a single, monolithic term in the language(s) of the people who at present most visibly practice "veiling" suggests a significance to this diversity that cannot be captured in one term. By subsuming and transcending such multivocality and complexity we lose the nuanced difference in meaning and associated cultural behaviors.

FADWA EL GUINDI, VEIL: MODESTY, PRIVACY AND RESISTANCE 7 (Joanne B. Eicher ed., Berg 2000) (1999). While it is important to keep this diversity in mind, this Comment is not designed to delve deeply into such nuances. Therefore, for the purposes of this section the word "veil" will be used to encompass all types of face-coverings worn by Muslim women. For a detailed discussion of the veil's many different nuances, see generally *id.* at 3–160.

> MUHAMMAD: Well, Your Honor, with all due respect, this is part of my clothes, so I can't remove my clothing when I'm in Court . . . . I'm a practicing Muslim and this is my way of life . . . .[27]

This dialogue reveals the potential lack of understanding between American courts and Muslim witnesses, especially when it comes to the veil.[28] It also indicates that, before engaging in a meaningful discussion of the "veil" and its place in the American criminal courtroom, it is necessary to gain a basic understanding of Islam and its followers. This section will thus offer a general overview of the Islamic religion and culture, the origins and differing uses of the veil, and how the world is currently responding to the veil.

A. Understanding Islam and its Followers

Islam[29] is a religion that stretches across the globe. With roughly one billion Muslim[30] followers,[31] it currently stands as the second largest

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27. Transcript of Record at 4, 6, Muhammad v. Enterprise Rent-A-Car, No. 06-41896 (Mich. 31st Dist. Ct. Oct. 11, 2006) [hereinafter Transcript of Record]. The judge dismissed Ginnnah Muhammad's case after she refused to remove her veil. *Id.* at 6; *see infra* note 72 and accompanying text.

28. As a recent article describes:

> [T]hose who drafted the rules governing . . . [the] courtroom would never have thought to consider a face-covering "clothes" in the same sense that a skirt and blouse are "clothes," while to Muhammad this was a natural use of the word and the concept. From this difference in background assumptions arose [as to] Muhammad's conflict.

McCusker, *supra* note 11, at 396. When Muhammad declared that her veil was "a religious thing," the judge directly countered by saying, "I think it's a custom thing." Transcript of Record, *supra* note 27, at 4. The judge even admitted that he had "no clue about any of this information," to which Muhammad responded, "That's what I'm saying." *Id.*

29. The word "Islam" means "submission" or "peace." THE OXFORD DICTIONARY OF ISLAM 144 (John L. Esposito ed., Oxford Univ. Press 2003) [hereinafter DICTIONARY OF ISLAM].

30. DAVID WAINES, AN INTRODUCTION TO ISLAM 1 (Cambridge University Press 2003) (1995). Due to the existing "variety of Muslim peoples and cultures," there is a wide range of "ethnic, linguistic, and geographical diversity among [them]." *Id.* at 2. Yet, similar to Christians, Muslims belong to a "world-wide community." *Id.* This has been described as a "trans-national and cross-cultural loyalty shared by Muslims everywhere." *Id.*

31. *Id.* (this estimate is based on data available in 2003). It is important to note, however, that some sources have criticized the reliability of private surveys that provide these numbers. *See generally* Teresa Watanabe, *Private Studies Fuel Debate Over Size of U.S. Muslim Population*, L.A. TIMES, Oct. 28, 2001, *available at* http://www.post-gazette.com/headlines/20011028usmuslimsnat7p7.asp. In regard to United States statistics, there is no official count of Muslims or a number commonly accepted by those who study the question. Jane I. Smith, *Patterns of Muslim Immigration*, Oct. 2002, http://usinfo.state.gov/products/pubs/muslimlife/immigrat.htm. This is largely because the U.S. Census Bureau does not collect or release figures for religious affiliation, due to the separation of church and state. *Id.* As a result, the estimated figures widely range from two million to as many as seven million. *Id.* However, it is possible to evaluate the level of Muslim immigration into the United States. *See* Andrea Elliott, *Muslim Immigration Has Bounced Back*,

religious community in the world.[32] Islam is a monotheistic faith,[33] with its center and foundation being God, or Allah.[34] Muslims believe that in the seventh century Allah revealed a divine message to the Prophet Muhammad,[35] which is recorded verbatim in the Qur'an and forms their scripture.[36] In this "divine message," Allah directly proclaimed the "happy consequences of worshiping and following him."[37] The Qur'an is therefore regarded as the ultimate authority in all matters pertaining to the Islamic religion.[38]

Muslim believers are also guided by their desire to emulate the prophet Muhammad, whose words and actions have served as the "ideal model."[39]

SEATTLE TIMES, Sept. 10, 2006, *available at* http://seattletimes.nwsource.com/html/nationworld/2003252072_911muslims10.html. According to statistics gathered by the Department of Homeland Security and the U.S. Census Bureau, "Muslims appear to be moving here again in surprising numbers." *Id.* As the statistics reveal:

> In 2005, more people from Muslim countries became legal permanent U.S. residents—nearly 96,000—than in any year in the previous two decades. More than 40,000 of them were admitted last year, the highest annual number since the terrorist attacks, according to data on 22 countries provided by the Department of Homeland Security.

Id. These Muslims have come to America "seeking the same promise that has drawn foreigners . . . for many decades, according to a range of experts and immigrants: economic opportunity and political freedom." *Id.*

32. *See* WAINES, *supra* note 30, at 1. Though many regard the Arab world as the "heartland of Islam," the majority of Muslims live in Asia and Africa. DICTIONARY OF ISLAM, *supra* note 29, at 144. The largest Muslim communities can be found in "Indonesia, Bangladesh, Pakistan, India, Central Asia, and Nigeria." *Id.* Islam is second to Christianity in terms of the largest religious community in the world. *Id.*

33. DICTIONARY OF ISLAM, *supra* note 29, at 144. "Monotheism" is the belief that there is only one God. *Id.* In fact, Muslims believe that Islam was "the original monotheistic faith," with Judaism and Christianity as "tolerated offshoots." *Id.*

34. *Id.* Muslims believe Allah is the "transcendent, all-powerful, and all-knowing creator, sustainer, ordainer, and judge of the universe." *Id.* Allah is "not only powerful and majestic, but also merciful and just." *Id.*

35. Allah's message was revealed through the archangel Gabriel. S.A. NIGOSIAN, ISLAM: ITS HISTORY, TEACHING, AND PRACTICES 65 (Ind. Univ. Press 2004). Thus, the Qur'an is considered to be the "infallible message or speech of God." *Id.*

36. DICTIONARY OF ISLAM, *supra* note 29, at 144. Besides the Qur'an, Muslims believe four other "Holy Books" were periodically sent down by Allah to different prophets: Abraham, Moses, David, and Jesus. NIGOSIAN, *supra* note 35, at 65. However, each book was "adulterated by human imperfections." *Id.* Muslims believe that the Qur'an sets right the imperfections in all the other books, and therefore that it is "the perfection and culmination of all truth." *Id.*

37. *Id.*

38. DICTIONARY OF ISLAM, *supra* note 29, at 256. The Qur'an "furnishes the basic tenets of the faith, the principles of ethical behavior, and guidance for social, political, and economic activities." *Id.*

39. NIGOSIAN, *supra* note 35, at 80. "[T]he actions, decisions, and practices that Muhammad approved, allowed, or condoned, as well as those he refrained from or disapproved of, are used by Muslims as examples for guidance in all aspects of life." *Id.* The Islamic word for Muhammad's

As a result, Muhammad's words and actions were compiled and recorded into a literary source called the Hadith.[40] Using the Hadith as a guide, Muslims model their daily lives after their prophet Muhammad.[41] Thus, for Muslims, the Hadith is the most important literary material next to the Qur'an.[42]

Overall, the Qur'an and the Hadith form the source material of Islamic law,[43] and together they outline the fundamental principles that regulate a Muslim's "full range of human activities in both the public and private spheres."[44] It follows, then, that these sources of law address the social and religious regulations pertaining to Muslim women.[45] These include issues such as marriage, inheritance, gender roles, and dress codes.[46] Socially and economically Islam has traditionally favored men, but debates over Muslim women's rights and status have emerged.[47] Included in those debates is the practice of veiling, and its corresponding history, purpose, and meaning.[48]

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words and actions is *Sunnah*. *Id.*

40. *See id.* at 80. "The literature of the Hadith includes the earliest biography of the prophet Muhammad, an account of the founding of the community, a portrait of Muhammad as founder and legislator of the community, and of Muhammad as the model and guide for Muslims." *Id.* The collections of the Hadith deal with everyday problems, in the areas of "social, political, economic, and domestic life." *Id.*

41. *Id.* Muslims have modeled their lives after the prophet Muhammad for more than thirteen hundred years:

> They awaken every morning as he awakened; they eat as he ate; they wash as he washed; and they behave even in the minutest acts of daily life as he behaved. The presence of the Prophet is felt, as it were, in a tangible way, as much through the Hadith as through the Qur'an.

Id. at 81.

42. *Id.* at 80.

43. This Islamic law is called *Shari'ah*, which is defined as "God's eternal and immutable will for humanity, as expressed in the Qur'an and Muhammed's example (*Sunnah*), considered binding for all believers; ideal Islamic law." DICTIONARY OF ISLAM, *supra* note 29, at 288. Islamic law differs from Western legal systems in two major ways: its scope and its value. NIGOSIAN, *supra* note 35, at 85. First, Western systems of law "govern one's relationship to the state and to fellow beings," while Islamic law "regulates one's relationship with God and conscience, in addition to the state and to fellow beings. *Id.* Second, Western legal systems "adapt to the changing circumstances of contemporary society," while Islamic law is imposed by Allah on society and does not change. *Id.* at 85–86.

44. Cynthia DeBula Baines, Note, *L'Affaire des Foulards—Discrimination, or the Price of a Secular Public Education System?*, 29 VAND. J. TRANSNAT'L L. 303, 309 (1996). For example, polygamy is strictly regulated, incest is absolutely forbidden, and drinking alcohol or gambling is forbidden. NIGOSIAN, *supra* note 35, at 72. "Law rather than theology is the central religious discipline and locus for defining the path of Islam." DICTIONARY OF ISLAM, *supra* note 29, at 144.

45. NIGOSIAN, *supra* note 35, at 90.

46. *Id.*

47. *Id.* at 91. "Millions of Muslim women around the world have formed various groups, leagues, associations, and organizations to modify the existing gender inequities." *Id.* "Those [women] who support reform are called 'modernists,' 'reformists,' 'liberals,' or 'secularists.'" *Id.* Those who oppose the reform "are known as 'conservatives,' 'fundamentalists,' 'scripturalists,' or 'Islamists.'" *Id.*

48. *Id.*

B. Islam and the Veil

The custom of veiling existed prior to Islam, and therefore did not originate within the Islamic religion or culture.[49] Although history is unclear as to exactly how the practice of veiling was introduced to Muslims,[50] it is clear that Islamic veiling evolved its own distinct function, characteristics, and meaning.[51]

Both Muslim men and women are required to dress modestly, with the dress code conforming to a general understanding of the Hadith and tradition.[52] Yet only Muslim women wear the veil, which comes in a variety of forms and is described by a variety of terms.[53] To support the practice of veiling, passages from both the Hadith[54] and the Qur'an[55] have been

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49. EL GUINDI, *supra* note 26, at 149. Veiling existed for both men and women "in Hellenic, Judaic, Byzantine, and Balkan cultures." *Id.* In some of these cultures, the veil was a sign of high status. DICTIONARY OF ISLAM, *supra* note 29, at 112.

50. Possibilities include "adoption, reinvention, or independent invention." EL GUINDI, *supra* note 26, at 149.

51. *Id.*

52. *Muslim Women, Dress Codes and Human Rights: An Introduction to Some of the Issues*, HUMAN RIGHTS COMM'N 2 (2005), *available at* http://www.hrc.co.nz/home/hrc/newsandissues/muslimwomendresscodesandhumanrights.php.

53. In Arabic, the veil is generally referred to as the *hijab*, which means a "[t]raditional Muslim women's head, face, or body covering." DICTIONARY OF ISLAM, *supra* note 29, at 112. There are various forms of the *hijab*, ranging from the headscarf, "the long rectangular scarf or shayla worn widely in the Gulf states, the waist-length cape or khimar," the Iranian head-to-toe covering called the *chador*, to the most concealing Muslim veil, the *burqa*, which covers the entire face and body. Police v. Razamjoo, [2005] D.C.R. 408, 2005 N.Z.D.C.R. LEXIS *3, *17–18 (D.C. Jan. 14, 2005). This article is only concerned with those veils that cover significant portions of the woman's face, as the others do not raise any Confrontation Clause issues.

54. The follow passage appears in the Hadith: "And as regards the (verse of) the veiling of the women, I said, 'O Allah's Apostle, I wish you ordered your wives to cover themselves from the men because good and bad ones talk to them.'" *Id.* at *19.

55. Qur'an, *Sura* 33:59 says: "O Prophet, tell your wives and daughters, and the women of the believers to bring down over themselves part of their outer garments. That is the more suitable that they will be known and not be abused. And ever is Allah Forgiving and Merciful." *Id.* at *18 (parenthetical omitted). Another passage, Qur'an, *Sura* 24:31 says:

> And tell the believing women to reduce their vision and guard their private parts, and not expose their adornment except that which is apparent; and let them wrap their covers over their chests and not expose their beauty except to their husbands and fathers, or the fathers of their husbands, or their sons, or the sons of their husbands, or their brothers, or their brothers' sons, or their sisters' sons, or their women, or what their right hands possess, or their male attendants who are incapable, or to children who are not yet aware of women's nakedness; and that they not stamp their feet to make known what they conceal of their adornment. And turn to Allah in repentance, all of you believers, that you may succeed.

Id. at *18–19.

interpreted to require it.[56] As such, veiling practices have differed among the various Muslim cultures due to varying interpretations of the Qur'an and the Hadith.[57] Modernly, debates over the practice of veiling have arisen within the Muslim community.[58] Due to the complexity of the various views and arguments involved, the substance of these debates is beyond the scope of this article.[59] Yet, the existence of the debate reveals an important point: there are many different reasons why Muslim women wear the veil.[60] The purpose of the veiling may be for the fulfillment of a religious obligation,[61] cultural practice,[62] or as a symbol of political conviction. Other Muslim women may veil simply to improve their family relations[63] or to communicate certain messages to the outside world.[64] Regardless of the

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56. *Id.*

57. *Id.* at *19–20.

58. NIGOSIAN, *supra* note 35, at 91. "Today, a large number of Muslim women insist on gender equality in national, secular, and religious spheres. They challenge various patriarchal systems, reject the constraints placed upon them, defy domination by men, and try to redefine their identity as women." *Id.*

59. *See generally*, NIGOSIAN, *supra* note 35, at 90–92.

60. This is because there are "varying degrees of choice afforded to Muslim women as to what they wear." HUMAN RIGHTS COMM'N, *supra* note 52, at 2. "Women may don Islamic dress in fulfillment of what they see as a religious obligation, it can be a symbol of political conviction, a cultural practice, or a means of avoiding criticism and harassment from men." *Id.* These reasons, combined with other factors like social class, "may all influence how strictly a woman adheres to the Islamic dress code." *Id.*

61. For example, Ginnah Muhammad was willing to give up her right to sue in civil court due to her religious beliefs and offered the court the following explanation: "[T]his is my way of life and I believe in the Holy Koran and God is first in my life." Transcript of Record, *supra* note 27, at 4. *See infra* note 72 and accompanying text. Another Muslim woman by the name of Naushaba Habib has described the veil as her "Islamic duty," in her effort to be as "perfect as possible." THE MUSLIM VEIL IN NORTH AMERICA: ISSUES AND DEBATES 116 (Sajida Sultana Alvi et al. eds., Women's Press 2003) [hereinafter THE MUSLIM VEIL].

62. A Muslim woman by the name of Zia Afsar admits she was "not influenced or pressured" to wear the veil, but rather does so through her own independent decision to portray her "Muslim identity." *Id.* at 115. Afsar now describes the veil as a part of her personality. *Id.* at 116.

63. One nineteen-year-old Palestinian declared that the veil freed her from "arguments and headaches" with her parents. *Id.* at 20. She described how when she turned fourteen years old, her "parents started to limit [her] activities and even telephone conversations," while her "brothers were free to go and come as they pleased." *Id.* She then described the veil as a solution to her problems:

> [A]s a way out, I asked to go to Qur'anic classes on Saturdays. There I met with several veiled women of my age. They came from similar backgrounds. None of them seemed to face my problems. Some told me that since they took the veil, their parents know that they are not going to do anything that goes against Muslim morality. The more I hung around with them, the more convinced I was that the veil is the answer to all Muslim girls' problems here in North America.

Id. at 20–21.

64. *See id.* at 22.

> Veiling also makes it clear to Muslim and non-Muslim men that the veiled women are not available for dating. The veil is a powerful means of communicating all these messages without uttering a word, and with this understanding, it is not surprising that women have discovered and adopted it.

Id.

reason, it is clear that these women care deeply about their decision to veil in our modern society, and the practice will often be strongly defended.

Despite the veil's undefined history and often unclear and multitude of purposes, it cannot be denied that certain Muslim women see the veil as an *obligation*.[65] In some instances, a Muslim woman may rather suffer harsh consequences than to publicly unveil.[66] Problems therefore arise when society pushes for the veil's removal, while the Muslim woman desires to remain grounded in her beliefs. Thus, the existence of the veil is inextricably linked to its integration into modern societies worldwide.

C. Reactions to the Veil in America and Abroad

Keeping in mind the veil's sacred importance to certain Muslim women around the globe, it is helpful to look at how the modern world is responding to veiling, especially in America. Given America's deeply rooted tradition of protecting religious practices, the treatment of veiled Muslims has opened the door for harsh criticism.[67] An unfortunate example is the treatment that many Muslim-Americans endured after the terrorist attacks of September 11, 2001,[68] where mosques were vandalized, hate crimes rose, thousands of men were placed into deportation proceedings, and others were "arrested in an

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65. *See supra* note 61.

66. A Muslim woman named Amira Elias describes the misery she endured by sticking to her religious beliefs and wearing the veil:

> I want[ed] to please God. If the *hijab* pleases Him, I'll do it, and be proud of wearing it because of my love and faith in Him. So I completely changed my wardrobe . . . and transformed myself from a modern-looking Canadian woman to a completely shrouded woman . . . . Then . . . problems began. . . . I was frightened of being looked at strange. I hated being stared at . . . . I secluded myself at home, and did not want to go out . . . . I became extremely depressed, and even got admitted to a hospital for a week because of depression . . . . [But] I was still determined to obey God and not change the way I dressed.

THE MUSLIM VEIL, *supra* note 61, at 112–15. The lengths Amira Elias was willing to go to honor her religion are proof enough that American courts should not lightly approach the issue of forceful unveiling.

67. As one Muslim writer argues, "widespread incidents [in the wider Western society] often convince even more Muslims of the hypocrisy of the Western world concerning freedom of expression and individual liberty, further poisoning the relationship between Muslims and non-Muslims." *Id.* at xiii.

68. The terrorist attacks of September 11, 2001 were a series of coordinated suicide attacks by al-Qaeda terrorists who hijacked commercial passenger airliners and crashed them into the World Trade Center in New York City and the Pentagon in the nation's capitol. For a detailed account of that day, see CNN.com/U.S., *September 11: Chronology of Terror*, Sept. 12, 2001, http://edition.cnn.com/2001/US/09/11/chronology.attack/.

array of terrorism cases."[69] As a result, Muslim women have been warned not to wear veils in public,[70] and many suffer day-to-day discrimination.[71] Yet veiled Muslims deal with more than just blatant discrimination as they try to integrate into American culture, as illustrated by several recent court cases.

In 2006, for example, a Michigan district court judge refused to allow Ginnnah Muhammad to wear her veil in court, and ultimately dismissed her case when she wouldn't unveil.[72] In another 2006 case, a Florida court of appeal held that a Muslim woman could not wear her veil in a driver's license photo.[73] Although these recent cases deal with civil matters, they still shed light on our country's views toward the practice of veiling in our

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69. Elliott, *supra* note 31. Some Muslim women had their headscarves ripped off or cigarette lighters thrust at their heads. Mackenzie Carpenter, *Muslim Women Say Veil is More About Expression than Oppression*, PITTSBURGH POST-GAZETTE, Oct. 28, 2001, *available at* http://www.post-gazette.com/headlines/20011028muslimwomennat3p3.asp. Shockingly, a Muslim reporter for a Seattle newspaper who wore a veil to see how Muslim "women were being treated was pushed into the path of a truck." *Id.* During this time, "[s]ome Muslims changed their names to avoid job discrimination," for example changing "Mohammed" to "Moe" or "Osama" to "Sam." Elliott, *supra* note 31. Also, "[s]cores of families left for Canada or returned to their native countries." *Id.*

70. *See id.* This is most likely in an effort to avoid discrimination still stemming from the 9/11 attacks.

71. For example, Wal-Mart recently issued a public apology for the comments made by one of its employees in Utah. *See* Associated Press, *Wal-Mart Apologizes to Muslim Woman Who Said Cashier Mocked Face Veil*, FOXNEWS.COM, Feb. 20, 2008, http://www.foxnews.com/story/0,2933,331389,00.html. While the veiled Muslim woman was checking out at Wal-Mart, a cashier said, "Please, don't stick me up." *Id.* A Wal-Mart vice-president apologized by saying, "I can assure you that the associate in question was disciplined in accordance with our employment policies as a result of the situation." *Id.* Apparently the employees at the Utah store also were to undergo "'sensitivity training', specifically in the Islamic faith and Muslim culture." *Id.*

72. Ginnah Muhammad brought a small-claims action in October 2006, in which she "contested a rental car company's charging her $2,750 to repair a vehicle after thieves broke into it." Zachary Gorchow, *Judge Tosses Out Muslim Woman's Case After She Refuses to Remove Veil*, THE SAN DIEGO UNION-TRIB., Oct. 22, 2006. Muhammad wore a scarf and veil that covered her face and head, except for her eyes. *Id.* Judge Paul Paruk asked Muhammad to remove her veil so that he could see her face and see whether she was telling the truth. *Id.* When Muhammad refused, Judge Paruk dismissed her case. *Id.* Muhammad later said, "I just feel so sad . . . . I feel that the Court is there for justice for us. I didn't feel like the court recognized me as a person that needed justice. I just feel I can't trust the court." *Id.*

73. In 2001, a Florida DMV clerk allowed Sultaana Freeman to take a driver's license photo while wearing her veil. Freeman v. Dep't of Highway Safety & Motor Vehicles, 924 So. 2d 48, 51 (Fla. Dist. Ct. App. 2006). The Florida DMV later realized this had occurred by mistake, and thereafter told Freeman that she could either return to take a photo without her veil, or have her license cancelled. *Id.* at 51–52. Freeman, who had converted to Islam a few years earlier, refused to remove her veil for religious reasons and eventually brought suit against the state. *Id.* at 52. Freeman claimed that the Department violated her First Amendment rights by "clearly making her choose between violating her religious tenets or sacrificing her driver's license." *Id.* The court ruled against Freeman, holding that her First Amendment rights were not violated. *Id.* at 57. The court noted that, "[W]e are a cosmopolitan nation made up of people of almost every conceivable religious preference . . . . Consequently, it cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in . . . disadvantage to some religious sects . . . ." *Id.* (quoting Braunfeld v. Brown, 366 U.S. 559, 606 (1961)).

society. Although complaints may arise over such incidents, many of them fail to reach the restrictive measures adopted in other countries around the world.[74]

It is therefore helpful to look beyond America's borders to see how countries across the globe have addressed the extent to which veiling is permitted. In Turkey, there is a complete ban on Islamic face-coverings in all civic spaces, even though as many as sixty-five percent of Turkish women wear headscarves.[75] However, recently in 2008, the Turkish Parliament began to overturn some of the bans.[76] France has put a ban on headscarves and other "conspicuous religious symbols" in state schools.[77]

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74. Therefore, although many Muslims may be unhappy with some of America's policies, "they still come here because the United States offers what they're missing at home." Elliott, *supra* note 31. As one Iranian exile and author said, "America has always been the promised land for Muslims and non-Muslims." *Id.* The "lures" of economic opportunity and political freedom have "been enough to conquer fears that America is an inhospitable place for Muslims." *Id.*

75. *The Islamic Veil Across Europe*, BBC NEWS, Nov. 17, 2006, http://news.bbc.co.uk/2/hi/europe/5414098.stm. These "civic spaces" include schools, private and public universities, and all official buildings. *Id.* This is because "for . . . 80 years Turks have lived in a secular state founded by Mustafa Kemal Ataturk, who rejected headscarves as backward-looking in his campaign to secularise Turkish society." *Id.* The European Court of Human Rights had ruled the ban legitimate in November 2005. *Id.* However, this ban is not without controversial effect. In one case, a military officer "ordered a girl wearing a headscarf to leave a high school stage, where she was waiting to receive a prize in a writing competition." Associated Press, *Turkish Bill Could End Islamic Head Scarf Ban at Universities*, Jan. 29, 2008, FOXNEWS.COM, http://www.foxnews.com/story/0,2933,326307,00.html. In another instance, a "member of a pro-Islamic party was booed out of the swearing-in session in the parliament in 1999 for wearing a head scarf and was banned from taking the parliamentary oath." *Id.*

76. *See Turkey Ends Student Headscarf Ban*, BBC NEWS, Feb. 22, 2008, http://news.bbc.co.uk/1/hi/world/europe/7259694.stm. In February 2008, the Turkish Parliament adopted a government bill lifting the decades-old ban on wearing a headscarf in Turkish universities. Alexander Bakustin, *Will Muslim Veil Split Secular Turkey?*, Feb. 15, 2008, RUSSIAN NEWS & INFO. AGENCY, http://en.rian.ru/analysis/20080214/99215548.html. In that same month, the bill was signed into law by Turkish President Abdullah Gul. *Turkey Ends Student Headscarf Ban*, *supra*. The new law allows female students to "wear headscarves at universities as long as they [are tied] under the chin, leaving . . . faces more exposed." *Turkish Bill Could End Islamic Head Scarf Ban at Universities*, *supra* note 75. However, *chadors*, veils and *burqas* are still completely banned. *Id.* One Turkish lawmaker told reporters that the "main aim is to end the discrimination experienced by a section of society just because of their personal beliefs." Gareth Jones & Hidir Goktas, *Turkish Parliament Lifts University Headscarf Ban*, REUTERS, Feb. 9, 2008, http://www.reuters.com/article/topNews/idUSL09670267200802097feedType=RSS&feedName=topNews. This change in Turkish law has caused great debates among the Turkish community. *Id.* "[T]ens of thousands of people waving Turkish flags and chanting secularist slogans staged a protest rally against the changes just a few [miles] from the parliament . . . ." *Id.*

77. *The Islamic Veil Across Europe*, *supra* note 75. This ban was introduced in 2004, and it received "overwhelming political and public support in a country where the separation of state and religion is enshrined in law." *Id.* By banning such religious items as Muslim veils, Sikh turbans, Jewish skullcaps and large Christian crucifixes, the law aimed to "maintain France's tradition of strictly separating state and religion." *French Scarf Ban Comes into Force*, BBC NEWS, Sept. 2,

The Italian parliament has forbidden the wearing of a *burqa* in public for anti-terrorism purposes.[78] Similarly, the Dutch government recently implemented a "total ban" of *burqas* and other face veils in public.[79]

Yet in other instances around the world, the veil has proven resilient to modernization and development.[80] In Afghanistan, it is near universal for Muslim women to wear *burqas*.[81] There is no total ban on Islamic dress in the United Kingdom.[82] Russia's Supreme Court overturned a ruling that forbade the wearing of headscarves in passport photos.[83] Thus, it is clear that the veil has been controversial in America and around the world. Today, this controversy is extending into the American courts.

2004, http://news.bbc.co.uk/1/hi/world/europe/3619988.stm. Public opinion polls in 2004 indicated that "about 70 percent of the French [were] in favor of the measure. And even in the French Muslim community, Muslim women favor[ed] a ban 49 percent to 43 percent." Jim Bittermann, *France Backs School Head Scarf Ban*, CNNINT'L.COM, Feb. 10, 2004, http://www.cnn.com/2004/WORLD/europe/02/10/france.headscarves/index.html. However, the ban was not met without opposition. The Human Rights Watch directly opposed the ban, claiming that because "wearing a headscarf is not only about religious expression . . . [but also] about religious obligation," it is "an unwarranted infringement on the right to religious practice." *France: Headscarf Ban Violates Religious Freedom*, HUMAN RIGHTS WATCH, Feb. 27, 2004, http://www.hrw.org/en/news/2004/02/26/france-headscarf-ban-violates-religious-freedom. Human Rights Watch continued:

> Some in France have used the headscarf issue as a pretext for voicing anti-immigrant and anti-Muslim sentiments. Some arguments appear to be based on the premise that all Muslims want to oppress women, or that women and girls who choose to veil do not understand women's rights. Public debate has also touched on many other significant social issues: religious fundamentalism and political uses of religious symbols; oppression of girls and women; levels of immigration; discrimination and lack of economic opportunity for immigrant communities; pluralism and national integration.

Id. Also in 2004, two French journalists were kidnapped by Islamic extremists, who threatened to kill the journalists if France did not abolish the "headscarf law." *Hostages Plead: Lift Headscarf Ban*, CNNINT'L.COM, Aug. 31, 2004, http://www.cnn.com/2004/WORLD/europe/08/30/france.hostages.villepin/index.html. That same group had recently executed an Italian reporter after Italy refused to withdraw troops from Iraq. *Id.* France refused to budge on the law, and eventually the extremists released the hostages. *Freed French Hostages Head Home*, BBC NEWS, Dec. 12, 2004, http://news.bbc.co.uk/2/hi/europe/4116849.stm. The extremists claimed they released the hostages due to France's stance on the Iraq War. *Id.*

78. *The Islamic Veil Across Europe*, *supra* note 75.

79. Alexandra Hudson, *Dutch to Ban Wearing of Muslim Burqa in Public*, REUTERS, Nov. 17, 2006, http://www.reuters.com/article/topNews/idUSL1720620620061117.

80. Police v. Razamjoo, [2005] D.C.R. 408, 2005 N.Z.D.C.R. LEXIS *3, *21 (D.C. Jan. 14, 2005).

81. *Id.*

82. *See Lawyers 'Can Wear Veils in Court'*, BBC News, Nov. 10, 2006, http://news.bbc.co.uk/1/hi/uk/6134804.stm. In fact, legal advisors and solicitors are allowed to wear veils in court, as long as the veil doesn't interfere with the "interests of justice." *Id.*

83. *The Islamic Veil Across Europe*, *supra* note 75.

III. THE CONFRONTATION CLAUSE

A. Early History

The Sixth Amendment provides that a criminal defendant "shall enjoy the right . . . to be confronted with the witnesses against him."[84] Although this portion of the Sixth Amendment, known as the "Confrontation Clause,"[85] has existed since the passage of the Bill of Rights, its history and origins are unclear.[86] Despite this uncertainty, in 1895 the Supreme Court

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84. U.S. CONST. amend. VI. The full text of the Sixth Amendment is as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Id. The Confrontation Clause was made applicable to the States through the Fourteenth Amendment in 1965. *See* Pointer v. Texas, 380 U.S. 400, 403 (1965) ("[T]he Sixth Amendment's right of an accused to confront the witnesses against him is . . . a fundamental right and is made obligatory on the States by the Fourteenth Amendment.").

85. The U.S. Supreme Court first used the term "Confrontation Clause" in 1965 in an opinion written by Justice Brennan. Douglas v. Alabama, 380 U.S. 415 (1965). Oddly, the Court did not use the term in *Pointer v. Texas*, which was decided on the very same day. *See supra* note 84.

86. The language of the Confrontation Clause "comes to us on faded parchment," with a history tracing back to the "beginnings of Western legal culture." Coy v. Iowa, 487 U.S. 1012, 1015 (1988) (*citing* California v. Green, 399 U.S. 149, 174 (1970) (Harlan, J., concurring)). The origins of the right of confrontation have been traced back over 2,000 years to the time of the Romans, when Roman Governor Festus addressed the rights of his prisoner, Paul. Festus said, "It is not the manner of the Romans to deliver any man to die, before that he which is accused have the accusers face to face, and have license to answer for himself concerning the crime laid against him." Daniel H. Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381, 384 (1959). It has been argued that the right of confrontation existed in England before the right to trial by jury. *Id.* Commentators have also traced the right of confrontation back to the 1603 English trial of Sir Walter Raleigh. *Id.* at 388–89. Raleigh was convicted of treason through an alleged co-conspirator's admission, which was obtained by means of torture. *Id.* Raleigh argued that the admission was false and demanded that the witness appear before him in trial, saying: "[T]he Proof of the Common Law is by witness and jury: let [the witness] be here, let him speak it. Call my accuser before my face . . ." MUELLER & KIRKPATRICK, *supra* note 6 at 371; *see also* Murphy, *supra* note 9 at 1244 n.6. Raleigh was convicted and sentenced to death, causing one of the trial judges to pronounce: "[T]he justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh." MUELLER & KIRKPATRICK, *supra* note 6, at 371. Through a series of reforms, English law developed a right of confrontation "that limited these abuses." *Id.* Even in America's earliest days, many "declarations of rights adopted around the time of the Revolution" addressed the right of confrontation, in response to controversial examination practices used in the colonies. *Id.* at 372. The Founders responded by including the Confrontation Clause in "the proposal that became the Sixth Amendment." *Id.* For an alternate theory on the origins of the Confrontation Clause, see Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L. J. 77 (1995) (proposing that the Clause originated from criminal procedure that existed in the newly formed states and that it did not come from overseas).

began identifying the primary interests that animate the Confrontation Clause, first directly discussed in *Mattox v. United States*.[87] In *Mattox* the Court identified that the Clause's primary function is to ensure the reliability of evidence presented at criminal trials through the use of adversarial testing.[88]

The Court's subsequent decisions interpreting the Confrontation Clause continued to address the guarantee of adversarial testing, specifically in cases involving ex parte testimony submitted through deposition and affidavit,[89] written testimony,[90] and exclusion of the accused from trial.[91] The Court has also clarified that the Clause applies to extra-judicial testimonial utterances as well.[92]

Throughout time, two distinct lines of cases emerged in which the Court addressed Confrontation Clause issues.[93] The most prominent line of cases

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87. 156 U.S. 237 (1895); *see also* Maryland v. Craig, 497 U.S. 836, 845 (1990) (calling *Mattox* the "earliest case interpreting the [Confrontation] Clause"). In at least one earlier case, the Court referred to, but did not directly address a defendant's constitutional right of confrontation. *See* Reynolds v. United States, 98 U.S. 145, 151 (1878) (stating "[t]he constitutional right of a prisoner to confront the witness and cross-examine him is not to be abrogated" without supporting this with any legal authority).

88. *See Mattox*, 156 U.S. at 242–43. The Court in *Mattox* specifically referred to the dangers of depositions or ex parte affidavits that were used against a criminal defendant "in lieu of a personal examination and cross-examination of the witness." *Id.* at 243. The Court stated that the criminal defendant should "never lose the benefit" of these safeguards, which give him

> an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Id. at 242–43. It is important to note, however, that the Court addressed the possibility of exceptions to these Confrontation Clause guarantees by saying that "general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case." *Id.* at 243. As an example, the Court said the Clause could not prevent a dying declaration. *Id.*

89. *See* California v. Green, 399 U.S. 149, 180 (1970) (Harlan, J., concurring); *see also* Motes v. United States, 178 U.S. 458 (1900); Kirby v. United States, 174 U.S. 47 (1899); *Mattox*, 156 U.S. at 237.

90. *See Green*, 399 U.S. at 182 (Harlan, J., concurring). For other examples, see Barber v. Page, 390 U.S. 719 (1968); Pointer v. Texas, 380 U.S. 400 (1965); Douglas v. Alabama, 380 U.S. 415 (1965); Stein v. New York, 346 U.S. 156 (1953); and West v. Louisiana, 194 U.S. 258 (1904).

91. *See Green*, 399 U.S. at 182 (Harlan, J., concurring). For other examples, see *In re* Oliver, 333 U.S. 257 (1948) and Brookhart v. Janis, 384 U.S. 1 (1966).

92. *See Green*, 399 U.S. at 182 (Harlan, J., concurring). Justice Harlan noted that although historically the Clause primarily protected against trial by affidavit, "[a] restricted reading of the clause . . . that attempts to differentiate between affidavits, as a substitute for first-hand testimony, and extra-judicial testimonial utterances" cannot be defended. *Id.* Justice Harlan concluded that this distinction is irrelevant by pointing out that the Court's early recognition of the dying declaration exception to the Confrontation Clause indicates extra-judicial testimonial declarations are also a concern of the Sixth Amendment. *Id.*

93. *See* Coy v. Iowa, 487 U.S. 1012, 1016 (1988). "Most of this Court's encounters with the Confrontation Clause have involved either the admissibility of out-of-court statements . . . or restrictions on the scope of cross-examination." *Id.* (internal citations omitted).

involves the relation between the Confrontation Clause and the rules of evidence governing hearsay,[94] while the other deals with restrictions on the scope of cross-examination.[95] Beginning in the late 1980s, however, a third line of cases began to emerge which involve the defendant's constitutional

94. These cases involve the overlap of the evidence rules governing hearsay and the requirements of the Confrontation Clause, which has caused confusion. *See* Murphy, *supra* note 9, at 1245. On one extreme, the Clause could be interpreted to mean that no hearsay may be admitted against a defendant unless the witness actually testifies in trial. *Id.* The opposite extreme is that the Clause only applies to witnesses when they actually testify in trial, which would mean it would not bar hearsay at all. *Id.* The Court was forced to start addressing this problem after the Confrontation Clause was made applicable to the states through *Texas v. Pointer* in 1965. Andrew Dylan, *Working Through the Confrontation Clause After* Davis v. Washington, 76 FORDHAM L. REV. 1905, 1906 (2007). Thus, a "theory of the Confrontation Clause" began to develop in order to address the relationship between the Clause and hearsay rules in the lower courts. *Id.* In 1970, Justice Harlan twice proposed a method of analyzing issues involving the Confrontation Clause and hearsay rules, but in both cases he failed to convince the majority to adopt his theory. *Id.*; *see Green*, 399 U.S. at 172 (Harlan, J., concurring); *see also* Dutton v. Evans, 400 U.S. 74, 93 (1970) (Harlan, J., concurring). Ten years later, the Court finally attempted to lay out a general rule in *Ohio v. Roberts*. *See* Ohio v. Roberts, 448 U.S. 56 (1980). This rule, which involved determining the availability of the witness and the reliability of the out-of-court statement, proved to be difficult in application. Dylan, *supra*, at 1907. Complaints arose that the *Roberts* test was unclear and only served to "constitutionalize" hearsay rules. *Id.* In response to growing dissatisfaction and confusion, the Supreme Court struck down the *Roberts* test in 2004 and replaced it with a new test that turned on the *testimonial* aspect of the out-of-court statement, and therefore restricted the Clause's protection to *testimonial* statements. *See* Crawford v. Washington, 541 U.S. 36 (2004). The test requires that, where the admission of *testimonial* out-of-court statements is at issue, the statements will only be allowed if the witness is (1) unavailable and (2) if there was a prior opportunity for cross-examination. *See id.* at 68. Otherwise, the testimonial statement will be constitutionally barred by the Confrontation Clause. *See id.* The Court further developed this test in *Davis v. Washington*, where it attempted to distinguish between "testimonial" and "non-testimonial" statements. *See* Davis v. Washington, 547 U.S. 813 (2006). For a detailed discussion of the recent impact of *Davis*, see Dylan, *supra*.

95. These cases involve the Confrontation Clause's guarantee of cross-examination and specifically address whether a witness' forgetfulness while testifying in trial violates that right. This issue first arose in *California v. Green*, where the Court declined to conclude whether a witness' forgetfulness in trial about his prior statements so greatly hindered the defendant's cross-examination that his Sixth Amendment rights were violated. *See* Murphy, *supra* note 9, at 1252; *see also Green*, 399 U.S. at 183. The Court also declined to revisit this same issue in *Delaware v. Fensterer*. Murphy, *supra* note 9, at 1252; *see also* Delaware v. Fensterer, 474 U.S. 15 (1985). However, the Court was forced to resolve this issue in *United States v. Owens*, where the defendant claimed that his Confrontation Clause rights were violated when a witness testified as to prior statements but suffered extensive memory loss on the stand. *See* United States v. Owens, 484 U.S. 554 (1988). In an opinion written by Justice Scalia, the majority denied the defendant's claim, holding that "the Confrontation Clause guarantees only an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Id.* at 559 (citations and internal quotations omitted). Justices Brennan and Marshall dissented, arguing that the Confrontation Clause guarantees more than just the procedural right of cross-examination. *Id.* at 565 (Brennan, J., dissenting). They wrote that the Clause ensures "full and *effective* cross-examination at the time of trial," which guarantees more than just an "opportunity." *Id.* at 568 (quoting *Green*, 399 U.S. at 159).

right to literally "confront" those witness that speak against him at trial. The remainder of this section will focus on this third line of cases and its applicability to the issue at hand.

B. *The Confrontation Clause and the Issue of "Face-to-Face" Confrontation*

The two U.S. Supreme Court cases of *Coy v. Iowa*[96] and *Maryland v. Craig*[97] address the issue of whether the Confrontation Clause guarantees a criminal defendant the *literal* right to confront his accusers "face-to-face." Specifically, these two cases involve the testimony of child sex abuse victims. Yet the rules that arise from these cases have resulted in a broader and more far-reaching application than just child abuse cases.

1. *Coy v. Iowa*

In August of 1985, John Coy was arrested and charged with sexually assaulting two young girls.[98] In order to protect the young girls from possible trauma caused by seeing their alleged assailant at trial, the judge allowed a large screen to be placed between Coy and the witness stand.[99] This screen prevented the girls from seeing Coy during their testimony, but allowed others in the courtroom to see the girls.[100] Coy "strenuously" objected to the use of the screen, arguing it violated his Sixth Amendment confrontation right to "face" the witnesses before him.[101] The trial court rejected these arguments and Coy was convicted.[102]

In a majority opinion written by Justice Scalia, the Court reversed Coy's conviction by finding that the procedure had created a Confrontation Clause violation.[103] Using literal interpretation,[104] anecdotal history,[105] references

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96. 487 U.S. 1012 (1988).

97. 497 U.S. 836 (1990).

98. *Coy*, 487 U.S. at 1014. The girls, both thirteen years old, were camping out in the backyard of a house next door to Coy's. *Id.* After the girls were asleep, Coy allegedly entered their tent wearing a stocking over his head, shined a flashlight in their eyes, and warned them not to look at him. *Id.* Neither girl saw her assailant's face. *Id.*

99. *Id.* The placement of the screen was authorized by an Iowa statute, which was designed to protect child witnesses. *Id.* at 1014–15.

100. *Id.* at 1015. After lighting adjustments in the courtroom, "the screen would enable [Coy] dimly to perceive the witnesses," but the witnesses could not see Coy at all. *Id.* However, the screen did not block the girls from the views of the judge and the jury. *Id.* at 1027 (Blackmun, J., dissenting).

101. *Id.* at 1015.

102. *Id.* The Iowa Supreme Court affirmed Coy's conviction and rejected his Confrontation Clause argument, reasoning that "the ability to cross-examine the witnesses was not impaired by the screen." *Id.* The court concluded that, because the ability to cross-examine existed, no Confrontation Clause violation occurred. *Id.*

103. *Id.* at 1022.

to core human values,[106] and Supreme Court precedent,[107] Justice Scalia concluded that the "irreducible literal meaning" of the Confrontation Clause guarantees the criminal defendant "a right to *meet face to face* all those who appear and give evidence *at trial*."[108] Because the screen physically prevented the witnesses from seeing Coy, he was denied his guarantee of literal "face-to-face" confrontation.[109] Scalia conceded that exceptions to

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104. *Id.* at 1016. Justice Scalia wrote that "'[s]imply as a matter of English' [the Clause] confers at least 'a right to meet face to face all those who appear and give evidence at trial.'" *Id.* (quoting *Green*, 399 U.S. at 175). Justice Scalia also noted that it confers this right "[s]imply as a matter of Latin as well, since the word 'confront' ultimately derives from the prefix 'con-' (from 'contra' meaning 'against' or 'opposed') and the noun 'frons' (forehead)." *Id.*

105. *Id.* Justice Scalia referred to the story of the Roman Festus and his discussion of his prisoner Paul's treatment. *Id.* He also referred to Shakespeare, who had Richard the Second say: "Then call them to our presence—face to face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak . . . ." *Id.* Justice Scalia also referred to a quote by President Eisenhower, who discussed face-to-face confrontation in his Kansas hometown:

> In Abilene, he said, it was necessary to "[m]eet anyone face to face with whom you disagree. You could not sneak up on him from behind, or do any damage to him, without suffering the penalty of an outraged citizenry . . . . In this country, if someone dislikes you, or accuses you, he must come up in front. He cannot hide behind the shadow."

Id. at 1017–18.

106. *Id.* "[T]here is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'" *Id.* at 1017 (quoting Pointer v. Texas, 380 U.S. 400, 404 (1965)). Justice Scalia argues "[i]t is always more difficult to tell a lie about a person 'to his face' than 'behind his back.'" *Id.* at 1019. Justice Scalia also describes the confrontation right as stemming from "human feelings of what is necessary for fairness." *Id.* at 1018.

107. *Id.* "[R]ecently, we have described the literal right to confront the witness at the time of trial as forming the core of the values furthered by the Confrontation Clause. *Id.* at 1017 (referring to *Green*, 399 U.S. at 157) (internal quotations omitted). Justice Scalia also refers to the plurality opinion of *Pennsylvania v. Ritchie*, where the Court described one of the protections of the Confrontation Clause as "the right physically to face those who testify against him." *Id.* (quoting Pennsylvania v. Richie, 480 U.S. 39, 51 (1987)).

108. *Id.* at 1021 (quoting *Green*, 399 U.S. at 175) (Harlan, J. concurring).

109. *Id.* at 1020. In examining the facts of this case, Justice Scalia stated that, with the screen successfully enabling the complaining witnesses to avoid viewing Coy during trial, "[i]t is difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter." *Id.* He continued: "That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs." *Id.* Justice Blackmun, in a dissent joined by Chief Justice Rehnquist, strongly disagreed with the majority opinion. *See id.* at 1025 (Blackmun, J., dissenting). While recognizing the *preference* for face-to-face confrontation, Justice Blackmun and Chief Justice Rehnquist argued that public policy demanded an exception in this case. *Id.* at 1031. They further argued that the screen in this case "did not interfere with . . . the 'purposes of confrontation,'" namely cross-examination. *Id.* at 1026–27 (quoting *Green*, 399 U.S. at 158). The dissenting Justices argued this was because "the girls' testimony was given under oath, was subject to unrestricted cross-examination, and 'the jury that [was] to decide the defendant's fate [could] observe the demeanor of the witness[es] in making [their] statement[s], thus aiding the jury in assessing [their] credibility.'" *Id.* at 1027 (quoting *Green*,

the confrontation right may exist, but the majority explicitly left this question "for another day."[110] That day came two years later, when the Supreme Court decided *Maryland v. Craig*[111] in 1990.

2. *Maryland v. Craig*

In October of 1986, a grand jury charged Sandra Craig with child abuse and various other offenses.[112] At trial, the judge allowed several child witnesses to testify by one-way closed circuit television[113] in order to prevent the child from suffering "serious emotional distress" that would result from testifying in front of Craig.[114] "Craig objected to the use of [this] procedure on Confrontation Clause grounds."[115] The trial court rejected Craig's argument and allowed the use of the one-way closed circuit television, after which "[t]he jury convicted Craig on all counts."[116]

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399 U.S. at 158). Because the "purposes of confrontation" were met, Coy's "only complaint [was a] very narrow objection that the [witnesses] could not see him while they testified." *Id.* Yet the dissenting Justices argued that because a valid public policy exception existed in regard to literal "face-to-face" confrontation, that objection should not have succeeded. *See id.* at 1032.

110. Justice Scalia noted that if such an exception did arise, it "would surely be allowed only when necessary to further an important public policy." *Id.* at 1021. The majority did not find that the Iowa statute addressing child abuse warranted such an exception, to the dismay of the dissenting Justices. *Id.* However, in her concurring opinion Justice O'Connor argued that, although an exception was not warranted in this case, such an exception could arise more easily than Justice Scalia made it seem. *Id.* at 1022 (O'Connor, J., concurring). More pointedly, she stated the "right physically to face those who testify against . . . [the accused] . . . *is not absolute*," but rather "'reflects a *preference* for face-to-face confrontation at trial.'" *Id.* at 1024 (quoting *Ritchie*, 480 U.S. at 51 and Ohio v. Roberts, 448 U.S. 56, 63 (1980)) (O'Connor, J., concurring) (first emphasis added). This contradicted Justice Scalia's theory, which considers the right of confrontation as *absolute*, minus a few rare exceptions. *Id.* at 1020–21 (majority opinion). Justice O'Connor continued, "I would permit use of a particular trial procedure that called for something other than face-to-face confrontation if that procedure was necessary to futher [sic] an important public policy." *Id.* at 1025 (O'Connor, J., concurring).

111. 497 U.S. 836 (1990).

112. *Id.* at 840. Specifically, Craig was charged "with child abuse, first and second degree sexual offenses, perverted sexual practice, assault, and battery." *Id.* The "victim in each count was a six-year-old girl, who . . . attended a kindergarten and prekindergarten center owned and operated by Craig." *Id.*

113. *Id.* at 843. This procedure allows the child witness, prosecutor, and defense counsel to enter a separate room while the judge, jury, and defendant stay in the courtroom. *Id.* at 841. "The child witness is then examined and cross-examined in the separate room, while a video monitor records and displays the witness' testimony to those in the courtroom." *Id.* During this process the child witness is unable to see the defendant. *Id.* The defendant is able to communicate with counsel via electronic communication, in order for objections to be made "as if the witness were testifying in the courtroom." *Id.* at 842.

114. A Maryland statute made this procedure available only after the trial judge determined the child witnesses' testimony in the courtroom would "result in the child suffering serious emotional distress such that the child cannot . . . communicate" when in the presence of the defendant. *Id.* at 841–42 n.1. Once this condition was met, the closed-circuit television procedure could be invoked. *Id.*

115. *Id.* at 842.

116. *Id.* at 843. The Court of Appeals of Maryland reversed and remanded the case, but not on

In deciding this case the Supreme Court revisited its decision in *Coy* and set out to answer a question that it had previously left unanswered: What exceptions to a defendant's right to physical "face-to-face" confrontation exist?[117] In a five-to-four opinion written by Justice O'Connor, the majority upheld the constitutionality of the closed-circuit television procedure, holding that the Confrontation Clause reflects only a "*preference* for face-to-face confrontation at trial."[118] The majority reached this conclusion by focusing on Confrontation Clause exceptions made in past hearsay cases[119] and by focusing on the possibility of achieving the Clause's primary purposes without literal "face-to-face" confrontation.[120] Using this logic, the

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Confrontation Clause grounds. *Id.* The Court of Appeals held that the trial court did not show specifically that the child's emotional distress would be caused as a *direct result of face-to-face confrontation* with the defendant, as required by the state statute. *Id.* The U.S. Supreme Court granted certiorari to resolve the Confrontation Clause issue. *Id.*

117. Justice O'Connor wrote that although the literal text and historical roots of the Confrontation Clause "guarantee[ ] the defendant a face-to-face meeting with witnesses appearing before the trier of fact," the Supreme Court has "never held . . . that [it] guarantees criminal defendants the *absolute* right to a face-to-face meeting with witnesses against them at trial." *Id.* at 844 (quoting Coy v. Iowa, 487 U.S. 1012, 1016 (1988)). Instead, Justice O'Connor emphasized that *Coy* left this question "for another day" and that the current case required the Court to give an answer. *Id.* (quoting *Coy*, 487 U.S. at 1021).

118. *Id.* at 849 (quoting Ohio v. Roberts, 448 U.S. 56, 63 (1980)).

119. Justice O'Connor stated, "[W]e have . . . recognized . . . that [face-to-face confrontation] is not the *sine qua non* of the confrontation right." *Id.* at 847. The Court supported this contention by pointing to cases that allow exceptions to "face-to-face" confrontation in *hearsay* situations. *Id.* at 847–48. *See* Mattox v. United States, 156 U.S. 237, 243 (1895) (allowing an exception for dying declarations); *see also* Bourjaily v. United States, 483 U.S. 171, 181–82 (1987) (allowing an exception for hearsay statements of non-testifying co-conspirators). Based on these hearsay cases, the Court reasoned that the Confrontation Clause "cannot simply mean face-to-face confrontation, for the Clause would then . . . prohibit the admission of any accusatory hearsay statement made by an absent declarant—a declarant who is undoubtedly as much a 'witness against' a defendant as one who actually testifies at trial." *Craig*, 497 U.S. at 849. Justice O'Connor stated that such a literal reading of the Confrontation Clause "would 'abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme.'" *Id.* at 848 (quoting *Roberts*, 448 U.S. at 63)). In his dissent, Justice Scalia strongly disagreed with this use of hearsay precedent. *Id.* at 860 (Scalia, J., dissenting).

120. *Id.* at 849. The majority focused on the purpose of the Confrontation Clause, the role literal "face-to-face" confrontation plays in this purpose, and whether this purpose could be fulfilled without the "face-to-face" element. *Id.* at 845. Justice O'Connor wrote that "[t]he central concern of the Confrontation Clause is to ensure the *reliability* of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Id.* at 845 (emphasis added). To support this contention, Justice O'Connor referred to the Court's first interpretation of the Clause's primary purpose in *Mattox* and in the more recent case of *California v. Green*:

> [T]he right guaranteed by the Confrontation Clause includes not only a "personal examination," . . . but also "(1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-

majority concluded that literal "face-to-face" confrontation is not an "indispensable" element of the Confrontation Clause.[121]

However, the majority clarified that the "face-to-face" requirement "may [not] easily be dispensed with."[122] As a result, guarantees of the Confrontation Clause "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."[123] In determining the assurance of reliability element, Justice O'Connor focused on the fulfillment of the "elements of confrontation":

> The combined effect of these elements of confrontation—[1] physical presence, [2] oath, [3] cross-examination, and [4] observation of demeanor by the trier of fact—serves the purposes of the Confrontation Clause by ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings.[124]

Thus, the majority laid out a rule for determining the constitutionality of an exception to the Confrontation Clause's "preference" for face-to-face confrontation.[125]

When applying this rule to the current case, the majority found the one-way closed circuit television procedure did not violate the primary purposes of the Confrontation Clause, and therefore satisfied the reliability requirement.[126] Further, the majority found the state's interest in protecting

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> examination, the 'greatest legal engine ever invented for the discovery of truth'; [and] (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility."

Id. at 845–46 (quoting California v. Green, 399 U.S. 149, 158 (1970)). The majority then boiled this down to "elements" of confrontation: "physical presence, oath, cross-examination, and observation of demeanor by the trier of fact." *Id.* at 846. The majority concluded that even if the literal "face-to-face" component is absent, the preservation of all other "elements" of confrontation "ensures that testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to . . . live, in-person testimony." *Id* at 851. In his dissent, Justice Scalia heavily opposed this analysis. *Id.* at 860 (Scalia, J., dissenting).

121. *Id.* at 849–50.

122. *Id.* at 850.

123. *Id.* (emphasis added).

124. *Id.* at 846.

125. *Id.*

126. *Id.* at 852. The court reached this conclusion by applying the "elements of confrontation:"

> Maryland's procedure preserves all of the other elements of the confrontation right: The child witness must be competent to testify and must testify under oath; the defendant retains full opportunity for contemporaneous cross-examination; and the judge, jury, and defendant are able to view (albeit by video monitor) the demeanor (and body) of the witness as he or she testifies.

children victims sufficient and in compliance with the public policy requirement.[127] Therefore, the procedure did not violate Craig's Confrontation Clause rights.[128] Justice Scalia, joined by Justices Brennan, Marshall, and Stevens, responded to the majority's opinion with a scathing dissent.[129]

Id. at 851. The Court concluded: "We are . . . confident that use of the one-way closed circuit television procedure, where necessary to further an important state interest, does not impinge upon the truth-seeking or symbolic purposes of the Confrontation Clause." *Id.* at 852.

127. *Id.* at 855. "[T]he state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness . . . to testify . . . against a defendant in the absence of face-to-face confrontation." *Id.*

128. *Id.* at 857.

> Because there is no dispute that the child witnesses in this case testified under oath, were subject to full cross-examination, and were able to be observed by the judge, jury, and defendant as they testified, we conclude that, to the extent that a proper finding of necessity has been made, the admission of such testimony would be consonant with the Confrontation Clause.

Id.

129. *See id.* at 860–70. Claiming that the Court has seldom "failed so conspicuously to sustain a categorical guarantee of the Constitution against the tide of prevailing current opinion," Justice Scalia argued that the majority applied "'interest-balancing' analysis where the text of the Constitution simply does not permit it." *Id.* at 860, 870. By making "face-to-face" confrontation one of many "elements of confrontation," Scalia argued that the majority unjustifiably recharacterized the Confrontation Clause and denied what it explicitly guarantees. *Id.* at 862. Additionally, Scalia argued that the majority supported its "antitextual conclusion" with inappropriate cases, namely those that involved hearsay. *Id.* at 863. Scalia emphasized that the hearsay cases address the *implications* of the Clause and the receipt of "other-than-first-hand" testimony, while the current case involves an available witness testifying at trial. *Id.* In Scalia's view, the "reliability" analysis used in hearsay cases should not be applied "to permit what is explicitly forbidden by the constitutional text." *Id.* at 865. He continued, "[T]hat the defendant should be confronted by the witnesses who appear at trial is not a preference 'reflected' by the Confrontation Clause; it is a constitutional right unqualifiedly guaranteed." *Id.* at 863. Justice Scalia also disagreed with the majority's public policy rationale. While the "face-to-face" testimony may in some circumstances upset a witness, Scalia argued that "unwillingness cannot be a valid excuse under the Confrontation Clause, whose very object is to place the witness under the sometimes hostile glare of the defendant." *Id.* at 866. To illustrate the consequences of "[t]his subordination of explicit constitutional text to currently favored public policy," Scalia gave the following hypothetical:

> [T]he following scene can be played out in an American courtroom for the first time in two centuries: A father whose young daughter has been given over to the exclusive custody of his estranged wife, or a mother whose young son has been taken into custody by the State's child welfare department, is sentenced to prison for sexual abuse on the basis of testimony by a child the parent has not seen or spoken to for many months; and the guilty verdict is rendered without giving the parent so much as the opportunity to sit in the presence of the child, and to ask, personally or through counsel, "it is really not true, is it, that I—your father (or mother) whom you see before you—did these terrible things?"

Id. at 861. For another detailed discussion of Scalia's dissent in this case and a general discussion of the theories of originalism and non-originalism, see Murphy, *supra* note 9, at 1246.

C. *Recent Applications of* Maryland v. Craig *in American Courts*

In the seventeen years since the Supreme Court decided *Craig*,[130] lower courts have addressed the right of confrontation in a variety of contexts. In sixteen states *Craig* may not apply at all, due to explicit "face-to-face" confrontation language in their respective constitutions that grants more protection than the United States Constitution.[131] Yet this is the exception. The full force of *Craig*'s authority applies in all federal courts and in the thirty-four states with constitutions that mirror the Sixth Amendment's Confrontation Clause. In analyzing the necessity of "face-to-face" confrontation, these lower courts have applied *Craig*'s two-pronged test under a great variety of fact patterns.[132] Such cases have involved confrontation issues arising out of the use of two-way videoconference,[133] the physical positioning of the witness in a trial room,[134] and situations where a witness physically covers his or her face while testifying.[135] This section will focus on cases in the third category, as they are most applicable to the issue at hand.

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130. To this date the Court has not revisited its decision in *Craig*, despite the urging of Justice Scalia. The opportunity arose twice (once in 1998 and once in 1999), but the Court denied certiorari where it could have revisited its Confrontation Clause decisions in *Craig*. *See* Marx v. Texas, 528 U.S. 1034 (1999); *see also* Danner v. Kentucky, 525 U.S. 1010 (1998). In both cases Scalia dissented.

131. *See* Katherine W. Grearson, *Proposed Uniform Child Witness Testimony Act: An Impermissible Abridgment of Criminal Defendants' Rights*, 45 B.C. L. REV. 467, 480–84 (2004). Under United States Constitutional law, state legislatures are free to afford their citizens equal or greater rights than those in the U.S. Constitution. *Id.* at 480. Because each state drafts its own constitution, there are many "textual and interpretive variations among state provisions." *Id.* Today, thirty-four state constitutions contain confrontation clauses that conform to the U.S. Constitution Confrontation Clause. Aron Goldschneider & Morales v. Artuz, *Concealment and Confrontation—Shades of Coy?*, 13 TEMP. POL. & CIV. RTS. L. REV. 293, 295 n.22 (2003). The other sixteen states have confrontation clauses that use the explicit "face-to-face" language. *Id.* Whether a state in this latter category will apply the *Craig* analysis depends upon whether a literal or functional interpretive approach is taken. *See* Grearson, *supra*, at 481. Interestingly, Pennsylvania originally had a constitution that explicitly provided for "face-to-face" confrontation, but in 2003 voters effectively amended the Pennsylvania confrontation clause to conform to the U.S. Constitution. *See* Goldschneider, *supra*, at 295. The amendment presumably occurred in order to facilitate laws that protect child witnesses. *See id.*

132. Most of these have involved child abuse cases, where the focus is on protecting the interests of a child witness.

133. *See* United States v. Yates, 438 F.3d 1307 (11th Cir. 2006) (finding no valid public policy justification, and therefore a Confrontation Clause violation, where a witness from another country testified over two-way videoconference); *but see* Harrell v. Butterworth, 251 F.3d 926 (11th Cir. 2001) (finding no Confrontation Clause violation in testimony over two-way videoconference when foreigners refused to travel to the United States to testify); *see also* United States v. Gigante, 166 F.3d 75 (2d Cir. 1999) (finding no Confrontation Clause violation where terminally ill witness gave testimony from outside location via two-way videoconference).

134. *See* Commonwealth v. Johnson, 631 N.E.2d 1002, 1006 (Mass. 1994); *see also* Commonwealth v. Souza, 689 N.E.2d 1359, 1360 (Mass. App. Ct. 1998); Ellis v. United States, 313 F.3d 636, 639 (1st Cir. 2002).

135. *See infra* notes 136–57 and accompanying text.

In *Morales v. Artuz*,[136] the Second Circuit held that a criminal defendant's confrontation right was *not* violated when an adverse witness testified while wearing dark sunglasses.[137] During Morales' murder trial,[138] the judge allowed one of the prosecution's witnesses to wear dark sunglasses to hide herself from Morales.[139] The jury convicted Morales, and he appealed, arguing that the sunglasses interfered with his Sixth Amendment right to confrontation. After a series of failed appeals,[140] the Second Circuit Court of Appeals granted review of Morales's petition for habeas corpus, although limited solely to the confrontation issue.[141] Upon review, the Second Circuit concluded that the *Craig* precedent did not apply to this case's specific facts and was therefore not controlling.[142] The court reasoned that *Craig* deals with situations where there has been a complete "physical" separation between the witness and defendant, not in a case where the witness is physically present but "disguised."[143] The court further

136. 281 F.3d 55 (2d Cir. 2002).

137. *See id.* at 61.

138. Hector Morales was arrested for allegedly shooting another man in the back outside an apartment building. *Id.* at 56–57.

139. The witness, Tonita Sanchez, was present at the shooting. *Id.* at 56. She claimed to have seen Morales walk up to the victim, say, "You are the one," and then pull out a gun and shoot him as he ran away. *Id.* At trial, Sanchez wore dark sunglasses on the witness stand, and the judge objected. *Id.* at 57. Sanchez wore the glasses out of fear that Morales or his friends would seek retribution. Goldschneider, *supra* note 131, at 297. Despite the judge's orders to remove the sunglasses, Sanchez refused to comply. *Morales*, 281 F.3d at 57. The judge ended up allowing Sanchez to testify while wearing the sunglasses, rationalizing his decision by noting Sanchez's genuine fear and concluding that Morales' confrontation rights would only be "partially" infringed. *Id.*

140. In 1998 the Supreme Court of New York, Appellate Division, unanimously affirmed the conviction, finding that Morales' confrontation rights were not violated "under the unusual circumstances presented." Goldschneider, *supra* note 131, at 299. That same year the New York Court of Appeals denied leave for further appeal. *Id.* This led Morales to file a petition for habeas corpus in the United States District Court in New York. *Id.*

141. The United States District Court for the Southern District of New York denied Morales' petition for habeas corpus. Morales v. Artuz, No. 98CIV.6558(JGK), 2000 WL 1693563, at *10 (S.D.N.Y. Nov. 13, 2000). The law governing habeas corpus analysis required the court to overturn the conviction only if the lower court's ruling was "contrary to, or involved an unreasonable application of, clearly established Federal law," or if it "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented." *Id.* at *3. The court decided that *Craig* did not apply to the specific issue of whether a disguised witness violates a defendant's right to confrontation and that this issue was not "clearly established" by the U.S. Supreme Court. *Id.* The court further found that even if the *Craig* precedent did apply, the lower court's ruling was not unreasonable because use of the sunglasses was justified by public policy and because they had a "minimal" impact on the reliability of the testimony. *Id.* For a more detailed analysis of the lower court reasoning, see Goldschneider, *supra* note 131, at 299–300.

142. *Morales*, 281 F.3d at 62.

143. *Id.* at 58. After reviewing *Coy* and *Craig*, the court found that those cases dealt with

held that even if *Craig* did apply, no violation had occurred because the reliability of the testimony was not compromised.[144] At least one state supreme court has applied the *Morales* decision to similar facts.[145]

Yet other courts have reached different conclusions about the applicability of *Craig* to cases involving witness disguise. In *People v. Sammons*,[146] the Court of Appeals of Michigan held that a witness who testified in a "full-face mask" violated the defendant's confrontation rights.[147] Unlike *Morales*, this court found *Craig* applicable and controlling because the mask similarly interfered with the "face-to-face" aspect of confrontation.[148] Because the mask prevented the trier of fact from adequately judging demeanor, the testimony's reliability was found to be compromised, and a Confrontation Clause violation had occurred.[149]

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situations where "physical" separation occurred between the defendant and witness and not where "a witness testifying in the presence of the defendant and the jury with a slight disguise." *Id.* Therefore, it refused to apply a *Craig* analysis. The court thus proceeded to apply its own case law to the facts to determine if the lower court decision was unreasonable. *Id.*

144. *Id.* at 60. Unlike the district court, the Second Circuit Court of Appeals did not focus on whether an exception to "face-to-face confrontation" was necessary here for public policy reasons, presumably because it found that *Craig* did not apply. *Id.* Instead, the court focused on concerns over testimony reliability. *Id.* at 60–61. While conceding that the sunglasses did cause "some impairment" to the jury's ability to consider the witness's demeanor, the court found this impairment to be minimal. *Id.* In doing so, the court placed doubt over the value of demeanor evidence, mainly supporting this proposition with empirical studies. *Id.* at 61. The court concluded:

> [T]he jurors had an entirely unimpaired opportunity to assess the delivery of Sanchez's testimony, notice any evident nervousness, and observe her body language. Most important, they had a full opportunity to combine these fully observable aspects of demeanor with their consideration of the substance of her testimony, assessing her opportunity to observe, the consistency of her account, any hostile motive, and all the other traditional bases for evaluating testimony.

Id. at 61–62. For an extensive analysis of *Morales v. Artuz*, and an argument that the Second Circuit committed a grave error in its holding, see Goldschneider, *supra* note 131.

145. *See* Commonwealth v. Lynch, 789 N.E.2d 1052 (Mass. 2003).

146. 478 N.W.2d 901 (Mich. Ct. App. 1991).

147. *Id.* at 909. Martin Sammons was arrested by an undercover police officer for intending to deliver over 225 grams of cocaine. *Id.* at 904. At an entrapment hearing, a witness spoke against Sammons while wearing a mask, which the defense counsel described as "a ski mask or some type of mask where his face and head are not visible." *Id.* at 908 n.4. The prosecution argued that the Confrontation Clause does not apply to pre-trial entrapment hearings because the ultimate issue is not one of guilt. *Id.* at 906. The court disagreed, holding that the Confrontation Clause does apply to such hearings. *Id.* at 907.

148. *Id.* at 908. The court compared the mask to the screen used in *Coy*, stating that "a full-face mask tends to diminish the aspect of personalization associated with testifying about a defendant 'to his face.'" *Id.* Thus, the court continued, "[the mask] may very well make a witness 'feel quite differently' than when he has to repeat his story while looking at the defendant." *Id.*

149. *Id.* at 909. Also unlike the court in *Morales*, the *Sammons* court stressed the "utmost importan[ce]" of demeanor evidence. *Id.* It accordingly held that the mask made the testimony unreliable because it "foreclosed the opportunity for the trier of fact to adequately assess the witness'[s] credibility through observation of demeanor." *Id.* at 908. The court briefly discussed a public policy exception in this situation but concluded that this argument was foreclosed due to the lack of reliability. *Id.*

Similarly, in the more recent case of *Romero v. State*,[150] the Texas Court of Criminal Appeals held that a defendant's confrontation rights were violated when a witness testified in a "disguise," composed of dark sunglasses, a baseball cap, and a turned up collar.[151] The court found *Craig* applicable to the facts of this case and applied the two-prong test.[152] Under the reliability prong, the court held that two of the "elements of confrontation" were violated. The first—physical presence—was violated even though the witness physically sat in front of the defendant because the disguise "insulated" the witness from the defendant.[153] Second, the court found that the disguise interfered with the jury's ability to properly observe demeanor.[154] Together, the court concluded these violations destroyed the testimony's reliability. The court also did not find a sufficient public policy reason for creating a Confrontation Clause exception in this case, as required by the second prong.[155] Taken altogether, the court found a clear violation

150. 173 S.W.3d 502 (Tex. Crim App. 2005).

151. *Id.* at 503. Israel Romero was indicted for aggravated assault. *Id.* At trial, one of the prosecution's key witnesses entered the courtroom wearing "dark sunglasses, a baseball cap pulled down over his forehead, and a long-sleeved jacked with its collar turned up and fastened so as to obscure [his] mouth, jaw, and the lower half of his nose." *Id.* The witness apparently feared that Romero would retaliate against himself and his family if his identity were revealed. *Id.* Romero objected to this "disguise" and argued it violated his right to confrontation. *Id.* The trial court overruled the objection and Romero was convicted. *Id.* at 504.

152. *Id.* at 505. Unlike the court in *Morales*, the Texas Court of Criminal Appeals apparently found little trouble applying the *Craig* precedent. The court's analysis delves straight into the application of the two-prong test without discussing *Craig*'s applicability. *See id.*

153. *Id.* at 505. The court called the witness's physical presence in the courtroom "superficial" because the disguise conferred "a degree of anonymity" that hid him from the defendant. *Id.* The court noted that a witness is not allowed to "hide behind the shadow." *Id.* (quoting Coy v. Iowa, 487 U.S. 1012, 1018 (1988)). The court recognized that the Supreme Court found no violation in *Craig* despite the absence of the physical presence element. *Id.* However, the court distinguished this case because a second element was violated. *Id.*

154. *Id.* The court found that the disguise deprived the trier of fact of "the ability to observe [the witness's] eyes and his facial expressions." *Id.* Although the jury could still evaluate the witness's body language, this was no "adequate substitute for the jurors' ability to view a witness's face, the most expressive part of the body and something that is traditionally regarded as one of the most important factors in assessing credibility." *Id.* at 505–06. To hold otherwise, the court continued, would remove the "face" from "face-to-face confrontation." *Id.* at 506.

155. *Id.* The court noted that a compelling interest *might* exist where a witness seeks protection from retaliation by a defendant but found no such interest present in this case. *Id.* The court emphasized that Romero already knew the witnesses' name and address, and that there was no concrete evidence that Romero would retaliate. *Id.* The court further distinguished this case from *Craig* by pointing out that this witness was an adult rather than a child and that adults are "made of sterner stuff." *Id.* In addition, the witness was merely a bystander and not a victim. *Id.* Allowing an exception every time a witness expressed fear of retaliation, the court argued, would eviscerate the principle that face-to-face confrontation should only be deprived in "exceptional circumstances." *Id.*

under the *Craig* test.[156] Two judges took issue with the decision in a dissenting opinion, arguing that the disguise had a minimal effect on "face-to-face" confrontation.[157]

D. Unveiling and Confrontation Litigation in New Zealand

Despite the above applications and interpretations of *Craig*, no American court has addressed the precise question of whether a Confrontation Clause violation occurs when a Muslim woman testifies against a criminal defendant while wearing a veil. However, at least one case from abroad has ruled on the issue. This occurred only three years ago in a New Zealand district court.[158]

In *Police v. Razamjoo*,[159] two Muslim women attempted to testify in a criminal trial while wearing their *burqas*.[160] The defendant argued that the veil interfered with his right to a fair and public trial and expressed special concern over the interference with the testimony's reliability.[161] Accordingly, the defense labeled the *burqa* as "tantamount to camouflage."[162] After weighing the issues of free religious practice and the guarantees of the New Zealand criminal justice system, the court held that

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156. *Id.* at 507.

157. *See id.* at 507–09 (Meyers, J., dissenting). In his dissent, Judge Meyers argued that the elements of physical presence and demeanor were not compromised in this case: "I'm fairly confident that the witness was there face-to-face to testify, was cross-examined, and that his demeanor showed that he was scared to death of the defendant." *Id.* at 507. Judge Meyers further argued that the witness's disguise served to comfort the witness, much like the children in *Coy* and *Craig*, and that since no "face-to-face" confrontation was prevented by the disguise, there was no harm caused. *Id.* at 508. Meyers compared the disguise to other situations where attorneys change a witness's appearance in court, for example when "[d]runks are sobered up, addicts are cleaned up, and the homeless are dressed up." *Id.* In a separate dissent, Judge Holcomb argued that the disguise furthered the important state interest of protecting witnesses, which he argued was worthy of an exception. *Id.* at 508–09.

158. For a detailed description of the New Zealand legal system, *See The New Zealand Legal System*, http://www.justice.govt.nz/pubs/other/pamphlets/2001/legal_system.html (discussing the New Zealand legal system in detail).

159. Police v. Razamjoo, [2005] D.C.R. 408, 2005 N.Z.D.C.R. LEXIS *3 (D.C. Jan. 14, 2005).

160. *Id.* at *7. The defendant was on trial for insurance fraud for allegedly selling his Nissan Bluebird and later claiming it was stolen. *Id.* at *13. The two Muslim women were called to confirm events that would indicate the defendant engaged in this fraud. *Id.*

161. *Id.* at *15.

162. *Id.* at *55. The defense also claimed that condoning the veiled testimony would allow such witnesses "the potential to infiltrate New Zealand's legal system by creating a separate justice system for Muslims in what is essentially a secular society." *Id.* Pushing further, the defense submitted that the wearing of a *burqa* "must be seen in the context of the political expression of the Muslim religion or Islamism which aims to relegate the Western world back to the dark ages through bombings of innocent people, televised executions and general dehumanization of women." *Id.* The court considered such assertions offensive and ignorant, but considered the defense's fundamental argument—that witnesses should not be allowed to veil—as valid. *Id.* at *64.

the Muslim women had to unveil.[163] In evaluating the appearance of the veiled women at trial, the court gave a compelling description:

> There was . . . a strong sense of disembodiment, far greater than arises in receiving evidence by video link or the playing of an evidential videotape. It was all slightly unreal. The voice of the rogue computer in *2001 A Space Odyssey* quickly came to mind as an example of a voice conveying some sense of character but without an effective physical presence to fill out one's sense of a person. A telephone call from a complete stranger provides another example.[164]

The court concluded that allowing Muslim women to testify while veiled from the judge, jury, and counsel would undermine "the basic values of the New Zealand type of society" because criminal justice must be "administered publicly and openly."[165] The court feared that an opposite holding would shake public confidence in the criminal justice system and bring the court into "disrepute."[166] However, the court clarified that no one but the judge, counsel, and court staff had to see the witnesses unveiled, and suggested using a screen to minimize intrusion.[167]

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163. *Id.* at *91.

164. *Id.* at *63.

165. *Id.* at *88. In its analysis, the court put special emphasis on the importance of demeanor evidence. Specifically, the court stated:

> The look which says "I hoped not to be asked that question," sometimes even a look of downright hatred at counsel by a witness who obviously senses he is getting trapped, can be expressive. So too can abrupt changes in mode of speaking, facial expression or body language. The witness who moves from expressing himself calmly to an excited gabble; the witness who from speaking clearly with good eye contact becomes hesitant and starts looking at his feet; the witness who at a particular point becomes flustered and sweaty, all provide examples of circumstances which, despite cultural and language barriers, convey, at least in part by his facial expression, a message touching credibility.

Id. at *68–69. The court also focused on the importance of demeanor during cross-examination, where "tiny signals" from facial expressions guide the questioning. *Id.* at *71.

166. *Id.* at *90.

167. *Id.* at *90–91. Specifically, the judge wrote: "[S]creens may be used to ensure that only Judge, counsel, and Court staff (the latter being females) are able to observe the witness's face." *Id.* at *90. This ruling indicates that the court was more concerned with the jury's ability to use demeanor and with the defense counsel's ability to cross-examine than with the defendant's ability to see the witness. Yet, New Zealand is not governed by the Confrontation Clause, and the judge had no need to consider the specific issue of "face-to-face" confrontation between witness and defendant.

E. *The Unresolved Issue of Veiling and Confrontation in America*

While parallels may be drawn from the above precedent to support an argument for or against unveiling, this specific question raises new and controversial issues that have not been addressed in an American court of law. Where before the arguments centered on the physical and mental protection of witnesses who wish to remain hidden from the defendant, the argument here involves the protection of a religious practice many Muslim women consider sacred. In the future, this issue will inevitably require the attention of American jurisprudence. Utilizing the above discussion of Islam, the veil, the history of the Confrontation Clause, and its recent applications, this article will now offer an answer.

IV. THE CONFRONTATION CLAUSE AND VEILED WITNESSES IN TRIAL: WHO WINS?

Although no existing legal authority addresses this specific issue, the United States Supreme Court has laid down precedent that clearly applies and guides us to an answer.[168] In *Maryland v. Craig*,[169] the Court crafted a test that was designed to prevent the unreasonable abridgment of a criminal defendant's constitutional right to confront the witnesses against him at trial—the right to call his accusers from the shadows and subject them to the full protective power of America's adversarial system.[170] Where a Muslim

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168. The most significant U.S. Supreme Court cases are *Coy v. Iowa*, 487 U.S. 1012 (1988), and *Maryland v. Craig*, 497 U.S. 836 (1990). Although these cases do not address the precise issue at hand, they are still applicable, and a court handling this issue must apply the law as appropriately as possible in a case of first impression. *See supra* notes 98–128 and accompanying text. When faced with an issue of first impression, a high court's "duty is to adopt the rule of law that is most persuasive." Gov't Employees Ins. Co. v. Graham-Gonzales, 107 P.3d 279, 284 (Alaska 2005) (citations omitted). Therefore, the following approach has been suggested:

> A court must determine whether law exists on a subject, and when deciding a question without the guidance of precedent, a court must adopt the rule that is most persuasive, in light of precedent, reason, and policy, considering local custom, the Restatement view, legislative intent, or the law in other jurisdictions.

21 C.J.S. *Rules of Adjudication, Decisions, and Opinions* § 190 (2008). The U.S. Supreme Court has made it clear that "a court properly asked to construe a law has the constitutional power to determine whether the law exists." U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 446 (1993).

169. 497 U.S. 836 (1990).

170. *See supra* notes 112–29 and accompanying text (examining *Craig* and analyzing its resulting rule). The Court explicitly declared, "The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by *subjecting it to rigorous testing in the context of an adversary proceeding* before the trier of fact." *Craig*, 497 U.S. at 845 (emphasis added). After crafting the applicable test for face-to-face confrontation clause issues, the Court described that test as "serv[ing] the purpose of the Confrontation Clause by ensuring that evidence admitted against an accused is *reliable and subject to the rigorous adversarial testing* that is the norm of Anglo-American criminal proceedings." *Id.* at 846 (citing Kentucky v. Stincer, 482 U.S. 730, 739 (1987)) (emphasis added). Specifically, the test is designed to apply in situations where an

woman serves as an adverse witness and testifies from behind the veil, a shadow is cast on that witness and the adversarial process is severely crippled.[171] This is precisely the situation where the *Craig* precedent was designed to apply, and where it *must* apply.[172] Despite the unfortunate invasion of religious practice that results,[173] the test clearly points to one appropriate answer when applied: a criminal defendant's right to confrontation, as guaranteed by the Sixth Amendment, is violated when a Muslim woman testifies behind a veil.

To support this argument, this section will first address why courts must apply the *Craig* analysis to cases that involve the issue at hand.[174] Next, this section will apply the Supreme Court's two-pronged *Craig* test, analyzing the issues of reliability and public policy.[175] First Amendment concerns are discussed in the following part of this Comment.[176]

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accusatory witness speaks against a criminal defendant and there is an absence of "physical, face-to-face confrontation." *Id.* at 850.

171. It is for this reason that the New Zealand judge in *Police v. Razamjoo* described veiled testimony as "a major departure from accepted process and the values of a free and democratic society." Police v. Razamjoo, [2005] D.C.R. 408, 2005 N.Z.D.C.R. LEXIS *3, *90 (D.C. Jan. 14, 2005). It is also why the Michigan judge faced with a veiled party in small-claims court said, "I can't see your face and I can't tell whether you're telling me the truth or not and I can't see certain things about your demeanor and temperament . . . ." Transcript of Record, *supra* note 27, at 4. It was for similar reasons that the Texas Court of Criminal Appeals refused to allow a witness to cover her face, "the most expressive part of the body and something that is traditionally regarded as one of the most important factors in assessing credibility." Romero v. State, 173 S.W.3d 502, 506 (Tex. Crim. App. 2005). It was also for similar reasons that a Florida court of appeals upheld the state's ban of veils in driver's license photos. *See supra* note 73 and accompanying text. It is also why countries such as France, Italy, and Turkey have banned the veil in many public forums. *See supra* notes 76–83 and accompanying text. As recognized in Section II of this article, there are many forms of the Muslim "veil." *See supra* note 53 and accompanying text. For the purposes of this argument, the veil referred to here is one that covers a majority of the witness's face. The following analysis does not address religious headgear that leaves the face uncovered.

172. It is true that in at least one case, a federal court has decided not to apply the *Craig* analysis in a "face-to-face" confrontation situation. *See* Morales v. Artuz, 281 F.3d 55 (2d Cir. 2002). However, the court in that case "should have . . . held that the Supreme Court's established confrontation law as set forth in *Craig* . . . did apply." Goldschneider, *supra* note 131, at 306. Even still, a veiled witness's testimony brings up even greater concerns than those that arose in *Morales*, which further weakens the argument that *Craig* is not applicable here.

173. *See supra* notes 49–66 and accompanying text for a discussion of the Muslim veil and its meaning. *See infra* notes 247–85 and accompanying text for a discussion of the potential claims a veiled witness may try to bring under the First Amendment.

174. *See infra* notes 177–99 and accompanying text.

175. *See infra* notes 200–29 and accompanying text.

176. *See infra* notes 247–85 and accompanying text.

A. *The* Craig *Analysis Is Clearly Applicable*

Before discussing the ultimate issue of whether a veiled witness's testimony violates a defendant's Sixth Amendment rights under *Craig*, it first must be established that this is the appropriate test to apply. As the following discussion shows, the Court's clear use of language in directing when to apply the test and an examination of the central purposes of the Confrontation Clause demand that the *Craig* test be used in the case of a testifying veiled witness.

The central question raised in *Craig* was whether exceptions exist to the Confrontation Clause's guarantee of "face-to-face" confrontation, and this is where the Supreme Court applied the majority of its analysis.[177] The two-pronged test that resulted from this analysis was designed to determine the constitutionality of any trial court decision that denies the defendant his or her literal right to physically confront a witness "face-to-face."[178] As a result, the *Craig* test is applicable when an adverse witness testifies against a criminal defendant in trial and there is an interference with the "face-to-face" aspect of confrontation with that witness.[179]

It has been argued that the *Craig* Confrontation Clause analysis guaranteeing literal confrontation is only triggered by the mere lack of physical presence of the witness, and in no other situations.[180] Under this argument, as long as the witness is physically placed on the stand in front of the defendant, the court is free to apply its own test in place of the *Craig*

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177. Maryland v. Craig, 497 U.S. 836, 844 (1990). The Court states the issue precisely as follows: "[W]hether any exceptions exist' to the irreducible literal meaning of the Clause: 'a right to *meet face to face* all those who appear and give evidence *at trial*.'" *Id.* (internal quotations and citations omitted).

178. *Id.* at 850–51. *See also infra* notes 201–49 and accompanying text.

179. *Craig*, 497 U.S. at 850–51. In *Craig*, the interference occurred when a child was placed in another room and her testimony was broadcasted into the courtroom. *Id.* at 841. Specifically, the televised testimony interfered with the "physical presence" element of the reliability prong of the *Craig* test. *Id.* at 851. In the case of the veiled witness, there is also an interference with the "physical presence" element. *See infra* notes 185–99. Yet the veil creates even greater interferences, as it impairs *two* other elements of the reliability prong: cross-examination and observation of demeanor. *See infra* notes 209–29. If the interference of only a single element was enough to trigger the application of the test in *Craig*, then the test surely should be applied here.

180. *See generally* Morales v. Artuz, 281 F.3d 55 (2d Cir. 2002). In *Morales*, the Second Circuit argued that the *Craig* analysis could only apply to situations where a complete "physical[ ] separa[tion]" exists between the defendant and the witness at trial. *Id.* at 58. Thus, the court did not use the *Craig* analysis when determining whether a witness testifying while wearing dark sunglasses violated the defendant's Sixth Amendment rights. *Id.* at 59. It is important to note that the Second Circuit's review of the applicable law was guided by laws governing habeas corpus. *Id.* at 58. This required the court to review the *Craig* test in terms of whether it was "clearly established law." *Id.* Because the court found that *Craig* did not directly address the issue of whether a disguised witness violates a defendant's Sixth Amendment rights, it decided that *Craig* was not "clearly established" law governing disguised witnesses. *Id.* at 59. Yet even still, the *Morales* decision is highly questionable. For a detailed criticism of *Morales*, see Goldenschneider, *supra* note 131 (discussing the error in the *Morales* decision for not apply *Craig* to its analysis).

analysis.[181] It follows under this rationale that the *Craig* test cannot apply unless the witness is physically located outside of the courtroom and of the presence of the defendant.[182] Thus, the argument would be that a veiled witness's testimony would not be subject to *Craig*'s Confrontation Clause analysis because that witness sits within the courtroom and in the "view" of the defendant.

Yet the above argument is in direct contradiction with *Craig* and its predecessors.[183] In *Craig*, the Supreme Court chose to explicitly use and re-use the phrase "face-to-face confrontation"[184] because for more than a century the Confrontation Clause has been interpreted as guaranteeing the defendant just that—a "*face-to-face* meeting with witnesses appearing before the trier of fact."[185] The Court in *Craig* did not limit its analysis—either expressly or implicitly—to address only situations where the witness's

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181. The *Morales* court reasoned that "none of the cases thus far decided by the Supreme Court deals with our precise context—a witness testifying in the presence of the defendant and the jury with a slight disguise that prevents the defendant and the jurors from seeing the witness's eyes." *Morales*, 281 F.3d at 58. The court did admit, however, that "[t]here can be no question that the right of a defendant to confront the witnesses against him has been clearly established in decisions of the Supreme Court." *Id.*

182. In *Morales* the court decided not to apply *Craig* because the "disguised" witness sat directly in front of the defendant and therefore was not "physically separated." *Id.* at 62.

183. The *Morales* court engaged in an extremely narrow reading of *Craig* and, as a result, rendered the Supreme Court's test meaningless. To support its holding that the Supreme Court's *Craig* precedent only applies to situations where the defendant and witness are "physically separated," the court refers to both *Coy* and *Craig* for support. *Id.* at 59–60. Yet in *Coy*, the witness was in the same room as the defendant, and the only "physical separation" that existed was a screen. *Id.* at 58. The *Morales* court itself admits that *Coy* involved a witness that was "permitted to testify behind a screen that prevented [the witnesses from] seeing the defendant although it allowed him 'dimly' to perceive them." *Id.* The court still claims that, while a screen may create a physical separation, a disguise does not. *Id.* This extremely narrow reading of *Craig* is unwarranted, and a cause for great concern:

> [A]s interpreted by the Second Circuit, there can be no . . . decision regarding witness disguise [that is] reviewable under the established confrontation law of the Supreme Court, no matter how gross a violation of a defendant's rights. . . . [E]ven if [the witness] had worn a paper bag over her head with holes cut out, the Second Circuit's holding that no Supreme Court precedent had addressed the "precise context" of *Morales* would remain valid.

Goldschneider, *supra* note 131, at 323. Thus, "[t]he Second Circuit's decision suggests no limits, even in dicta, to how far [such testimony] might go." *Id.*

184. In *Craig*, the majority opinion used the phrase "face-to-face" twenty-eight times. *See generally Craig*, 497 U.S. 836. In fact, the U.S. Supreme Court has been using this phrase for the last 113 years, beginning with the *Mattox* case in 1895. *See* Mattox v. United States, 156 U.S. 237, 242 (1985) ("compelling him to stand face to face with the jury in order that they may look at him").

185. *Craig*, 497 U.S. at 844 (emphasis added). "There is nothing novel about the proposition that the Clause embodies a general requirement that a witness face the defendant. We have expressly said as much, as long ago as 1899." Coy v. Iowa, 487 U.S. 1012, 1024 (1988) (O'Connor, J., concurring).

body is physically absent from the courtroom.[186] Neither does the Court describe the confrontation right using any such phrases as "physical confrontation," "in-person confrontation," or "body-to-body confrontation," and understandably so.[187] Such a narrow interpretation strips *Craig* of its explicit purpose and meaning.[188] Accordingly, the Court was very explicit about where the *Craig* test must apply: testimony "absent a physical, *face-to-face* confrontation at trial."[189] Because mere physical presence is not enough to guarantee this literal "face-to-face" confrontation, it is necessary to analyze the witness's general appearance in trial to determine if any such situation arises.[190]

It is undeniable that confrontation issues can arise even when the witness sits directly in front of the defendant, as exemplified by witnesses who wear masks[191] or disguises[192] that shield their faces from the defendant's view.[193] The veiled witness is no exception. The literal "face-to-face" aspect of confrontation is undoubtedly compromised when a witness's face is covered to the extent that only a small portion is visible.[194] "Face-to-face" becomes "face-to-veil," and literal confrontation is obscured. This is exactly where the *Craig* test was designed to apply in order to

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186. *See Craig*, 497 U.S. at 844.

187. Such phrases, in place of "face-to-face," might indicate that mere physical confrontation is sufficient to satisfy the guarantees of the Confrontation Clause. However, this is a mere hypothetical posed to prove a point; there is no evidence to show the Court has ever considered the use of such phrases.

188. Using this "physical separation" interpretation, a witness could take the stand while wearing a sheet over his entire head and body, and the court would be unable to apply the *Craig* analysis due to lack of physical separation. Yet if a witness testified in a separate room via video camera and every detail of his face was clearly broadcasted into the courtroom over a high-definition television, the *Craig* test would apply. The Court surely did not intend this backwards result, which completely ignores the "face-to-face" aspect of its holding.

189. *Craig*, 497 U.S. at 850 (emphasis added).

190. The reliability of demeanor evidence has been questioned by empirical studies, and some claim the absence of facial observation is harmless. However, this does not change the fact that our legal system is heavily reliant on demeanor evidence. Plus, this does little to negate the Court's explicit guarantee of "face-to-face" confrontation.

191. *See supra* notes 147–48 and accompanying text.

192. *See supra* notes 151–57 and accompanying text.

193. In fact, a witness who physically covers herself is *more* damaging to a defendant's right to "face-to-face" confrontation than other situations the Court has faced, and therefore even more deserving of protection under the *Craig* test. For example, the Court in *Coy* found a violation when a screen was placed between the defendant and child witness, even where the judge, jury, and counsel could still see the witness's face. *See* Coy v. Iowa, 487 U.S. 1012 (1988). In the case of a veiled witness, *no one* in the courtroom has the opportunity to see the witness's face. The latter situation has many more negative impacts on the defendant's Sixth Amendment rights, such as the ability of the jury to evaluate demeanor.

194. This is similar to the disguised witness who testified in *Romero*, where the *Craig* test was used. Romero v. State, 173 S.W.3d 502, 504 (Tex. Crim. App. 2005). The court emphasized that the disguise, which covered practically his entire face, "prevented a face-to-face confrontation" and required the use of the *Craig* analysis. *Id.*

determine whether such an interference with a defendant's right to "face-to-face" confrontation is justified.[195]

The necessity of applying the *Craig* test to veiled witnesses is even more obvious when examining the purposes of the Confrontation Clause.[196] As noted in *Craig*, the Confrontation Clause's central concern is to ensure the reliability of testimony against a defendant by subjecting it to the adversarial system.[197] As a result, the *Craig* test's main focus is on the assurance of testimony reliability despite a lack of literal "face-to-face" confrontation. To suggest that the test is inapplicable to a situation where the witness's face is almost completely covered simply because that witness is within the "physical presence" of the defendant is to completely ignore the test's purpose. The *Craig* test was designed specifically for such instances where a witness shields himself from the defendant, judge, and jury to the extent that reliability is in danger.[198] That purpose remains clear whether the witness is testifying far away from the courtroom through video feed or twelve feet away under the cover of a veil. In the latter situation, the Court is not permitted to tolerate such a blatant and direct assault on the effectiveness of the adversarial system without first invoking the *Craig* test. This test is likely the defendant's only method of protecting his right of confrontation against a veiled witness. Where clear Supreme Court precedent demands protection, it must be applied vigorously.[199]

B. Applying Craig*'s Two-Pronged Test*

It is thus clear that a veiled woman's testimony in trial interferes with the defendant's right to physical "face-to-face" confrontation and that the

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195. "That the face-to-face confrontation requirement is not absolute does not, of course, mean that it may easily be dispensed with." Maryland v. Craig, 497 U.S. 836, 850 (1990). Thus, the *Craig* test assures that the absence of face-to-face confrontation is necessary in order to further important public policy and that the testimony remains reliable. *Id.* Unless these requirements are met, the lack of face-to-face confrontation will not be justified. *Id.*

196. *See supra* notes 84–95 and accompanying text (discussing the purposes of the Confrontation Clause).

197. *Craig*, 497 U.S. at 845.

198. For example, in *Craig*, the Supreme Court makes an exception for children who might suffer trauma from facing their accuser face-to-face but still focuses on "reliability" throughout the majority of the discussion. *Id.* The physical "face-to-face" aspect of confrontation could only be sacrificed if all the other elements appeared. *Id.*

199. "[T]he Confrontation Clause was meant to constitutionalize a barrier against flagrant abuses, trials by anonymous accusers, and absentee witnesses." *Id.* at 851 (citations omitted). The Supreme Court emphasizes that "face-to-face confrontation enhances the accuracy of fact-finding by reducing the risk that a witness will wrongfully implicate an innocent person." *Id.* at 846. As a result, the Court clearly states that "face-to-face confrontation" may not "easily be dispensed with." *Id.* at 850.

Craig test applies as a result of that interference.[200] Yet, because the Supreme Court has determined that this aspect of confrontation is not *absolute*, there are limited circumstances in which the Confrontation Clause will not be violated.[201] The *Craig* test is used to determine whether such a denial is permissible, and that test applies here just as it would in any situation where the "face-to-face" aspect of confrontation is denied.[202]

First, the Court will look to see if the testimony remains reliable even though the veil prevents physical "face-to-face" confrontation.[203] This requires an inquiry into whether all the other "elements of confrontation"—oath, cross-examination, and demeanor—are preserved.[204] If not, the test is not satisfied and a violation occurs. However, if reliability is found unimpaired, the Court will move on to the second part of the test, which will only allow the Muslim witness to wear the veil if it furthers an important public policy.[205]

1. Reliability

Although the Supreme Court split on the issue, the majority of the Justices in *Craig* held that the Confrontation Clause's guarantee of reliable witness testimony may still be guaranteed even without "face-to-face" confrontation.[206] However, the necessary reliability will not be established unless all of the remaining "elements of confrontation" are met:

a. The Impact of Oath

This element deserves little discussion in this context because the veil clearly does not prevent a witness from testifying under oath. Thus, the "seriousness of the matter" and the possibility of the penalty of perjury are still impressed upon the veiled witness, regardless of the lack of physical face-to-face appearance.[207] According to the Court, these effects assist in

200. *See supra* notes 177–99 and accompanying text.

201. *Craig*, 497 U.S. at 849–50 ("[W]e cannot say that [face-to-face] confrontation is an indispensable element of the Sixth Amendment's guarantee of the right to confront one's accusers.").

202. *See* People v. Sammons, 478 N.W.2d 901 (Mich. Ct. App. 1992) (finding that a witness's "full-face mask" violated defendant's confrontation rights); *see also* Romero v. State, 173 S.W.3d 502 (Tex. Crim App. 2005) (finding that a witness's disguise violated defendant's confrontation rights).

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

204. *Id.* at 851.

205. *Id.* at 852.

206. *Id.* at 851. Justices Scalia, Brennan, Marshall, and Stevens disagreed with this proposition, arguing that by making "face-to-face" confrontation a mere "dispensable element," the majority has re-characterized the Confrontation Clause. *Id.* at 862 (Scalia, J., dissenting).

207. *See id.* at 845–46.

protecting against lies. Therefore, the fulfillment of the oath element weighs toward reliability.[208]

b. Defense Council's Opportunity for Cross-Examination

However, the element of cross-examination cannot be so easily dismissed. A crucial element of the reliability test is the criminal defense counsel's ability to engage in cross-examination—the "greatest legal engine ever invented for the discovery of truth."[209] While many strategies exist in the execution of cross-examination, legal commentators have identified the ability to assess a witness's expression and general demeanor as an important part of the truth finding process in cross-examination.[210] For example, is the witness comfortable or uncomfortable during questioning? Does the witness appear hesitant or confident? Is the witness indifferent? Is he scared? These are a few questions that can help guide counsel in prodding, cajoling, and prying information from the witness to the benefit of the accused.[211] And because the actual process of cross-examination is instinctive, an ongoing evaluation of the witness is crucial.[212] One trial attorney has therefore made the following recommendation:

> During an examination, never take your eyes off the witness. Your eyes will see things that others in the courtroom will not—a sense of doubt, hesitancy, lack of confidence, or a lie. Let the witness know that your eyes will rarely leave him; never give him an opportunity to relax or time to conceal.[213]

Yet with the veiled witness, the counsel conducting the cross-examination has no choice about concealment. The defense is helpless to the fact that all of the assessments recommended above can never be fully implemented when the witness wears a veil over her face, which has been

208. Yet compared to the other elements, this is the least persuasive indicator of reliability.

209. *Id.* at 846.

210. *See supra* note 6 and accompanying text.

211. Aron Goldschneider, *Choose Your Poison: A Comparative Constitutional Analysis of Criminal Trial Closure v. Witness Disguise in the Context of Protecting Endangered Witnesses at Trial*, 15 GEO. MASON U. CIV. RTS. L.J. 25, 55 (2004).

212. Police v. Razamjoo, [2005] D.C.R. 408, 2005 N.Z.D.C.R. LEXIS *3, *71 (D.C. Jan. 14, 2005).

213. Jack B. Swerling, *"I Can't Believe I Asked That Question": A Look at Cross-Examination Techniques*, 50 S.C. L. REV. 753, 771 (1999) (as quoted in Goldschneider, *supra* note 131, at 321).

described as "the most expressive part of the body."[214] The veil covers up those "[t]iny signals" revealed in facial expression that indicate "how the witness is performing."[215] Thus, the defense counsel's ability to make crucial "heat of battle" decisions that guide cross-examination is impaired.[216] Where cross-examination is subject to such impairment, the resulting testimony surely cannot be considered subject to the "rigorous adversarial testing" as required by the *Craig* reliability prong.[217]

Therefore, when a Muslim woman testifies against a criminal defendant while wearing the veil, the "cross-examination" element is not preserved in a manner "functionally equivalent" to physical, face-to-face testimony, as the test requires. This element must fail.

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214. Romero v. State, 173 S.W.3d 502, 506 (Tex. Crim. App. 2005).

215. *Razamjoo*, 2005 N.Z.D.C.R. LEXIS at *71.

216. *Id.* This problem does not exist in cases where a screen or closed circuit television is used to prevent a witness from seeing the defendant because the defense counsel maintains the ability to fully view the witness. For example, in *Coy* the screen may have prevented the defendant from seeing the child and vice-versa, but the defense counsel was allowed to walk past the screen and talk to the child face-to-face like in any typical trial. Coy v. Iowa, 487 U.S. 1012, 1026–27 (1988). Also, in *Craig*, the television may have prevented the child witness from physically facing the defendant in trial, but everyone was still able to observe the child's facial expressions, "albeit by video monitor." Maryland v. Craig, 497 U.S. 836, 851 (1990). Because the defense counsel in both *Coy* and *Craig* were free to utilize the child's expressions to make the necessary split-second decisions required by cross-examination, no impairment occurred.

217. *Id.* at 851. An argument might arise that the Supreme Court has held that the Sixth Amendment 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." United States v. Owens, 484 U.S. 554, 559 (1988) (emphasis added). However, in that context, the Supreme Court was dealing with the cross-examination of a witness that suffered severe memory loss and was trying to recount out-of-court statements. *Id.* at 556. In this regard, the Court held that a witness's memory loss does not impair the right to cross-examination because "it is sufficient that the defendant has the opportunity to bring out such matters as the witness' bias, his lack of care and attentiveness, his poor eyesight, and even . . . the very fact that he has a bad memory." *Id.* at 559. Yet when the veil covers a witness's face, the defense counsel is prevented from even *effective* cross-examination. The defense counsel is severely limited in observing such indicators as lack of care, attentiveness, or bias, as were still available in *Owens*. By demanding that the veiled witness reveal her face, the defense is not arguing for "cross-examination that is effective in whatever way, and to whatever extent" desired. *Id.* The defense is arguing to retain an essential component of the "greatest legal engine ever invented for the discovery of truth": face-to-face questioning. *Id.* (quotations omitted).

c. The Jury's Evaluation of Demeanor[218]

The defendant's life and liberty are in the hands of the jury, for it is the jury that holds the power to label him as a "criminal."[219] Under the Confrontation Clause, the defendant is guaranteed that before this power is exercised, the jury will at least be permitted to "observe the demeanor[220] of the witness in making [her] statement, thus aiding the jury in assessing [her] credibility."[221] It is worth emphasizing once again what the Supreme Court guaranteed over a century ago and still guarantees today:

> [An] . . . examination . . . in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to *stand face to face with the jury in order that they may look at him, and judge by his demeanor* upon the stand and the manner in which he gives his testimony whether he is worthy of belief.[222]

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218. This element is closely related to the cross-examination element, because both involve reading the witness's facial expressions. While both elements increase testimony reliability, they accomplish this purpose in different ways. The cross-examination element increases reliability because the defense counsel has the full opportunity to test and challenge the witness's credibility on the stand, thereby facilitating proper questioning. The demeanor element increases reliability because the jury is allowed to fully evaluate the witness's demeanor and use this evaluation to determine credibility. Overall, the former allows the defense counsel to deliver the jury reliable testimony, while the latter allows the jury to evaluate the credibility of the testimony.

219. *See supra* note 2 (discussing the consequences of being labeled a "criminal").

220. Black's Law Dictionary gives the following definition of demeanor: "Outward appearance or behavior, such as facial expressions, tone of voice, gestures, and the hesitation or readiness to answer questions." BLACK'S LAW DICTIONARY 463 (8th ed. 2004).

221. *Craig*, 497 U.S. at 846 (quoting California v. Green, 399 U.S. 149, 158 (1970)). As the Michigan Court of Appeals once put it, "[D]emeanor is of the utmost importance in the determination of the credibility of a witness." People v. Sammons, 478 N.W.2d 901, 909 (Mich. Ct. App. 1992) (quoting People v. Dye, 427 N.W.2d 501, 505 (Mich. 1988)). That court continued, "The innumerable telltale indications which fall from a witness during the course of his examination are often much more of an indication to judge or jury of his credibility and the reliability of his evidence than is the literal meaning of his words." *Dye*, 427 N.W.2d at 505. Recently, empirical evaluations have been used to suggest that demeanor evidence is unreliable. James P. Timothy, *Demeanor Credibility*, 49 CATH. U. L. REV. 903, 905 (2000). Commentators who support this argument use various studies to conclude that "demeanor findings based on visual observations are generally of little use in determining the witness's credibility." *Id.* at 930. In *Morales v. Artuz*, these same studies led the Second Circuit to conclude that reliability should be more grounded on empirical data, rather than tradition. Goldschneider, *supra* note 131, at 319. However, as one judge notes: "The classroom is not the courtroom. The conditions of the psychological experiment do not have the ceremony, oath, atmosphere, and institutional tradition of a courtroom and do not inspire the same sincerity." Timothy, *supra*, at 934–35.

222. Mattox v. United States, 156 U.S. 237, 242–43 (1895) (emphasis added).

Thus, a crucial part of the reliability guaranteed by the Confrontation Clause depends on the jury's ability to *look* at the witness *face-to-face* and judge his *demeanor*.[223]

The veil impairs the jury's ability to evaluate demeanor as guaranteed by the Confrontation Clause because it hides the most expressive part of the body—the face.[224] The jury can still evaluate the veiled witness's tone of voice and possibly her body language,[225] and one court has held that these alternative forms of demeanor are sufficient to ensure reliable testimony.[226] But when the veil erases a witness's face from the jury's view, that witness becomes essentially expressionless, and the alternate forms of demeanor simply do not sufficiently support reliability. Behind the veil, a witness may sweat nervously yet maintain perfect composure. She may bite her lip or grind her teeth to abate her growing anger, but on the outside appear calm.

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223. *Id.*

224. General "demeanor" encompasses more than just facial expressions, such as voice tone and body language. *See* Timothy, *supra* note 221, at 904 n.3. However, most demeanor evidence is extremely difficult, if not impossible, to evaluate *without* the ability to see a witness's face. For example, demeanor is useful in revealing a witness's surprise, anger, nervousness, disgust, amusement, boredom, fear, or pain. *Id.* at 918–21. Other looks cannot be so easily categorized, such as the look that says, "I hoped not to be asked that question." Police v. Razamjoo, [2005] D.C.R. 408, 2005 N.Z.D.C.R. LEXIS *3, *68–69 (D.C. Jan. 14, 2005). Jurors may get a sense of such emotions by evaluating body language and tone of voice but will determine these emotions more confidently and easily through the witness's multitude of facial expressions. In fact, one expert "has identified . . . 46 facial muscle movements as emblems of the speaker's emotions." Timothy, *supra* note 221, at 916 n.116. To illustrate the range of human emotions through facial expressions, several researchers in Japan formed a database containing 213 images of 7 facial expressions posed by 10 models. This collection of photos can be downloaded at http://www.kasrl.org/jaffe_download.html. Overall, while other forms of demeanor may exist, none is more useful than the witness's facial expressions. Covering a witness's face also prevents the jury from evaluating simple aspects of physical appearance. Timothy, *supra* note 221, at 907–08. The following strategy used by renowned defense attorney Clarence Darrow provides a classic example:

> The witness was a squat, heavy-set man of medium height . . . . His swollen face, bleary eyes, puffy eyelids, and reddish-purple nose marked the habitual drunkard. His shaggy . . . hair had been stranger to brush or comb for so long as to have become tangled and matted. His clothes . . . were covered with dirt and grease. His huge hands . . . were covered with grime. Darrow's cross-examination of the witness consisted only of his request that the witness stand up and turn around for the jury.

Id.

225. The value of a veiled witness's body language will depend on the extent the veil covers the body. For example, a *burqa* is not as restricting as typical clothing because it drapes down over the body. Such veils may hide subtle body language and further impair the jury's ability to evaluate demeanor.

226. *See* Morales v. Artuz, 281 F.3d 55, 61 (2d Cir. 2002). In *Morales*, the court allowed a witness to testify against the defendant in dark sunglasses, and reasoned that the jurors still "had an entirely unimpaired opportunity to assess the delivery of [the witness's] testimony, notice any evidence nervousness, and observe her body language." *Id.* Further, the court concluded that the jury could "combine these fully observable aspects of demeanor with their consideration of the substance of . . . [the] testimony." *Id.* at 61–62. This is doubtful. Yet even assuming this is a valid argument, the veil covers much more than sunglasses cover. It nearly covers the *entire* face, impairing the jurors' opportunity to make credibility assessments that simply cannot be revealed by the other forms of demeanor alone.

She may be smiling, frowning, or stoic, yet the jury will never know. Little by little these "tiny signals" will slip away unnoticed by the jury, amounting to testimony that is essentially worthless in terms of reliability. If that testimony is the only evidence supporting a defendant's conviction, the denial of these "tiny signals" can lead to immense consequences.

Yet in the situation of a veiled witness, *Craig*'s plain language should preclude a judge from even addressing the above argument about the different methods of demeanor evidence. This is because the Court has interpreted the Confrontation Clause as guaranteeing *more* than the jury's opportunity to simply assess demeanor; it literally guarantees that the witness will stand "*face to face* with the jury" in that assessment.[227] Just as the veil prevents a physical "face-to-face" meeting between the witness and defendant,[228] here it prevents the same "face-to-face" meeting between the witness and the jury. Because the reliability prong cannot be satisfied when a veiled witness testifies against a criminal defendant, there can be no exceptions granted, and the veil must be removed.[229] This element also must fail.

2. Public Policy

For the sake of argument and analysis,[230] if the reliability prong is met in the case of a veiled witness, the *Craig* test will proceed to the next prong.[231] The second "critical inquiry" is whether the denial of "face-to-face" confrontation is "necessary to further an important public policy."[232]

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227. Maryland v. Craig, 497 U.S. 836, 845 (1990) (emphasis added).

228. *See supra* notes 185–98 and accompanying text.

229. "[A] defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial *only where . . . the reliability of the testimony is otherwise assured*." *Craig*, 497 U.S. at 850 (emphasis added).

230. A court would normally not proceed to this step of the analysis because the reliability prong has not been met. This section analyzes the Public Policy for the purpose of fleshing out more meaning in this unexplored area of law.

231. *Id.*

232. *Id.* "'Public policy' consists of the principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society." 20 AM. JUR. 2D *Courts* § 47 (2004).

> There is no principle of judicial restraint that requires courts to refrain from deciding public policy questions. Public policy is not determined by a court's generalized concepts of fairness and justice or a determination of what might be most just in a particular case; courts must look to the Constitution, statutes, and the judicial decisions of the state to determine public policy. A court may make an alleged public policy the basis of a judicial decision only in the clearest cases. However, that which is not prohibited by statute, condemned by judicial decision, or contrary to the public morals contravenes no

To answer this question, the Court looks to see if the state's interest is "sufficiently important to outweigh . . . a defendant's right to face his or her accusers."[233] In sum, the denial of "face-to-face" confrontation must be necessary to further that interest.[234]

The state's "interest" at issue here is best described as the protection of witnesses and their ability to choose where and how they want to practice their religion.[235] Given the prominence of the First Amendment, protecting a witness's freedom of religion is an important state interest.[236] It would also appear that allowing veiled testimony is the only possible method of protecting a witness who wears the veil in trial as a religious obligation, because the only alternative is unveiling. Thus, in order to further the state's interest in protecting a witness's religious freedom, it would be necessary for the state to prevent face-to-face confrontation. Overall, there appears to be a strong public policy argument. Yet because public policy is so broad, it is necessary to analyze the bigger consequences of allowing veiled testimony.[237]

First, allowing the veil in trial will create a slippery slope that may lead to the admission of even more troublesome testimony. If a Confrontation Clause exception is made for the veil because the Muslim woman is exercising her freedom of religion, what else must the Court make room for? If a witness enters the courtroom with a sincere belief that he has a religious obligation to wear a hockey mask in public, will the court also allow it into

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principle of public policy.

Id.

233. *Craig*, 497 U.S. at 853. In *Craig*, the Court found a valid public policy justification for removing the face-to-face aspect of confrontation at trial:

> We . . . conclude today that a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court. That a significant majority of States have enacted statutes to protect child witnesses from the trauma of giving testimony in child abuse cases attests to the widespread belief in the importance of such a public policy.

Id. (O'Connor, J., concurring) (citing Coy v. Iowa, 487 U.S. 1012, 1022–23 (1987)).

234. *Id.* at 852.

235. This is essentially a First Amendment argument because it involves the guarantee of free exercise of religion. As discussed in the next section of this article, the witness's right to practice her religion by wearing a veil in court must cede to a defendant's Sixth Amendment right of confrontation. Thus, this interest is not sufficient to outweigh the confrontation right.

236. "[T]he First Amendment constitutes an absolute prohibition against governmental regulation of religious beliefs. Thus, the Supreme Court has said that freedom of conscience and freedom to adhere to such religious organization or form of worship as an individual may choose cannot be restricted by law." 16A AM. JUR. 2D *Constitutional Law* § 424 (1998).

237. An accepted definition of "public policy" is, "[b]roadly, principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society." BLACK'S LAW DICTIONARY 1267 (8th ed. 2004). "Courts sometimes use the term to justify their decisions." *Id.*

trial?[238] Also, allowing veiled testimony will cause a great appearance of impropriety,[239] which may shake the public's confidence in America's criminal justice system.[240] Additionally, allowing such veiled testimony may encourage abuse of the exception to the Confrontation Clause. Prosecutors could take their most unbelievable witnesses and cover them up at will.[241] Finally, it is again helpful to look at policy implemented overseas.[242] Various countries have banned the Muslim veil in many respects, all for a variety of reasons. In New Zealand specifically, a district court ruled decisively against veiled testimony.[243]

Taken altogether, there appears to be a sufficiently important state interest in protecting veiled witnesses, and preventing the veil from being removed seems to be necessary to further that interest. Yet many other public policy factors indicate allowing veiled testimony would have a detrimental effect. A court would need to engage in an intricate balancing act to reach a conclusion. As Justice Scalia has expressed, the United States Constitution "enshrines" certain rights that should not be easily influenced by public policy.[244] The Court should not be so willing to make an exception to a fundamental right that has existed since the time of our forefathers.[245] Fortunately, this specific public policy determination is likely unnecessary due to the veiled witness's lack of reliability.

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238. As ridiculous as this hypothetical may seem, based on the Court's approach to freedom of religion issues there is cause for concern. "Religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." 16A AM. JUR. 2D *Constitutional Law* § 424 (1998).

239. "The trial of a case should not only be fair in fact, but it should also appear to be fair. And where the contrary appears, it shocks the judicial instinct to allow the judgment to stand." Hernandez v. Paicius, 109 Cal. App. 4th 452, 455 (Ct. App. 2003) (citation omitted).

240. When presented with such a situation in the New Zealand case of *Police v. Razamjoo*, the judge said:

> Public interest considerations well beyond the scope of rights are relevant. They include the need to maintain public confidence in the criminal justice system. The need for consistency within that system means that Courts should follow normal and accepted processes except (where permitted by law) to the extent justified by all the circumstances of a particular case. The more extreme the departure from normal process the greater the justification required.

Police v. Razamjoo, [2005] D.C.R. 408, 2005 N.Z.D.C.R. LEXIS.*3, *86 (D.C. Jan. 14, 2005).

241. This, coupled with a court's inability to question a witness's "sincere" religious beliefs, would create a dangerous situation for the criminal defendant.

242. *See supra* notes 75–83 and accompanying text (exploring worldwide reaction to the Muslim veil).

243. *See supra* notes 158–67 and accompanying text (discussing the New Zealand trial ruling that refused to allow two Muslim women to testify while veiled).

244. *See* Maryland v. Craig, 487 U.S. 836, 861 (1990) (Scalia, J., dissenting).

245. *See supra* note 86.

C. *Confrontation Clause Violated*

As discussed above, when a Muslim woman testifies against a criminal defendant while wearing a veil, the reliability prong fails. Specifically, the absence of the elements of cross-examination and the jury's ability to utilize demeanor evidence is what truly impairs reliability.[246] Because the veiled witness's testimony cannot be considered reliable, the argument stops there. However, it has also been emphasized that the public policy argument would *also* be questionable.

In sum, a veiled witness simply cannot testify against criminal defendants without violating their Sixth Amendment Confrontation Clause rights. As indicated, this is a just result. The primary goals of the Confrontation Clause are preserved when the witness is forced to unveil. Yet the unfortunate fact is that the unveiling will likely be deeply offensive and humiliating for many Muslim women. The next section addresses possible claims that veiled witness might bring under the First Amendment.

V. FIRST AMENDMENT CONCERNS

The Muslim woman who faces a court order to unveil will likely demand her own protections under the law. After all, the defendant is not the only one protected by the United States Constitution.[247] In seeking protection, a Muslim woman may attempt to exercise her First Amendment right to free exercise of religion. It is not an unreasonable argument,[248] and ultimately the result will depend upon the jurisdiction in which the veiled witness testifies.[249] Yet because the Confrontation Clause is neutral toward religion and generally applicable to all Americans, the religious practice of veiling should cede to the Sixth Amendment's Confrontation Clause.

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246. In *Craig*, the Court narrowly agreed by majority that there was reliability, but in that case only *one* of the additional "elements of confrontation" was absent. *See Craig*, 487 U.S. 836. When there are two elements absent, such as in this situation, the result is very clear: no reliability can be found.

247. "The Bill of Rights belongs . . . to all citizens. It protects them as long as they reside within the boundaries of our land. It protects them in the exercise of the great individual rights necessary to a sound political and economic democracy." Bridges v. Wixon, 326 U.S. 135, 166 (1945). "Only by zealously guarding the rights of the most humble, the most unorthodox and the most despised among us can freedom flourish and endure in our land." *Id.*

248. As Congressman Jerrold Nadler writes, "In the face of religious strife through the world, it is my hope that Americans understand that religious freedom, as protected by the Bill of Rights, is the crown jewel of America's experiment in democracy . . . . We tamper with that freedom at our own peril." Jerrold Nadler, *Thou Shalt Not Post the Ten Commandments in Public Buildings*, 4 No. 15 LAW. J. 7 (2002).

249. The level of protection will depend on whether the case is brought in federal or state court. Certain states offer more protection for free exercise of religion through special legislation. *See infra* note 269 and accompanying text (discussing Congressional and state legislation that directly addresses Free Exercise).

A. History of Free Exercise of Religion

The First Amendment provides that "Congress shall make no law . . . prohibiting the free exercise" of religion.[250] Generally, the Supreme Court has interpreted this clause[251] to mean that: "[T]he government is prohibited from interfering with or attempting to regulate any citizen's religious beliefs, from coercing a citizen to affirm beliefs repugnant to his or her religion or conscience, and from directly penalizing or discriminating against a citizen for holding beliefs contrary to those held by anyone else."[252]

However, conflict arises when a religious practice clashes with a "generally applicable" rule of law.[253] History reveals this conflict through Supreme Court precedent and federal and state legislative action.

Beginning with the first major free exercise cases in the late nineteenth century and continuing through the first part of the twentieth century, the Court mostly ruled in favor of secular laws over minority religious practice.[254] Thus, in the landmark case of *Reynolds v. United States*,[255] the Court held that "while [laws] cannot interfere with mere religious belief and opinions, they may with practices."[256] This view continued for decades and in the majority of cases, religious practices gave way to secular government laws.[257] Starting in 1963, however, the Court began taking a different

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250. U.S. CONST. amend. I. The full text of the First Amendment is as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

251. This clause is often referred to as the "Free Exercise Clause." *See* 5 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 21.6 (3d ed. 1999). "[This] clause, like all of the guarantees of the First Amendment, applies to state and local governments through the Fourteenth Amendment." *Id.* "The free exercise clause was first held applicable to the states in Cantwell v. Connecticut." *Id.* (citing Cantwell v. Connecticut, 310 U.S. 296 (1940)).

252. 16A AM. JUR. 2D *Constitutional Law* § 424 (1998) (citing Sch. Dist. Of Abington Twp., Pa. v. Schempp, 374 U.S. 203 (1963)).

253. "A person may be unable to comply with a law because his religious beliefs prohibit him from taking an action that is required by law . . . or because his religious beliefs require him to do something that is prohibited by the law." ROTUNDA & NOWAK, *supra* note 251, at § 21.6. "These types of situations raise the question of whether the free exercise clause requires the government to grant an exemption from a law of general applicability to a person who cannot conform his actions to the law due to his religious beliefs." *Id.*

254. McCusker, *supra* note 11, at 393.

255. 98 U.S. 145 (1879).

256. *Reynolds*, 98 U.S. 145 at 166. This is a "landmark case" where the Supreme Court upheld federal law prohibiting polygamy. McCusker, *supra* note 11, at 393. The law was upheld against a Mormon who claimed polygamy was his religious duty. *Id.*

257. McCusker, *supra* note 11, at 393. However, prior to 1963 the Court found that the First

approach by adopting a "compelling state interest standard for restrictions on religious practice."[258] Although this seemed to indicate that the Supreme Court would give significant protection to religious practice,[259] in reality, the Court ruled in favor of generally applicable laws in almost every case in the twenty-eight years it applied the "compelling state interest" test.[260]

In 1990, the Supreme Court abandoned the two-part "compelling state interest" test in the controversial case of *Employment Division v. Smith*.[261] The majority held that "if prohibiting the exercise of religion . . . is not the

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Amendment required an exemption to be granted from certain types of laws for persons who wanted to engage in First Amendment activity such as speech or assembly. *See id.*; *see also* Cantwell v. Connecticut, 310 U.S. 296 (1940) (exempting both religious and nonreligious speakers from certain types of licensing systems that would have been validly applied to business that did not involve First Amendment activity); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (prohibiting government from punishing children who refused to pledge allegiance to the United States flag).

258. Samuel J. Levine, *Religious Symbols and Religious Garb in the Courtroom: Personal Values and Public Judgments*, 66 FORDHAM L. REV. 1505, 1506 (1998). Using this standard, "the Court applied a balancing test to determine whether religious individuals and groups had the right to exemptions from generally applicable laws." McCusker, *supra* note 11, at 393. First, the complainant had to show that "the law at issue interfered with the practice of his religion by requiring him to engage in a practice (or to refrain from engaging in a practice) in violation of his religion." ROTUNDA & NOWAK, *supra* note 251, at § 21.6. Second, "the Court required the government to demonstrate that granting an exemption to the person whose religious beliefs prevented compliance with the law would interfere with a [compelling governmental interest.]" *Id.* The government could only pass this second step "if the Court determined that the regulation at issue was tailored to promote an end that was important enough to override the burden on the free exercise of religion by persons who could not comply with the law." *Id.*

259. "Court opinions during this era . . . read as if the Supreme Court would give significant protection to religiously motivated actions." *Id.*; *see* McCusker, *supra* note 11, at 393 ("[T]he Court's jurisprudence took a different turn which seemed—at least in theory—to shift the balance toward upholding religious practices that conflicted with laws of general applicability.").

260. ROTUNDA & NOWAK, *supra* note 251, at § 21.6. Under the "compelling interest test" the Court upheld several laws against free exercise challenges. *See* Goldman v. Weinberger, 475 U.S. 503 (1986) (upholding an Air Force policy that prohibited headgear, even though it infringed on the right of a Jewish officer to wear a yarmulke); *see also* O'Lone v. Shabazz, 482 U.S. 342 (1987) (upholding a prison rule that prevented Muslim prisoners from attending their worship service). However, in the 1972 case of *Wisconsin v. Yoder*, the Court "granted Amish children an exemption from mandatory school attendance laws." McCusker, *supra* note 11, at 394 (citing Wisconsin v. Yoder, 406 U.S. 205 (1972)). *Yoder* has been called "the most celebrated case of this period." *Id.*

261. 494 U.S. 872 (1990). In *Smith*, the Supreme Court found that "a state criminal law that totally prohibited the use of peyote could be applied to someone who used peyote based on a sincerely held religious belief that the drug had to be used in a religious ceremony." ROTUNDA & NOWAK, *supra* note 249, at § 21.6. In the opinion, Justice Scalia wrote:

> Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process . . . . But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required . . . . It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of religious beliefs.

Id. (citing *Smith*, 494 U.S. at 890).

object of a [law], but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."[262] Thus, the Court explicitly affirmed that the government only needs to prove a compelling interest when the law targets a specific religion, and not when authorizing a law of general applicability.[263] This decision created controversy and as a result many demanded legislative action.[264] "In an attempt to override [the effects] of *Smith*, Congress passed the Religious Freedom Restoration Act (RFRA) in 1993."[265] RFRA accomplished this by reinstating the "compelling interest" standard test for free exercise.[266] Five years later the Supreme Court struck down RFRA's application to state laws by holding that it violated the separation of powers doctrine.[267] Yet this did

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262. McCusker, *supra* note 11, at 394 (quoting *Smith*, 494 U.S. at 878).

263. *Id.* The Court later wrote:

> [A] law that is neutral and of general applicability need not be justified by a compelling government interest even if the law has the incidental effect of burdening a particular religious practice . . . . A law failing to satisfy these requirements must be justified by a compelling government interest and must be narrowly tailored to advance that interest.

Id. (citing Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993)).

264. Many saw the "abandonment of the 'compelling interest' test [as] a weakening of the protection of free exercise by the Supreme Court." 63 AM. JUR. 3D *Proof of Facts* § 2 (2001). "Groups concerned with that perceived loss of religious liberty urged Congress to take action," which later resulted in Congress passing the Religious Freedom Restoration Act (RFRA). *Id.*

265. 63 AM. JUR. 3D *Proof of Facts* § 3 (2001). According to Congress, the purpose of RFRA was to "restore the compelling interest test in those situations where someone's free exercise of religion is substantially burdened and to provide a claim or defense to those whose free exercise of religion is substantially burdened." *Id.* (citing 42 U.S.C. § 2000bb(b) (2000)).

266. McCusker, *supra* note 11, at 394. RFRA provided that the "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except . . . in furtherance of a compelling governmental interest; and . . . [if the law] is the least restrictive means of furthering that compelling governmental interest." *Id.* (quoting 42 U.S.C. § 2000bb-1 (2000)). This essentially reinstated the law as it existed before *Smith*.

267. The Court did this in *City of Boerne v. Flores*, and reasoned that the statute "exceeded Congress's Fourteenth Amendment power by impermissibly expanding the First Amendment and . . . intruding into the states' general authority to regulate for the health and welfare of their citizens." McCusker, *supra* note 11, at 395 (citing City of Boerne v. Flores, 521 U.S. 507, 535–36 (1997)). The Court concluded:

> Our national experience teaches that the Constitution is preserved best when each part of the Government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed. RFRA was designed to control cases and controversies, such as the one before us; but as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control.

not extinguish RFRA legislation, as the Court has held that it still applies to federal law.[268] Additionally, some states have passed statewide statutes that offer greater protection than federal law.[269]

Thus, the result of a free exercise claim depends on jurisdictional rules. Still, the general rule remains: "[W]hen faced with a conflict between religious practice and a rule or statute facially neutral toward religion, the Court's rulings indicate that religious practice must cede to facially neutral rules."[270] Yet, RFRA in federal cases and similar state statutes in certain states reflect more protective rules that will result in increased protection of religious practice. Therefore, the protections afforded to the veiled witness will depend greatly on the forum.

B. Free Exercise of Religion Applied to Veiled Testimony

Before analyzing any First Amendment free exercise claim, it is necessary to identify the law that creates the alleged violation.[271] In the case of a woman who is ordered to unveil at trial, the law in question is the Sixth Amendment Confrontation Clause.[272] In states that have not passed RFRA

City of Boerne v. Flores, 521 U.S. 507, 535–36 (1997) (citation omitted).

268. The Court recently clarified this point in *Gonzales v. O Centro Espirita Uniao Do Vegetal*, 546 U.S. 418 (2006).

269. McCusker, *supra* note 11, at 395. The following states have passed what are essentially new versions of RFRA: Alabama, Arizona, Connecticut, Florida, Idaho, Illinois, Missouri, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, and Texas. *Id.*; *see* ALA. CONST. amend. 622; ARIZ. REV. STAT. ANN. § 41-1493.01 (2000); CONN. GEN. STAT. ANN. § 52-571b (West 2005); FLA. STAT. ANN. § 761.03 (West 2000); IDAHO CODE ANN. § 73-402 (2006); 775 ILL. COMP. STAT. ANN. 35/15 (West 2001); MO. REV. STAT. § 1.302 (2007); N.M. STAT. ANN. § 28-22-3 (LexisNexis 2003); OKLA. STAT. tit. 51, § 251 (2006); 71 PA. CONS. STAT. § 2401 (2006); R.I. GEN. LAWS §42-80.1-3 (2007); S.C. CODE ANN. § 1-32-40 (2003); TEX. CODE ANN. § 100.003 (Vernon 2004).

270. McCusker, *supra* note 11, at 391–92 (citing Employment Div. v. Smith, 494 U.S. 872 (1990)).

271. The questionable law will be the focus of the claim since this is where the alleged violation arises. In approaching the questionable law, the Court has used a "well established constitutional principle":

> [T]hat [the] government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions . . . . Our review confirms that the laws in question were enacted by officials who did not understand, failed to perceive, or chose to ignore the fact that their official actions violated the Nation's essential commitment to religious freedom. The challenged laws had an impermissible object; and in all events the principle of general applicability was violated because the secular ends asserted in defense of the law, were pursued only with respect to conduct motivated by religious beliefs.

ROTUNDA & NOWAK, *supra* note 251, at § 21.6. (quoting Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 524 (1993)).

272. Because most state constitutions mirror the U.S. Constitution's Sixth Amendment Confrontation Clause language, the law in question would be the same for state and federal courts. However, some state constitutions offer more guarantees than the U.S. Constitution. In those cases, the specific language of the state constitution would be the correct law to examine. *See supra* note 131 and accompanying text (discussing the Confrontation Clause's applicability to the states and the

statutes, a Muslim woman who demands First Amendment Free Exercise protection will be subject to the *Smith* rule.[273] This only requires a court to look for a compelling state interest if the law targets a specific religion,[274] and that is not the case here. Like most constitutional language, the Confrontation Clause speaks very broadly and refers to *any* witness,[275] regardless of race, religion, sex, or any other distinguishing language. It is therefore classified as a "generally applicable law." Under *Smith*, such a neutral and generally applicable law does not need to be supported by a compelling government interest, even if it incidentally burdens a religious practice.[276] Unfortunately for the veiled witness, this means that even if the Confrontation Clause burdens her religion by requiring unveiling, the state does not need to defend its law.[277]

Yet in some situations a Muslim woman will have a stronger Free Exercise claim due to more favorable laws in certain jurisdictions. In federal court, the federal RFRA applies and creates a more rigorous standard.[278] The same is true in those states that have passed RFRA statutes. In these jurisdictions, a Muslim woman would first have to show a substantial burden[279] on the free exercise of her religion caused by the unveiling.[280] Assuming the woman declares to the court that her religion requires her to

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different state constitutions).

273. Because the Supreme Court held RFRA unconstitutional as applied to the states, *Smith* is the proper standard to apply unless state legislation indicates otherwise. *See supra* notes 267–68 and accompanying text (discussing RFRA and its relationship to the states).

274. McCusker, *supra* note 11, at 394.

275. The Confrontation Clause says that a criminal defendant "shall enjoy the right . . . to be confronted with *the* witnesses against him." U.S. CONST. amend. VI (emphasis added). *See supra* note 84 for the full text of the Sixth Amendment.

276. Employment Div., Dept. of Human Res. v. Smith, 494 U.S. 872, 878 (1990).

277. The unveiling would be the "incidental effect" of the Confrontation Clause's guarantees, and thus not offend the First Amendment under *Smith*. *Id.* It is likely this type of result that led Congress to pass RFRA.

278. This standard is more rigorous because it requires a compelling government interest for any law that infringes on a person's free exercise of religion, even if the law is generally applicable. *See* 63 AM. JUR. *Proof of Facts* 3D 195 § 3 (2001). However, it is interesting that while this standard was in effect between 1963 and 1989, very few exemptions were made for free exercise. *See supra* note 260 and accompanying text (discussing the Court's application of the "compelling interest" standard). This seems to indicate that, even with the heightened standard, very few exemptions will be made.

279. "There would be no free exercise issue in a case if the individual seeking the exemption could not demonstrate that complying with the law constituted a burden on her religious beliefs." ROTUNDA & NOWAK, *supra* note 251, at § 21.6. It is possible that this burden may be "direct" or "indirect." *Id.* "A law would directly burden a religion by making illegal a religious practice." *Id.* "A law that creates an indirect burden is one that does not regulate a religiously motivated practice, . . . but which makes the practice of a person's religion more difficult." *Id.*

280. *Id.*

wear the veil, she is likely to meet this burden. This is especially true when taking into account the existence of Muslim women who go to great lengths to remain veiled.[281] If a veiled witness is successful in showing a substantial burden,[282] the government will then have to demonstrate a "compelling governmental interest" to require unveiling under the Confrontation Clause and that the law "is the least restrictive means of furthering [its] interest."[283] The government could easily argue that it has a compelling interest in unveiling witnesses in criminal trials because it would be protecting the constitutional rights of a criminal defendant. The fact that the Confrontation Clause dates back to the founding of our country and beyond would bolster the government's argument.[284] Similarly, the government should be able to show there are not any less restrictive means of furthering the interest. When a witness wears a veil in trial, the defendant's Confrontation Clause rights are violated, and the only way to solve this problem is by unveiling the accuser. It may be possible to somehow mitigate the intrusion caused when the Muslim woman is forced to unveil,[285] but the unveiling must occur nonetheless. Thus, it is likely the government will have a strong argument that a Muslim woman's free exercise claim should fail even under a RFRA statute.

Overall, it is unlikely that a Muslim woman who is forced to unveil at a criminal trial will have a successful First Amendment argument. This is mostly due to the fact that the Confrontation Clause is "neutral" toward religion and generally applicable to all Americans. Further, because the government will have an arguable compelling interest in protecting the right of confrontation for its criminal defendants, a Muslim woman's free exercise may fail even under the stricter RFRA standards. Yet this should not prevent a court from ignoring the issue altogether. If possible, a procedure that mitigates the harm caused by the unveiling should be implemented.

VI. MITIGATING THE HARM OF UNVEILING

It is crucial that the American legal system opens its mind to procedures that will mitigate the intrusion felt by the unveiling witness.[286] Great

281. *See supra* notes 60–66 and accompanying text.

282. This will not always be the case. In Florida, a court found no substantial burden on a Muslim woman when a law required that she take full-face driver's license photos, thus having to remove her veil. Freeman v. Dep't of Highway Safety & Motor Vehicles, 924 So. 2d 48 (Fla. Dist. Ct. App. 2006)

283. ROTUNDA & NOWAK, *supra* note 251, at § 21.6.

284. *See supra* notes 84–95 and accompanying text (discussing the history of the Confrontation Clause and its importance).

285. *See infra* notes 286–87 and accompanying text (discussing some possible ways to mitigate the intrusion caused by forcing a Muslim witness to unveil).

286. This is where an understanding of the veiled witness's cultural and religious background is

difficulty lies in this task of developing solutions to the intrusion, as most Muslim women who wear the veil during trial simply do not want to be seen.[287] If America's adversarial system is to operate properly, it is impossible to fully accommodate the Muslim witness who unveils. This is because the trier of fact, counsel, and the defendant must see the witness's face. Keeping this in mind, it is possible for courts to employ similar procedures used in cases like *Craig* and *Coy* in order to limit the intrusion. Thus, a screen could block the witness from the majority of the courtroom. Alternatively, the witness could sit in a separate room and have her video testimony broadcasted on a television that only certain people in the courtroom could see.

There are also possibilities beyond *Craig* and *Coy*. For example, the judge could order the audience out of the courtroom on the day the Muslim woman gives her testimony. This would also involve restricting court reporters and any type of sketch artists. Also, the judge may permit a Muslim woman to bring down *only* the necessary portions of the veil, so that that rest of her body stays as covered up as possible. Another possibility is for the judge to monitor how much the veiled witness's testimony is being used by the prosecution in trial, and limit it as much as possible. This would prevent the excessive intrusion that would occur if the unveiled witness were compelled to sit on the stand for an unnecessary amount of time. Additionally, the judge could arrange special seating in the courtroom so that the unveiled witness can only be seen by the relevant parties.

Admittedly, the above solutions do not remove the core of the intrusion, as the witness is still being forced to unveil against her religion. At the very least, judges and counsel should be sensitive of the impact the Confrontation Clause may have on Muslim women who view veiling as a religious obligation.

VII. CONCLUSION

The Confrontation Clause is designed to protect people like Brian Taylor,[288] and that protection cannot be taken lightly.[289] While remaining

extremely helpful. *See supra* notes 26–83 and accompanying text (generally discussing Islam and the veil).

287. *See supra* notes 260–66 and accompanying text.

288. *See supra* note 1 and accompanying text.

289. "The purpose of enshrining this protection in the Constitution was to assure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant's right to face his or her accusers in court." Maryland v. Craig, 497 U.S. 836, 861 (1990) (Scalia, J., dissenting).

sensitive to those women who are trying to exercise their deeply held religious beliefs, we cannot forget what the Supreme Court has construed the Confrontation Clause to clearly guarantee: a witness cannot "hide behind the shadow" and should be compelled to "look [the defendant] in the eye while giving accusatory testimony."[290]

The veil creates such a shadow, and it threatens the very nature of our adversarial system. When we begin allowing certain exceptions to apply to our fundamental and deeply rooted values, the fabric of our country begins to unravel. We cannot forget that while our country and laws promote acceptance, tolerance, and fairness, there are points where we must stand our ground.[291] The Confrontation Clause is one of those grounds where we should budge very little.[292] If we become too careless, we risk destroying the integrity of our legal system.[293] When life and liberty are on the line, this is unacceptable.

The debate presented in this article is more than a simple intellectual exercise.[294] American courts must be prepared to face the veiled witness because the issue will eventually arise. Thousands of Muslims continue to enter our borders and integrate themselves into our society,[295] and the veil continues to be a part of that integration.[296] The increasing "flattening" of our world today[297] and America's involvement in the development of the Middle East only further the importance of the issue. We cannot simply isolate ourselves from the rest of the world, especially when it comes to fundamental beliefs.

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290. Romero v. State, 173 S.W.3d 502, 505 (Tex. Crim. App. 2005) (citing Coy v. Iowa, 487 U.S. 1012, 1018 (1988)).

291. As Justice Scalia emphasized in *Coy*, "face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult." Coy v. Iowa, 487 U.S. 1012, 1020 (1988). In order to respect the religion of one group, would we deny the ability to "confound and undo [a] false accuser" to *any* criminal defendant who happens to face a Muslim accuser? Keeping in the mind the Constitution's explicit guarantees and our nation's heavy emphasis on the right of confrontation, we must favor the criminal defendant. "It is a truism that constitutional protections have costs." *Id.*

292. It is for this very reason that the U.S. Supreme Court laid out such a strict test in *Craig*.

293. "For good or bad, the Sixth Amendment requires confrontation, and we are not at liberty to ignore it." Maryland v. Craig, 497 U.S. 836, 870 (1990).

294. The value, meaning, and originality of law review articles have been attacked for being "overstated." *See generally* E. Joshua Rosenkranz, *Law Review's Empire*, 39 HASTINGS L.J. 859 (1988). As one critic writes, "The dearth of originality in student notes should not be surprising. The student is permitted to say practically nothing that has not been said before. He must prove that it was not his idea by dropping a footnote citing the source that already said it." *Id.* at 909–10.

295. "In 2005, more people from Muslim countries became legal permanent U.S. residents . . . than in any year in the previous two decades." Elliott, *supra* note 31 and accompanying text.

296. *See id.*

297. *See generally* THOMAS L. FRIEDMAN, THE WORLD IS FLAT (2005).

As Muslims continue to join America's ranks, our laws must welcome them.[298] Yet while America must embrace diversity, its fundamental laws must not become lost in the sea of change. As the United States Supreme Court reminds us:

> Our Constitution is a covenant running from the first generation of Americans to us and then to future generations. It is a coherent succession. Each generation must learn anew that the Constitution's written terms embody ideas and aspirations that must survive more ages than one. We accept our responsibility not to retreat from interpreting the full meaning of the covenant in light of all of our precedents. We invoke it once again to define the freedom guaranteed by the Constitution's own promise, the promise of liberty.[299]

In upholding this covenant, we must continue to protect the liberty of America's criminal defendants. We must confront the shadow.

Steven R. Houchin[300]

298. As one author argues, "[A]n increasing number of cases will emerge in coming decades in which the religious practices of major religions will come into more 'accidental' contact with ancillary aspects of law and that these conflicts risk causing religious organizations and people to opt out of public life, thereby threatening democratic participation." McCusker, *supra* note 11, at 392.

299. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 901 (1992).

300. J.D. candidate, 2009, Pepperdine University School of Law. This Comment is dedicated first and foremost to my parents; without their never-ending love and support none of my accomplishments would be possible. I also thank my brother and best friend Nicholas, who never fails to keep everything in perspective with his love and laughter. Special thanks to Brittany DeBeikes, for her uncompromising love and support throughout the entire article writing process; to my law school companion, Marilena Fallaris, for her constant faith, encouragement, and constructive commentary; to Katie Benton, for enduring the process with me from beginning to end; to Tarak Anada, for imparting upon me his unique approach to law review articles; to my roommates, Brian Barr and Alex Willens, for their constant brotherly love and support; and to Juan and Angel Vasquez and family in Watts, Los Angeles. I also thank all of the professors, friends, and family who have lent me their encouragement over the years—it truly means the world to me.