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YOU MAY NOW “CALL” YOUR NEXT WITNESS: ALLOWING  
ADULT RAPE VICTIMS TO TESTIFY VIA TWO-WAY  
VIDEO CONFERENCING SYSTEMS

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**I. INTRODUCTION**

Adult rape is serious problem in the United States.<sup>1</sup> Unfortunately, many victims of adult rape do not report their attack to the police.<sup>2</sup> Even when victims report their attacks to the police, few reports lead to an arrest.<sup>3</sup> When victims do report their attacks, and police apprehend the attackers and make arrests, victims still have to repeat the horrific events to multiple parties, including their lawyers, the police, their friends, their families, and the courts, in the same rooms as their attackers.<sup>4</sup>

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<sup>1</sup> See *Sexual Assault Statistics*, RAINN (2014), archived at <http://perma.cc/J87V-VX6Y> (describing that every 107 seconds an American is sexually assaulted).

<sup>2</sup> See *id.* (highlighting that out of every 100 rapes, only 32 get reported to the police).

<sup>3</sup> See *id.* (acknowledging that out of every 100 rapes, only 2 lead to an arrest).

<sup>4</sup> See MEG GARVIN ET AL., NAT’L CRIME VICTIM LAW INSTITUTE, ALLOWING ADULT SEXUAL ASSAULT VICTIMS TO TESTIFY AT TRIAL VIA LIVE VIDEO TECHNOLOGY 1 (2011) (noting that “testifying in court can be particularly traumatic for rape victims,” which forces the victim to relive the crime both mentally and emotionally).

Hundreds of thousands of adult rapes are reported every year.<sup>5</sup> While this number is astonishing, the actual occurrence is even greater because many victims' fail to report their attack for fear of having to testify in court.<sup>6</sup> Additional traumatic physical and emotional responses to rape prevent many adult victims from reporting the attack.<sup>7</sup> Because perpetrators have the Constitutional right to confront their accusers, victims must testify against their attackers to find justice.<sup>8</sup> Rape victims are increasingly testifying remotely using video conferencing technology, which enables them to participate in courtroom proceedings and interact without being physically present, including giving testimony and being cross examined.<sup>9</sup>

Video conferencing abilities are becoming increasingly utilized in the courtroom.<sup>10</sup> Even though it solves the issue of victims' reoccurring trauma caused by testifying in the same room as their attacker, many courts are still skeptical of using video conferencing.<sup>11</sup> This Note challenges the argument against video conferencing technology in courtrooms, and it reinforces the urgency of using video conferencing in court for adult rape victims who wish to avoid the

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<sup>5</sup> See *Sexual Assault Statistics*, *supra* note 1 (declaring that every year there are approximately 293,000 victims of sexual assault).

<sup>6</sup> See GARVIN ET AL., *supra* note 4, at 1 (setting forth that less than 20 percent of rapes committed against adults are reported to law enforcement).

<sup>7</sup> See GARVIN ET AL., *supra* note 4, at 1 (explaining that "Post Traumatic Stress Disorder (PTSD) is a common consequence" for rape victims, which results in "depression, substance abuse, suicidal thoughts or behavior," and physical problems, such as "chronic pelvic pain, gastrointestinal disorders and hypertension").

<sup>8</sup> See U.S. CONST. amend. VI (granting the accused the right to confront witnesses against him).

<sup>9</sup> See GARVIN ET AL., *supra* note 4, at 1 (noting that allowing adult sexual assault victims to testify via live video technology would mitigate the trauma experienced from testifying in the defendant's physical presence).

<sup>10</sup> See Joe Beck, *New video system up and running*, THE NORTHERN VIRGINIA DAILY (Sept. 17, 2014), archived at <http://perma.cc/7TGK-J4VT> (describing new video conferencing technology in Virginia that allows inmates in jail to testify in court via live video feed). Using video conferencing in this jail, the defendant was able to "see and hear everything and communicate through equipment on his end of the connection." *Id.* Minor preliminary matters were handled quickly, causing less stress for attorneys, less travel time for inmates, and less time spent on each case.

<sup>11</sup> See Jamie Walker & Laura Carlsen, "Can I Testify via Skype?" *Using Videoconferencing Technology to Enhance Remote Witness Testimony*, NWSIDEBAR (June 11, 2014), archived at <http://perma.cc/9Y4N-AYYS> (asserting that courts are skeptical of video conferencing due to security concerns and because many courts are not equipped with such capabilities).

physical presence of their attacker by alternatively confronting their digital presence.<sup>12</sup> Part Two examines the history and development of video conferencing systems in the courtroom, as well as the allowance of child rape victims' to testify through video conferencing.<sup>13</sup> Part Three discusses the technology itself and explores the effect that seeing their offender again can have on an adult rape victim.<sup>14</sup> Part Four analyzes the benefits and drawbacks of using video conferencing for adult rape victims and emphasizes that a victim's traumatic experiences should not be exacerbated by forcing the victim to physically sit in the same room as their attacker.<sup>15</sup> Ultimately, this Note will advocate for courts and legislatures to adopt a federal or additional state statutes allowing adult rape victims to testify using video conferencing as an alternative to in-person court testimony.<sup>16</sup>

## II. HISTORY

### A. The Evolution of Video Conferencing

Video conferencing dates back to the 1970s and has rapidly been evolving since.<sup>17</sup> Beginning in 1972, Illinois courts began experimenting with video conferencing, which they used for bail hearings.<sup>18</sup> Ten years later, in 1982, video conferencing evolved even more, and the usage of two-way video conferencing television – as

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<sup>12</sup> See *infra* Part V (suggesting adult rape victims should be granted the opportunity to testify using video technology to reduce the side effects of PTSD).

<sup>13</sup> See *infra* Part II (highlighting the authority given to children victims to testify through video conferencing technology and exploring the history of video technology abilities).

<sup>14</sup> See *infra* Part III (analyzing the various forms of video conferencing technology and the effects of PTSD).

<sup>15</sup> See *infra* Part IV (identifying the pros and cons of video testimony for adult rape victims, and the gravity of forcing a victim to testify in the presence of their attacker).

<sup>16</sup> See *infra* Part V (concluding that the usage of video conferencing technology should be allowed to mitigate the negative effects that testifying in court can have on adult rape victims).

<sup>17</sup> See Daniel Devoe & Sarita Frattaroli, *Videoconferencing in the Courtroom: Benefits, Concerns, and How to Move Forward*, SOCIAL LAW LIBRARY, at 1-4, archived at <http://perma.cc/2SUJ-6MHP> (highlighting that videoconferencing is becoming the norm in courtrooms and has greatly evolved).

<sup>18</sup> See Michael D. Roth, Comment, *Laissez-Faire Videoconferencing: Remote Witness Testimony and Adversarial Truth*, 48 UCLA L. REV. 185, 192 (2000) (noting that judicial experimentation with remote testimony began in Illinois).

opposed to one-way video conferencing –began in Florida.<sup>19</sup> Although at first video conferencing was problematic, the technology now is far more sophisticated and advanced, and is becoming more widely used.<sup>20</sup>

Video conferencing is used in a variety of scenarios beyond criminal cases, including non-trial proceedings.<sup>21</sup> In 1996, the Federal Rules of Civil Procedure began to allow remote witness testimony in civil cases for good cause.<sup>22</sup> Video conferencing is more frequently used in civil cases because there are fewer constitutional concerns.<sup>23</sup> Furthermore, increasing numbers of courts have allowed video conferencing for immigration removal proceedings<sup>24</sup> and mediation.<sup>25</sup> Additionally, for both civil and criminal proceedings, video conferencing abilities are used when Circuit judges sit in different, farther away courthouses from each other, which helps relieve travel costs and time spent traveling to different courthouses.<sup>26</sup> The use of

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<sup>19</sup> See *id.* (highlighting that the technology was used for first appearances in misdemeanor cases).

<sup>20</sup> See Roth, *supra* note 18, at 204-05, 218-19 (indicating that early models had audio and video synching issues, low-resolution images, and involved numerous cameras and limited visibility). In one civil commitment hearing, an inmate could only see one image at a time, which was either the judge or the witness. *Id.* This caused skepticism on the advantages of the program. *Id.*

<sup>21</sup> See Roth, *supra* note 18, at 193 (describing that while Federal Rule Of Criminal Procedure Rule 43 requires the presence of the defendant, the presence can be considered using video conferencing if the defendant consents, or if it is necessary). Additionally, courts have allowed video conferencing during parole revocation hearings. *Id.*

<sup>22</sup> See FED. R. CIV. P. 43(a) (declaring that in civil cases where good cause is shown in compelling circumstances and upon appropriate safeguards, remote witness testimony may be allowed); see also WASH. CT. R. 43 (allowing use of remote testimony in civil cases, by live transmission, under compelling circumstances).

<sup>23</sup> See Devoe & Frattaroli, *supra* note 17, at 12 (recognizing that this is a tremendous cost saving device and helps backed-up courts). Additionally, because criminal procedure protections do not apply, Federal Rule of Civil Procedure 43 allows for testimony through video conferencing as long as good cause is shown in compelling circumstances and there are appropriate safeguards in place. *Id.* at 16.

<sup>24</sup> See Devoe & Frattaroli, *supra* note 17, at 18 (noting that because the number of immigration proceedings have increased, the option to use video conferencing saves time and resources).

<sup>25</sup> See Devoe & Frattaroli, *supra* note 17, at 21 (discussing that video conferencing for mediation is beneficial because of the cost and time savings for participants).

<sup>26</sup> See Devoe & Frattaroli, *supra* note 17, at 17 (highlighting the Ninth Circuit, where video conferencing is common because the judges sit farther distances from each other).

video conferencing in criminal proceedings is gaining popularity because of its benefits, and further advancement of the technology allows a greater ease of use and quality.<sup>27</sup> In Hawaii, for example, there is a criminal statute that gives victims and witnesses in criminal proceedings the right to testify at trial through two-way video conferencing.<sup>28</sup>

Courts have also allowed video conferencing when a witness or defendant would bear a hardship in traveling due to health conditions.<sup>29</sup> A Washington court held in 2014 that a mother could testify via video conferencing because she showed good cause that her son's health created a hardship while traveling.<sup>30</sup> In another case, the court allowed an elderly man to testify using Skype video conferencing technology because of a stroke that left him too weak to stand.<sup>31</sup> While poor health is a compelling circumstance, travel distance combined with poor health has also been persuasive in allowing testimonial video conferencing in court.<sup>32</sup>

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<sup>27</sup> See Beck, *supra* note 10 (pointing to a Virginia jail that has recently implemented video conferencing technology that allows inmates to take part in preliminary matters in a quick and expeditious manner). The reviews of this technology have been overwhelmingly positive, and the allowance of this technology avoids attorneys, prosecutors, and judges from wasting time waiting for prisoners to be transported. *Id.*

<sup>28</sup> See HAW.REV.STAT. § 801D-7 (2014) (establishing that "victims and witnesses shall have the right to testify by televised two-way closed circuit video to be viewed by the court, the accused, and the trier of fact").

<sup>29</sup> See *United States v. Gigante*, 166 F.3d 75, 80 (2d Cir. 1999) (explaining that because the defendant's medical reports and testimony showed that he could not appear in court due to his poor health, including fatal cancer, the court was appropriate in allowing the defendant to testify via video conferencing).

<sup>30</sup> See *In re Marriage of Swaka*, 179 Wash. App. 549, 557 (2014) (holding that because the respondent showed good cause in that traveling from Spain to Washington to testify in a relocation trial would cause she and her family considerable hardships, she was allowed to testify via video technology). Additionally, the court held that a significant inconvenience may be a factor that the court considers in allowing video conferencing. *Id.*

<sup>31</sup> See Rachel M. Zahorsky, *Bedridden man uses video chat provider Skype to testify against wife in court*, A.B.A. J. (Feb. 13, 2013), archived at <http://perma.cc/BWX6-3R7B> (concluding that because of the compelling circumstance, the man was allowed to testify via Skype using an iPad in the protection order case against his wife).

<sup>32</sup> See Ken McLemore, *Skype used as courtroom tool*, HOPE STAR (Apr. 1, 2013), archived at <http://perma.cc/K9MW-6L4R> (citing a first degree murder case where the witnesses were all far distances from each other were allowed to use video con-

## B. Children Rape Victims May Testify Via Video Conferencing

In 1988, the Supreme Court held in *Coy v. Iowa* that as a general rule, a defendant is guaranteed under the Confrontation Clause to the right to face-to-face confrontation.<sup>33</sup> In *Coy*, two minor sexual assault victims testified behind a screen, so that the defendant could barely see the witnesses and the witnesses could not see the defendant at all.<sup>34</sup> After being convicted, the Court found that the defendant's right to a face-to-face encounter was violated, finding that the defendant and witness must be able to see and hear each other.<sup>35</sup> Then, in 1990, the Supreme Court decided in *Maryland v. Craig* that children rape and sexual assault victims were permitted to testify through one-way closed-circuit television ("CCTV").<sup>36</sup> The Court held that this was constitutional because children are likely to suffer from severe emotional distress in testifying that would render them unable to reasonably communicate.<sup>37</sup> The one-way CCTV allowed the court to see each witness, although the witness could not see the courtroom or the defendant.<sup>38</sup> The defendant could see the witness<sup>39</sup> and all rulings were made as though the child was present in the courtroom.<sup>40</sup> The Court noted that the defendant's constitutional

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ferencing). The court noted that the conservation of the witness's time and the resources of the State made the usage beneficial to all. *Id.*

<sup>33</sup> See *Coy v. Iowa*, 487 U.S. 1012, 1016-22 (1988) (noting the first of two cases that the Supreme Court heard that dealt with a criminal defendant's constitutional right to confront his accusers).

<sup>34</sup> See *id.* at 1015 (noting that the screen gave the defendant only a glimpse at his accusers).

<sup>35</sup> See *id.* at 1016 (holding that "the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact").

<sup>36</sup> See *Maryland v. Craig*, 497 U.S. 836, 843 (1990) (holding that children victims are less able to communicate effectively and suffer from serious emotional distress).

<sup>37</sup> See *id.* at 843 (determining that children undergo serious emotional distress from face-to-face communication with the defendant and denying that face-to-face must be "eyeball-to-eyeball").

<sup>38</sup> See GARVIN ET AL., *supra* note 4, at 2 (discussing the framework for the *Craig* case).

<sup>39</sup> See Hadley Perry, Notes & Comments, *Virtually Face-to-Face: The Confrontation Clause and the Use of Two-Way Video Testimony*, 13 ROGER WILLIAMS U. L. REV. 565, 566 (2008) (describing the use of the one-way video testimony procedure).

<sup>40</sup> See *id.* (noting the procedures for one-way video testimony are different from two-way video testimony).

rights were not violated due to using the video testimony because it was necessary to further an important public policy, which was to protect the child from further trauma.<sup>41</sup> Additionally, the Court determined that the state's interest in protecting the children rape victims was sufficiently important to outweigh the defendant's right to physically face his or her accusers in court.<sup>42</sup>

While the Court made this determination, it held that trial courts must conduct an evidentiary hearing to ensure that these findings of necessity were case-specific.<sup>43</sup> The framework established in *Craig* was the appropriate standard to create because the protection of child sexual abuse victims was fundamental and many child abuse cases go unreported to the police.<sup>44</sup> In its holding, the Court determined that the physical confrontation right was "not an indispensable element of the right to confront one's accusers."<sup>45</sup> The *Craig* case ultimately determined two requirements for a child sexual abuse victim to be able to testify via one-way CCTV: 1) denying a defendant's confrontation right must be necessary to further a public policy interest and 2) the testimony must be reliable.<sup>46</sup>

### C. Rape Trauma Syndrome and Post Traumatic Stress Disorder (PTSD)

Rape is one of the most terrifying crimes that can be committed against a person.<sup>47</sup> The mental and physical effects of being

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<sup>41</sup> See GARVIN ET AL., *supra* note 4, at 3 (explaining that the Court determined that the proper case-specific finding of necessity was made).

<sup>42</sup> See *Craig*, 497 U.S. at 853 (asserting that the Court wanted to protect the child victim from further trauma).

<sup>43</sup> See *id.* at 855 (determining the trial courts should be cautious and ensure that the trauma is more than "de minimis").

<sup>44</sup> See Lisa Hamilton Thielmeyer, Note, *Beyond Maryland v. Craig: Can and Should Adult Rape Victims Be Permitted to Testify by Closed-Circuit Television?*, 67 IND. L.J. 797, 802 (1992) (noting that the prosecution of child sexual abuse cases are difficult because the child victim's testimony is often the only real admissible and relevant evidence available).

<sup>45</sup> See Jessica Smith, *Remote Testimony and Related Procedures Impacting a Criminal Defendant's Confrontation Rights*, ADMINISTRATION OF JUSTICE BULLETIN, Feb. 2013, at 4 (highlighting the *Craig* Court's desire to protect child sexual abuse victims).

<sup>46</sup> See *id.* (describing the framework and requirements set forth in *Craig*).

<sup>47</sup> See Thielmeyer, *supra* note 44, at 811 (citing Sagarin, *Forcible Rape and the Problem of the Rights of the Accused*, in FORCIBLE RAPE 142 (1977)) (stating that

raped are known as Rape Trauma Syndrome (RTS).<sup>48</sup> RTS begins immediately after the attack in the Acute stage, with the victim feeling shock, fear, soreness and confusion.<sup>49</sup> In the next stage, known as the Underground stage, the victim attempts to return to his or her normal life, attempts to forget about the rape, avoids discussing the attack, and avoids normal routines as a way to get back to normal.<sup>50</sup> In the Reorganization stage, the victim returns to a phase of turmoil, which can, arguably, be exasperated by receiving a subpoena to testify or by seeing his or her attacker on the street.<sup>51</sup> Finally, in the Development stage, the victim suffers issues of trust, power, control and independence, which can increase or decrease depending on the severity of the attack and the victim's support systems.<sup>52</sup>

Following a rape, adult victims suffer numerous serious mental and physical symptoms.<sup>53</sup> Post Traumatic Stress Disorder (PTSD) is common among adult rape victims.<sup>54</sup> About one-third of rape vic-

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the consequences of rape remain with the victim for years, or even a lifetime, and account for severe psychological problems).

<sup>48</sup> See KING CTY. SEXUAL ASSAULT RESOURCE CTR., RAPE TRAUMA SYNDROME 1 (explaining Rape Trauma Syndrome, a phrase coined by therapists Ann Burgess and Lynda Holmstrom to describe the symptoms experienced by rape victims).

<sup>49</sup> See *id.* (highlighting the effects of the victim immediately after the attack, also referred to as the Acute stage).

<sup>50</sup> See *id.* at 2 (noting that in the Underground stage, the common theme is avoidance of the rape).

<sup>51</sup> See *id.* (stressing that during the Reorganization stage, the victim suffers from severe fears and phobias, and can experience feelings of self-blame and guilt).

<sup>52</sup> See *id.* at 2-3 (providing that victims experience the Development stage differently based on the impact of the rape and support systems in place).

<sup>53</sup> See COMMUNITY CRISIS CTR., RAPE TRAUMA SYNDROME 2 (providing the symptoms suffered after a rape, including shame, guilt, depression, disturbed sleep, fear of future dating scenarios, anger, self-blame, fear of facing their assailant, disturbed eating abilities and inability to focus); see also AMANDA KONRADI, TAKING THE STAND: RAPE SURVIVORS AND THE PROSECUTION OF RAPISTS 34 (2007) (highlighting that adult rape victims who suffer from Rape Trauma Syndrome experience symptoms such as the inability to speak in complete sentences or convey whole thoughts; being incoherent, disorganized, and dazed; inability to plan the future; and other physical problems such as shaking uncontrollably, nausea and vomiting, feeling numb, breathlessness, elevated blood pressure, hysteria, dispassion, and running on "automatic pilot").

<sup>54</sup> See AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 271-72 (5th ed. 2013) [hereinafter DSM-V] (explaining the criterion for PTSD following direct exposure to sexual violence); see also Sarah E. Ullman & Henrietta H. Filipas, *Predictors of PTSD Symptom Severity and Social*

tims experience PTSD,<sup>55</sup> and are more likely to suffer from PTSD than those who experience other traumatic events.<sup>56</sup> Due to the inherently intrusive nature of rape, many victims experience some form of PTSD after their attack.<sup>57</sup> In particular, adult victims who suffer from PTSD experience flashbacks following their attack.<sup>58</sup> These flashbacks give the victim the same feeling of helplessness as they had at the time of the attack, leaving them unable to discern the difference between the flashback and reality.<sup>59</sup> Flashbacks are triggered by certain scenarios and lead the victim to avoid any similar circumstances.<sup>60</sup>

Additionally, many adult rape victims experience PTSD when asked to face their perpetrator in court.<sup>61</sup> As a result of having to testify in their attacker's presence, many adult victims suffer from the heightened trauma of being in the courtroom with their attacker.<sup>62</sup> Testifying in court leaves adult rape victims feeling intense symp-

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*Reactions in Sexual Assault Victims*, 14 J. OF TRAUMATIC STRESS 369 (2011) (recognizing that one-third of rape victims experienced PTSD).

<sup>55</sup> See Dean G. Kilpatrick, *The Mental Health Impact of Rape*, NATIONAL VIOLENCE AGAINST WOMEN PREVENTION RESEARCH CENTER (2000), archived at <http://perma.cc/V8Y6-34QT> (commenting that 31 percent of rape victims experience some form of PTSD).

<sup>56</sup> See *id.* (noting that the effects of rape, such as the threat to one's life, is more likely to cause PTSD than other traumatic experiences).

<sup>57</sup> See *id.* (highlighting that because rape invades a person's privacy and is inherently intrusive, PTSD is common after a rape).

<sup>58</sup> See *Post Traumatic Stress Disorder in Rape Survivors*, AMERICAN ACADEMY OF EXPERTS IN TRAUMATIC STRESS (2014), archived at <http://perma.cc/X72S-XJJU> (asserting that the intrusive symptom of a flashback can result in the victim being unable to decipher whether the flashback is real and noting that its vividness causes many survivors to have emotional breakdowns).

<sup>59</sup> See *id.* (proffering that the flashback can occur in the form of a nightmare or when triggered by something in their environment).

<sup>60</sup> See *id.* (highlighting that "triggers can be people, places, sounds, images, feelings, smells, tastes, films, animals, the tone of someone's voice, body positions or sensations, weather conditions, time factors, or any combination of things that even remotely resemble traumatic experiences").

<sup>61</sup> See GARVIN ET AL., *supra* note 4, at 1-2 (finding that when an adult rape victim must recall their personal details of the rape in court, many victims felt "as though the sexual assault [is] recurring" and re-experience "a lack of control and terror").

<sup>62</sup> See GARVIN ET AL., *supra* note 4, at 4 (providing that because rape is a significant social problem in the United States, studies have revealed that the heightened trauma experienced is a direct result of having to testify in the defendants' physical presence).

toms of PTSD.<sup>63</sup> Many adult victims feel powerless and embarrassed while recalling the rape experience in court in front of a judge, jury, friends, family and their attacker.<sup>64</sup> Introducing tangible evidence into trial can also trigger PTSD, causing a sense of powerlessness and fear similar to the time of the attack.<sup>65</sup>

#### D. Constitutionality

The right to confront one's accusers originated in Massachusetts during the Salem Witch trials.<sup>66</sup> While the Constitution in 1778 did not include the Confrontation Clause, the ratification of the Constitution included the Sixth Amendment, which encompasses the Confrontation Clause.<sup>67</sup> Under the Sixth Amendment to the Constitution, a defendant is guaranteed the right to confront witnesses against him.<sup>68</sup> The right to confront applies to all state prosecutions through the Fourteenth Amendment.<sup>69</sup> In *Crawford v. Washington*, the Supreme Court was confronted with the question of whether an out-of-court recorded statement violated the defendant's right to confront.<sup>70</sup> The Court held that the statement did violate the defendant's right to confront, reasoning that testimonial statements made out-of-court

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<sup>63</sup> See KONRADI, *supra* note 53, at 99 (stating that victims felt extreme fear, anger, embarrassment, frustration and anxiety in their court appearances).

<sup>64</sup> See KONRADI, *supra* note 53, at 99 (noting that encountering the defendant and interacting with the defense attorney leaves the victim feeling intense emotional symptoms of PTSD).

<sup>65</sup> See KONRADI, *supra* note 53, at 100 (explaining that when tangible evidence, such as police photographs of their bodies, is introduced at trial, victims suffer symptoms of PTSD).

<sup>66</sup> See WITCH-HUNTING IN SEVENTEENTH-CENTURY NEW ENGLAND 130 (David D. Hall ed., 1st ed. 1991) (explaining that the Massachusetts legislature issued a mandate requiring the accused to be given the opportunity to face their accusers before conviction).

<sup>67</sup> See Daniel H. Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381, 399-400 (1959) (describing the introduction of the Sixth Amendment).

<sup>68</sup> See U.S. CONST. amend. VI (establishing that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him").

<sup>69</sup> See *Pointer v. Texas*, 380 U.S. 400, 403 (1965) (reiterating that the Sixth Amendment is made applicable to the states through the Fourteenth Amendment).

<sup>70</sup> See *Crawford v. Washington*, 541 U.S. 36, 49 (2004) (holding that an out-of-court statement that is "testimonial" in nature cannot be admitted unless the defendant is able to cross-examine them prior).

were not admissible unless the witness is unavailable to testify and the defendant was able to previously cross-examine them.<sup>71</sup>

While the Sixth Amendment establishes the Confrontation Clause, video conferencing does not impinge this right.<sup>72</sup> In *Craig*, the Supreme Court determined that the Confrontation Clause does not expressly prohibit video conferencing for witnesses.<sup>73</sup> The Court also noted that the defendant still maintained their right to observe, cross-examine, and let the jury view the witness.<sup>74</sup> Additionally, *Craig* does not limit its application to cases with child victims or one-way closed-circuit television.<sup>75</sup>

As a result of the *Craig* decision, Congress enacted a Child Witnesses' Rights Act, which gives child witnesses the ability to testify through a two-way closed-circuit television or by videotaped deposition and has withstood constitutional challenges.<sup>76</sup> Similarly, the federal government and most states have enacted statutes establishing alternative methods for children or sensitive witnesses to testify other than live testimony.<sup>77</sup> Notwithstanding these statutes, the Supreme Court has yet to establish whether remote video conferencing applies to adults.<sup>78</sup> Additionally, the Supreme Court has declined to allow proposed changes in 2002 to the Federal Rules of Criminal

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<sup>71</sup> See *id.* at 68 (noting that the statement was hearsay and "testimonial" in nature).

<sup>72</sup> See *Craig*, 497 U.S. at 853 (noting that the testimony must still be reliable and there must be a specific necessity for the use of video conferencing).

<sup>73</sup> See *id.* at 849 (holding that the right to confront accusers face-to-face is not absolute).

<sup>74</sup> See *id.* at 843 (confirming that while the defendant was unable to physically confront the witness, other aspects were the same). The Court also highlighted public policy reasons for using videoconferencing, including the trauma that would be inflicted in forcing a child to testify with the attacker physically present). *Id.*

<sup>75</sup> See *People v. Wrotten*, 923 N.E.2d 1099, 1103 (N.Y. 2009) (holding that the public policy in criminal cases may require live two-way video testimony, which is not prohibited or limited by *Craig*).

<sup>76</sup> See 18 U.S.C. § 3509(b) (1994) (allowing children to testify through a two-way closed circuit television if the child is unable to testify in open court with the defendant present). This statute notes reasons a child may be unable to testify, including fear, emotional trauma, mental or other infirmities, or the defendant's conduct. *Id.*

<sup>77</sup> See Carol A. Chase, *The Five Faces of the Confrontation Clause*, 40 HOUS. L. REV. 1003, 1020-24 (2003) (providing federal and state statutes that are available).

<sup>78</sup> See Smith, *supra* note 45, at 7 (reinforcing the fact that the Supreme Court has not determined what the appropriate analysis is to apply to two-way remote testimony for adults).

Procedure to allow remote testimony in Rule 26, which focused on remote testimony.<sup>79</sup>

In *United States v. Gigante*, the Second Circuit concluded that because the witness had poor health, he was allowed to testify through a two-way closed-circuit television.<sup>80</sup> There is no established standard for whether two-way video testimony satisfies the Confrontation Clause,<sup>81</sup> although Courts have determined rationales that are insufficient to satisfy the public policy standard in *Craig*.<sup>82</sup> Other public policy interests that courts have considered to warrant live video testimony include national security and the physical and welfare of witnesses with mental illnesses.<sup>83</sup>

Beginning in the 1970s and 1980s, rape shield laws were enacted to protect victims of sex crimes.<sup>84</sup> The purpose of the rape shield law is to exclude evidence of a victim's sexual behavior, history or reputation.<sup>85</sup> The Federal Rules of Evidence Rule 412 only allows the sexual history of the victim to be admitted when required by due process, otherwise the sexual history of the victim is prohibited unless constitutionally required or offered to show that someone other than the defendant caused the injury.<sup>86</sup> The rape shield law has survived constitutional challenges, even though the law is criticized for violating the Confrontation Clause by granting rape victims spe-

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<sup>79</sup> See Smith, *supra* note 45, at 6 (explaining that Rule 26 of the Federal Rules of Criminal Procedure, which revolves around taking testimony, was not changed in 2002 by the Judicial Conference of the United States to include remote testimony).

<sup>80</sup> See *Gigante*, 166 F.3d at 80 (highlighting that the defense, jury, and judge were all able to hear and see the witness).

<sup>81</sup> See *Horn v. Quarterman*, 508 F.3d 306, 315 (5th Cir. 2007) (noting that the Supreme Court has not specifically addressed the use of two-way closed-circuit television).

<sup>82</sup> See Smith, *supra* note 45, at 11 (explaining that convenience, mere unavailability, cost savings, and general law enforcement do not satisfy the public policy justification established in *Craig*).

<sup>83</sup> See *GARVIN ET AL.*, *supra* note 4, at 3 (indicating that "national security, the just resolution of criminal cases, and the physical and mental welfare of ill or mentally challenged witnesses" are interests and policies that have been identified by courts as warranting the use of live video conferencing).

<sup>84</sup> See Lukas Saunders, *Rape Shield Laws: Protecting Sex-Crime Victims*, NOLO, archived at <http://perma.cc/D9J2-C8DR> (setting forth the definition and requirements of Rape Shield Laws).

<sup>85</sup> See *id.* (noting that although there are exceptions, evidence of victims' past sexual conduct is inadmissible at trial).

<sup>86</sup> See FED. R. EVID. 412 (stating evidence of victim's past sexual behavior, history or reputation is admissible in limited circumstances).

cial protection.<sup>87</sup> The public policy of rape shield laws is to protect rape victims from an embarrassing and unnecessary intrusion into their private life – a sufficiently important public policy concern that outweighs the Sixth Amendment right to confront.<sup>88</sup> Between the Sixth Amendment to the Constitution, the Child Witness’ Rights act, the Federal Rules of Evidence, and rape shield laws, courts have clearly begun to recognize the issue of protecting victims of rape while protecting the rights of the accused.

### III. PREMISE

#### A. Video Conferencing

Video conferencing uses audio and video technology to communicate directly from one location to another.<sup>89</sup> Video conferencing uses Integrated Services Digital Network (ISDN) or Internet Protocol (IP) data connections.<sup>90</sup> Most advanced equipment uses both connections, although one alone is sufficient.<sup>91</sup> The simplest form of video conferencing, known as “point-to-point,” requires only a microphone, visual display, and video conferencing hardware at each end of the camera.<sup>92</sup> For a more advanced, “multi-point” connection, there must be a master control unit or the use of commercial bridging services to connect.<sup>93</sup>

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<sup>87</sup> See *Doe v. United States*, 666 F.2d 43 (4th Cir. 1981) (reversing the admission of evidence that was reputation or opinion about the victim’s prior sexual behavior).

<sup>88</sup> See *Michigan v. Lucas*, 500 U.S. 145, 150 (1991) (reasoning that rape victims “deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy”).

<sup>89</sup> See Roth, *supra* note 18, at 189 (discussing video conferencing “at its most basic level”).

<sup>90</sup> See Fredric Lederer, *The Legality and Practicality of Remote Witness Testimony*, THE PRACTICAL LITIGATOR, Sept. 2009, at 20 (describing the technology of video conferencing).

<sup>91</sup> See *id.* (explaining that high-end commercial level equipment is capable of using both IP and ISDN data connections). Additionally, high-end video conferencing abilities allow the “concurrent transmission of computer images, whether of digital documents or of PowerPoint or similar electronic slides” that may benefit the trial. *Id.*

<sup>92</sup> See *id.* (stating that single location-to-location connections require the most basic form of hardware and equipment, and each end must be connected to the Internet).

<sup>93</sup> See *id.* (highlighting the differences between multi-point and point-to-point connections).

The equipment used in video conferencing must present a high quality image that is synchronized with the audio to ensure the full effect is given to the jury.<sup>94</sup> With advances in video conferencing technology, the equipment is portable and easily accessible to courts.<sup>95</sup> Projecting a witness on the stand and displaying any relevant information is important in giving the impression of the witness' physical presence.<sup>96</sup> High definition ("HD") is a major development in video conferencing, allowing the judge and jury a view "detailed enough ... to see sweat on the forehead of a witness."<sup>97</sup> While HD quality video streaming offers many advantages, parties on both ends must have HD-capable equipment for conferencing to work effectively.<sup>98</sup>

The most widely used type of video conferencing is IP based.<sup>99</sup> While the drawback of the IP type is that it has inconsistent quality, the drawback of using the ISDN type is that it costs roughly three times the cost of a normal phone call plus the monthly line subscription cost, which deters many users from using ISDN.<sup>100</sup> Additionally, while most people are accustomed to using personal computer-based video conferencing systems, personal computers with cameras should be avoided in a courtroom where more advanced equipment is available because the picture quality on a personal com-

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<sup>94</sup> See *id.* (discussing the implications of video technology and the importance of modern equipment).

<sup>95</sup> See *id.* (noting that commercial standard video conferencing does not use satellite technology).

<sup>96</sup> See Lederer, *supra* note 90 (suggesting the importance of using a video screen and computer images to display a witness and show jurors and the judge documents or exhibits).

<sup>97</sup> See Lederer, *supra* note 90, at 20 (describing the clarity of high definition quality video).

<sup>98</sup> See Lederer, *supra* note 90, at 20 (providing that adequate communication connections must be on both ends to make HD capabilities effective).

<sup>99</sup> See Lederer, *supra* note 90, at 21 (highlighting that the IP connection is the most widely used because it is effectively free for users).

<sup>100</sup> See Lederer, *supra* note 90, at 21 (inferring that while the ISDN type may work better and be more effective, many users prefer IP because of cost). The best-known manufacturers for video conferencing are Polycom, Tandberg, and LifeSize. Additionally, Polycom now offers an HD unit that can function as a computer model as well. *Id.*

puter is often less clear and can impact the way that jurors and judges are able to view the witness.<sup>101</sup>

The benefits of using video conferencing far outweigh the drawbacks.<sup>102</sup> Cost savings is an important benefit of video conferencing, reducing travel expenses and ultimately reducing the fees of lawyers and courtroom proceedings.<sup>103</sup> In one New Jersey federal court, the cost of transporting a defendant was about \$30,000, whereas by using video conferencing, the arraignment cost only \$45 total.<sup>104</sup> Video conferencing also makes distant courthouses more accessible<sup>105</sup> and increases courtroom safety, which can be a major concern for some witnesses and courtroom personnel.<sup>106</sup>

While the benefits to video conferencing are numerous, there are drawbacks, which stem mostly from judge and court personnel lack of knowledge and interest in learning how to use video technology.<sup>107</sup> Some other problems include minor sound delays, however, most judges using the technology report few technical glitches after proper know-how.<sup>108</sup> Poor video quality can be another drawback in certain regions where the technology is not advanced and transmits a lower quality of picture.<sup>109</sup>

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<sup>101</sup> See Lederer, *supra* note 90, at 21 (noting that in addition to poor quality and pictures, personal computer-based video conferencing may also present problems because of firewall issues).

<sup>102</sup> See Devoe & Frataroli, *supra* note 17, at 21 (highlighting the benefits of video conferencing abilities).

<sup>103</sup> See Devoe & Frataroli, *supra* note 17, at 21-22 (noting that the prohibitively expensive nature of testifying in court means that video conferencing may be preferable in a plethora of cases).

<sup>104</sup> See Roth, *supra* note 18, at 190-91 (citing a New Jersey case of first-degree murder, where the cost of an appearance was significantly reduced through using video conferencing).

<sup>105</sup> See Devoe & Frataroli, *supra* note 17, at 22 (highlighting that courthouses may be hundreds of miles away for witnesses, and using video conferencing to allow witnesses to testify remotely overcomes that hurdle).

<sup>106</sup> See Devoe & Frataroli, *supra* note 17, at 23 (noting that it is much safer to have certain individuals in a different location than the judge and other parties to a case).

<sup>107</sup> See Devoe & Frataroli, *supra* note 17, at 24 (explaining that judges and lawyers attempting to use the technology may encounter difficulty due to lack of technological knowledge).

<sup>108</sup> See Devoe & Frataroli, *supra* note 17, at 24 (asserting that technological issues were few but did present a problem).

<sup>109</sup> See Devoe & Frataroli, *supra* note 17, at 25 (stating that low quality pictures can lead to a lower quality of decisions).

Live two-way video conferencing allows the trier of fact to be able to observe the witness's demeanor as she is being questioned and allows attorneys to change their questioning based off of evidence presented.<sup>110</sup> Additionally, two-way video conferencing allows judges to rule on objections as they arise and protects the accused's right to confront.<sup>111</sup> While two-way video conferencing does mean that the witness will see the defendant, the defendant can still see the witness, but it is through the "medium of a television screen," thus keeping the witness from enduring further trauma and satisfying the defendant's right to be face-to-face with their accuser.<sup>112</sup>

### **B. Post Traumatic Stress Disorder (PTSD)**

Post Traumatic Stress Disorder (PTSD) is triggered by a traumatic event in one's life.<sup>113</sup> The traumatic event often makes the victim feel as though their life is in danger and can be any event such as combat exposure, rape, serious accident or terrorist attack.<sup>114</sup> Symptoms of PTSD include the sensation of reliving the event, avoiding situations that remind the person of the event, and negative changes in feelings and beliefs including persistent negative beliefs about oneself or the world.<sup>115</sup> Many people find psychotherapy or medication effective for maintaining their lives and coping, but there

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<sup>110</sup> See Perry, *supra* note 39, at 567, 577 (commenting that live two-way testimony corrects many problems that arise regarding the constitutionality of video conferencing).

<sup>111</sup> See Perry, *supra* note 39, at 578 (indicating that two-way video conferencing protects defendants by not infringing on their right to confront, and gives better protection than one-way closed-circuit television).

<sup>112</sup> See Perry, *supra* note 39, at 581 (suggesting that defendant's concern for his right to face-to-face confrontation is satisfied by two-way video conferencing).

<sup>113</sup> See National Center for PTSD, *What is PTSD?*, U.S. DEPARTMENT OF VETERANS AFFAIRS (Aug. 13, 2015), archived at <http://perma.cc/R7QU-6AMP> [hereinafter *What is PTSD?*] (describing what PTSD is and what the causes and effects are).

<sup>114</sup> See *id.* (discussing the traumatic events leading to PTSD).

<sup>115</sup> See DSM-V, *supra* note 54, at 271 (explaining changes in mood associated with a traumatic event).

is no “cure” for PTSD.<sup>116</sup> In the United States, about 7-8 out of every 100 people will suffer from PTSD in their lifetime.<sup>117</sup>

Out of one hundred women that are raped, ninety-four of them will suffer from PTSD following their attack.<sup>118</sup> In a study of 100 women who were raped, 30 of them still experienced symptoms of PTSD nine-months after their attack.<sup>119</sup> Whether PTSD will develop depends on how intense the trauma was, how long it lasted, how strong the victim’s reaction was, the support received after the trauma, if the person was hurt and how close the person was to the event.<sup>120</sup> The likelihood of developing PTSD increases if the person is a minority or female, has little education or mental health problems, has little support from family and friends and has recent stressful life changes.<sup>121</sup>

#### IV. ANALYSIS

The preceding sections provided an introduction to some of the concerns and benefits of extending the right to testify remotely to adult rape victims using two-way video conferencing systems. The following subsections analyze the constitutionality of two-way video conferencing systems in the courtroom and how the technology does not impinge on a defendant’s right to confront. This Note will conclude that while there are drawbacks and concerns to using two-way video conferencing systems, federal or state statutes should be established and considered to support the public policy of protecting adult rape victims.

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<sup>116</sup> See *What is PTSD?*, *supra* note 113 (stating that while there is no cure for PTSD, there are options for those who have endured a traumatic event and need help).

<sup>117</sup> See National Center for PTSD, *How Common is PTSD?*, U.S. DEPARTMENT OF VETERANS AFFAIRS, (Aug. 13, 2015), *archived at* <http://perma.cc/4UWP-2BNY> (highlighting the facts and statistics of those with PTSD).

<sup>118</sup> See National Center for PTSD, *Sexual Assault Against Females*, U.S. DEPARTMENT OF VETERANS AFFAIRS, (Aug. 13, 2015), *archived at* <http://perma.cc/NMZ-8NHS> (noting that 94 out of 100 women who were raped experienced symptoms of PTSD).

<sup>119</sup> See *id.* (noting that one out of every three rape victims develop PTSD after their attack).

<sup>120</sup> See *id.* (outlining the factors that may lead to developing PTSD).

<sup>121</sup> See *id.* (describing the factors that may lead to a higher likelihood of developing PTSD after a traumatic life event).

### A. Children vs. Adults: Public Policy

While children in sexual assault cases are able to testify remotely in necessary circumstances following the decision in *Craig*, this ability has not yet been extended to adults.<sup>122</sup> However, public policy concerns exist for adults similar to children who are facing their attacker at trial for sexual assault.<sup>123</sup> A woman is raped every six minutes in the United States; therefore a public policy that encourages all adults to report their rape by minimizing their fear of physically testifying at trial outweighs any drawbacks to doing so.<sup>124</sup>

Critics of allowing children to testify remotely argue that many children can in fact handle the trauma of testifying in court.<sup>125</sup> Critics also argue that allowing children to testify remotely undermines the truth-finding process because children will feel more comfortable lying when they are not in the physical presence of the defendant.<sup>126</sup> While these concerns may be valid, there is a significant policy concern in forcing children to be physically present in the courtroom – a concern that should be extended to include adult rape victims.<sup>127</sup> States have a significant interest in protecting all rape victims, whether the victim is a child or adult.<sup>128</sup> The public policy as-

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<sup>122</sup> See Thielmeyer, *supra* note 44, at 809 (observing that while the Supreme Court held that the right to face-to-face confrontation is not absolute, there is a sound public policy rationale to allow remote testimony and to extend this protection to adults).

<sup>123</sup> See Thielmeyer, *supra* note 44, at 809 (noting that rape is a serious problem in the United States today).

<sup>124</sup> See Thielmeyer, *supra* note 44, at 810 (asserting that rape is one of the most underreported crimes in the United States, with the conviction of rapes falling by thirty percent since the mid-1960s). Additionally, one of the primary reasons why women decide not to report their rape is fear of the legal system. *Id.*

<sup>125</sup> See Thielmeyer, *supra* note 44, at 802 (noting that “attorneys and psychologists that were present at a conference on child sexual abuse unanimously reported that a great majority of children are capable of testifying at trial without much difficulty”).

<sup>126</sup> See Thielmeyer, *supra* note 44, at 802-03 (noting that children who testify remotely could be more likely to lie on the stand or exaggerate their stories).

<sup>127</sup> See Thielmeyer, *supra* note 44, at 809 (highlighting that allowing adult rape victims to testify using video conferencing ultimately turns on whether adults should be considered in the public policy like children are currently).

<sup>128</sup> See Thielmeyer, *supra* note 44, at 813 (stressing that states have an interest in protecting adult rape victims who may have special needs in the courtroom, just like child victims). Allowing children to use remote testimony resulted because “the physical presence of a defendant [sic] who is a threatening figure in a child’s

pect of *Craig* is promoted when protecting rape victims who testify at trial and effectively prosecuting rapists who may not otherwise be tried or convicted.<sup>129</sup> While video conferencing should only be used in cases necessary for the wellbeing of children and adults, video conferencing is “second only to live testimony.”<sup>130</sup>

## B. The Right to Confront

The Confrontation Clause, applicable to the states via the Fourteenth Amendment, operates:

(1) to afford the defendant the opportunity to receive accusations directly from the mouth of his accuser, (2) to prevent false accusations against the defendant by those unwilling to state such allegations to the defendant’s face, and (3) to allow the judge and jury to view the demeanor of the witnesses testifying.<sup>131</sup>

These goals are not offended by extending the right to testify remotely using video conferencing.<sup>132</sup>

Two-way video conferencing does not offend the Confrontation Clause because the same rights are afforded to the defendant as when the victim gives testimony while physically present in the courtroom.<sup>133</sup> Two-way video conferencing still grants the defendant the ability to see the witness who has accused him of rape, to hear the allegations directly from the mouth of his accuser, and to allow the

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life . . . along with the stigmatizing and guilt-provoking presence of the general public, often constitute the primary impediments to a child’s ability to testify about sexual abuse.” *Id.* at 802. There is a valid argument to be made that the same impediment would apply for adults in similar scenarios when they must confront the physical presence of the defendant. *Id.*

<sup>129</sup> See Thielmeyer, *supra* note 44, at 814 (predicting that a statute similar to *Craig*’s which extends to adult rape victims in addition to children would be constitutional).

<sup>130</sup> See Thielmeyer, *supra* note 44, at 814 (explaining how live testimony is superior to video conferencing).

<sup>131</sup> See Perry, *supra* note 39, at 587 (listing the goals of the Confrontation Clause).

<sup>132</sup> See Perry, *supra* note 39, at 587 (concluding that the goals of the right to confront are safeguarded when two-way video testimony is used).

<sup>133</sup> See Perry, *supra* note 39, at 586-87 (finding two-way video testimony to be even more reliable than one-way video testimony, which has already been confirmed as constitutional).

jury and judge to see the witness, albeit through the medium of a television screen.<sup>134</sup> The Sixth Amendment does not specifically require that a witness be "face-to-face" or "physically present."<sup>135</sup> Critics of video conferencing technology argue that the Confrontation Clause requires the physical presence of a witness, which is not satisfied when there is a television screen as a barrier.<sup>136</sup> Proponents of extending the technology to adults through two-way video conferencing systems argue that the Confrontation Clause does not literally mean "face-to-face," which would effectively render unconstitutional all hearsay exceptions that allow for absent declarants to submit written records.<sup>137</sup>

According to the Supreme Court, "there are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."<sup>138</sup> As the Supreme Court held in *Craig*, the defendant's right to confront witnesses against him "may be satisfied absent a physical, face-to-face confrontation at trial only where the denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured."<sup>139</sup> Using two-way video conferencing, courts are able to uphold the standard

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<sup>134</sup> See Perry, *supra* note 39, at 587 (explaining the goals of the Confrontation Clause and the procedures of video conferencing that are not impinged upon in the use of two-way video conferencing systems).

<sup>135</sup> See Perry, *supra* note 39, at 583-84 (referencing the text of the Sixth Amendment, and noting that the concept of "face-to-face" is still met via two-way video conferencing).

<sup>136</sup> See Perry, *supra* note 39, at 589 (quoting Justice Scalia in that "the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact").

<sup>137</sup> See Perry, *supra* note 39, at 590 (noting that the literal requirement of face-to-face would mean "many long standing common law hearsay exceptions would become unconstitutional" and that the Confrontation Clause "merely states a principled preference for live testimony"). Additionally, the *Craig* Court determined that "the word 'confronted,' ... cannot simply mean face-to-face confrontation," because it would prohibit the admission of hearsay statements made by absent declarants, contrary to the Court's long history of hearsay jurisprudence." *Id.*

<sup>138</sup> See Thielmeyer, *supra* note 44, at 798-99 (quoting *Pointer v. Texas*, 380 U.S. 400, 405 (1965), where the Court held that the Confrontation Clause is applicable to the states through the Fourteenth Amendment).

<sup>139</sup> See *Craig*, 497 U.S. at 850 (focusing on the requirement of an important public policy when allowing a witness to testify remotely).

established in *Craig* by requiring that the camera and monitor give the defendant the opportunity to see the witness without requiring that the witness see the defendant.<sup>140</sup>

To determine whether the testimony is reliable, the video conferencing must still preserve the rights of the defendant.<sup>141</sup> Numerous different uses of video conferencing scenarios have withstood Confrontation Clause challenges, including when the defendant, judge and jury are in the courtroom while the witness, prosecutor and defense counsel are situated in a remote location, and when the courtroom can see and hear the witness using a live audio and video feed.<sup>142</sup> In preserving those constitutional rights, courts can require that the testimony be under oath, an opportunity for contemporaneous cross-examination be provided, and judge, jury and the defendant be able to view the demeanor of the victim testifying.<sup>143</sup> Ultimately, allowing the adult rape victim to testify through two-way video conferencing does not offend the constitutional right to confront.

### C. The Benefits and Drawbacks

Video conferencing has become more popular as technology advances, allowing people to incorporate video communications into their daily lives.<sup>144</sup> While there are drawbacks in allowing adult rape victims to testify using video conferencing, “the exercise of a victim’s participatory rights should not include an assumption of additional trauma when reasonable procedures exist to minimize such injury.”<sup>145</sup> Many adult victims of rape choose not to report their attack

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<sup>140</sup> See GARVIN ET AL., *supra* note 4, at 5 (noting that the *Craig* requirements are satisfied without forcing the witness to be in view of the defendant).

<sup>141</sup> See GARVIN ET AL., *supra* note 4, at 3 (noting that *Craig* found it significant to preserve the rights of the accused while allowing the child to testify remotely).

<sup>142</sup> See GARVIN ET AL., *supra* note 4, at 5 (providing scenarios where the Sixth Amendment challenge has failed, including when the defendant has continuous contact with defense counsel and objections are raised and ruled on as if the witness was present).

<sup>143</sup> See GARVIN ET AL., *supra* note 4, at 3 (protecting these rights ensures that the testimony is reliable and as close as it can be to live testimony in person).

<sup>144</sup> See Perry, *supra* note 39, at 588 (giving examples of daily uses for video communications, such as corporations and firms that use video conferencing to hold meetings in numerous cities simultaneously, and families that use web cameras to communicate live).

<sup>145</sup> GARVIN ET AL., *supra* note 4, at 4.

for fear of the legal system.<sup>146</sup> A rape trial is often the victim's word against the defendant's, therefore many defense attorneys use rigorous cross-examination methods in an attempt to diminish a victim's credibility.<sup>147</sup> Two-way video conferencing would not hamper these techniques, rather the victim would avoid post-trauma triggered by being in the same room as their attacker.<sup>148</sup>

There would be immense cost savings once courtroom video conferencing systems are in place.<sup>149</sup> Video conferencing is a resource that can help courthouses with already limited budgets by reducing the cost of transportation of the witness and decreasing the number of staff needed in the courtroom.<sup>150</sup> Although currently, the financial burden of video conferencing is not an affordable alternative for many courts,<sup>151</sup> the cost of video conferencing equipment is declining.<sup>152</sup> The initial cost of implementing the technology is in the range of a hundred thousand dollars, while the maintenance and upkeep of the technology is an additional few thousand dollars annually.<sup>153</sup> As the technology advances, costs of video conferencing equipment have declined.<sup>154</sup> Accordingly, it will be increasingly easier for courthouses to obtain video conferencing technology, allowing more victims to testify using the equipment.<sup>155</sup> In time, by imple-

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<sup>146</sup> See Thielmeyer, *supra* note 44, at 810 (noting that the psychological distress experienced by rape victims is exacerbated by the fear of the legal system).

<sup>147</sup> See Thielmeyer, *supra* note 44, at 811 (explaining that many rape trials focus on defense attorney's attempts to get the victim to admit consent to intercourse).

<sup>148</sup> See Thielmeyer, *supra* note 44, at 811 (recognizing that the tactics used in cross-examination makes the trial process devastating for rape victims and contributes to nonreporting).

<sup>149</sup> See Devoe & Frataroli, *supra* note 17, at 21 (addressing judges who were interviewed that stated that video conferencing significantly reduced the costs of litigation).

<sup>150</sup> See Devoe & Frataroli, *supra* note 17, at 22 (noting that witnesses will save money in not having to travel to court and stay at a hotel, and when witnesses cannot be in court, video conferencing is ideal).

<sup>151</sup> See Roth, *supra* note 18, at 191 (noting that the initial cost of the technology is a financial burden on many courts).

<sup>152</sup> See Roth, *supra* note 18, at 191 (suggesting that the recent improvements in the technology and the widespread availability of it are causing costs to decline).

<sup>153</sup> See Roth, *supra* note 18, at 191 (recognizing that in 1995, California courts paid over \$100,000 for the technology, with \$6,000-\$13,500 in annual upkeep).

<sup>154</sup> See Roth, *supra* note 18, at 191 (suggesting that the recent improvements in the technology and the widespread availability of it are causing costs to decline).

<sup>155</sup> See Roth, *supra* note 18, at 191-92 (noting that many courts have made "substantial investments to implement the technology in courtroom proceedings"). Ad-

menting video conferencing technology in more courthouses, the cost savings and the avoidance of further trauma to the victim will far outweigh the startup costs.<sup>156</sup>

Video conferencing allows a witness to testify through a television screen in a courtroom.<sup>157</sup> This projected view allows the jury to view the witness in a larger and closer light – potentially an even better perspective than live testimony.<sup>158</sup> Ultimately, two-way video conferencing is more akin to physically present testimony because of the ability to communicate in real time.<sup>159</sup> The high quality of video conferencing allows the defendant to hear allegations directly from the witness, providing for a more accurate presentation as opposed to a second-hand account of the victim's testimony.<sup>160</sup> Additionally, video conferencing is convenient and efficient, keeping up with the technological advancements of our society and giving victims access to justice.<sup>161</sup> While some users of the current technology have experienced minor technical problems, most people have general familiarity with the technology in their daily lives and use it without difficulty.<sup>162</sup> Furthermore, with high definition products becoming less

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ditionally, many jurisdictions are beginning to implement video conferencing technologies in their courthouses for routine matters with plans to evaluate its usage and expand to more intricate courtroom proceedings. *Id.* at 192.

<sup>156</sup> See Devoe & Frataroli, *supra* note 17, at 21 (indicating that even critics of video conferencing recognize the ability of video conferencing to reduce costs).

<sup>157</sup> See Lederer, *supra* note 90, at 20 (explaining how the technology of video conferencing works).

<sup>158</sup> See Perry, *supra* note 39, at 589 (highlighting that the jury is potentially given a better opportunity to view the witness and their demeanor through video conferencing).

<sup>159</sup> See Perry, *supra* note 39, at 586-87 (noting that two-way video testimony is superior to one-way video testimony, which has already been deemed constitutional by the Supreme Court). Additionally, noting that two-way video conferencing should apply in situations “where necessary to further an important state interest, [while maintaining] the truth-seeking or symbolic purposes of the Confrontation Clause.” *Id.*

<sup>160</sup> See Perry, *supra* note 39, at 587 (explaining that live video conferencing helps ensure the accuracy of testimony by allowing the victim to testify before the defendant).

<sup>161</sup> See Perry, *supra* note 39, at 592 (stating that “the procedure is convenient, cost-effective, efficient, and comports with modern notions of globalization and technological advancements”).

<sup>162</sup> See Devoe & Frataroli, *supra* note 17, at 24 (addressing the fact that judges with familiarity of technology cited no difficulties in using video conferencing equipment).

costly and more widely accessible, the video quality of video conferencing is also improving.<sup>163</sup>

Critics of video conferencing argue that jurors are less able to determine a witness's credibility when viewing them on a television screen.<sup>164</sup> Yet, psychological research shows that seeing a witness on screen as opposed to physically present does not hinder the ability to determine whether the witness is being truthful, because in observing a person telling a story, most people have no better than "chance" in determining whether someone is being truthful or not.<sup>165</sup> Additionally, "studies have found that jurors respond the same to live witnesses and those testifying via video conference," confirming that it makes no difference whether a juror views the witness on a television screen or physically sitting in the courtroom.<sup>166</sup> Nevertheless, critics still argue that video conferencing could affect how the jury views the witness; such as if the witness looks weaker or more credible than if she was physically in the courtroom.<sup>167</sup> To solve this problem, the camera can be positioned to show a full-body angle instead of just the witness's face, which will allow the jury to view the witness's non-verbal communication.<sup>168</sup> Non-verbal communication refers to a person's facial expressions or body movements, such as shifting one's feet.<sup>169</sup> Critics also argue that technological issues, such as a delay in audio transmission, could affect how the jury perceives the witness

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<sup>163</sup> See Devoe & Frataroli, *supra* note 17, at 32 (noting that "today, it is hard to find an electronics showroom that is not almost entirely full of high definition ("HD") products. HD is now that standard").

<sup>164</sup> See Perry, *supra* note 39, at 588 (arguing that it is harder to determine the truthfulness and reliability of a witness through a screen).

<sup>165</sup> See Perry, *supra* note 39, at 588 (opining that jurors are not any more or less capable of making accurate determinations in regards to a witness's testimony when viewing the testimony through a television screen).

<sup>166</sup> See Perry, *supra* note 39, at 593 (reaffirming that jurors react no differently to a witness via video conference than they would to a witness physically in the courtroom).

<sup>167</sup> See Thielmeyer, *supra* note 44, at 815 (noting that video conferencing can be problematic because the jury would be affected by how the camera portrays the victim).

<sup>168</sup> See Devoe & Frataroli, *supra* note 17, at 31 (explaining that by changing the camera angle to show a full-body will allow jurors to view non-verbal communications).

<sup>169</sup> See Devoe & Frataroli, *supra* note 17, at 31 (highlighting that with video conferencing, a person's non-verbal communications can still be attained).

testifying.<sup>170</sup> However, as video conferencing evolves, the experience will be essentially equivalent to being in the same room as the person on the screen.<sup>171</sup> In the not-so-distant future, video conferencing will leave participants virtually unaware of the lack of physically presence.<sup>172</sup>

#### D. Need for Reform

Adult rape victims who suffer from mental and physical symptoms and distress after their attack should not have to endure the trauma of testifying within the physical presence of their attacker.<sup>173</sup> Furthering the trauma already endured by the victim of rape goes against the public policy of encouraging adults to report their crime to the police.<sup>174</sup> Implementing video conferencing technology and allowing victims to testify remotely minimizes PTSD and RTS symptoms attributed to rape.<sup>175</sup>

Rape victims are five times more likely to attempt suicide and suffer from PTSD as compared to non-victims.<sup>176</sup> Forcing a rape victim to endure this trauma is unnecessary when the victim can communicate just as effectively by doing so remotely.<sup>177</sup> PTSD begins with Criterion A, where a stressor occurs, such as exposure to sexual

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<sup>170</sup> See Smith, *supra* note 45, at 13 (explaining that if audio transmission is delayed and the witness's body language and demeanor does not match up to the words being spoken, a jury may not get the full effect of the testimony).

<sup>171</sup> See Lederer, *supra* note 90, at 29 (suggesting that state-of-the-art telepresence technology establishes the opportunity for a meaningful transmittal of a person remotely).

<sup>172</sup> See Lederer, *supra* note 90, at 29 (opining that "at some point, it will be difficult even to realize that a law firm colleague, opposing counsel at a settlement meeting, or remote hearing participant, isn't within a few physical feet").

<sup>173</sup> See Thielmeyer, *supra* note 44, at 813 (explaining that states have an interest in protecting victims of rape from further trauma which would be suffered if forced to testify).

<sup>174</sup> See GARVIN ET AL., *supra* note 4, at 4 (providing public policy rationales for allowing adults to use video conferencing).

<sup>175</sup> See Devoe & Frattaroli, *supra* note 17, at 21 (outlining the benefits of videoconferencing and considering potential drawbacks to its use in the courtroom).

<sup>176</sup> See Thielmeyer, *supra* note 44, at 810 (noting that the psychological trauma following a rape can be everlasting and require extensive professional help).

<sup>177</sup> See Thielmeyer, *supra* note 44, at 813-14 (noting that allowing adult rape victims to testify remotely would still be constitutional and would effectively further public policy interests).

violence.<sup>178</sup> If the victim were allowed to testify remotely using video conferencing, the intrusion symptoms, which occur when the traumatic event is re-experienced through flashbacks or intrusive memories, would be relieved or at a minimum, be reduced.<sup>179</sup> In Criterion B, the victim suffers from distressing memories of the traumatic events, which would be exacerbated by being physically in the courtroom with her attacker.<sup>180</sup> Additionally within Criterion B, the victim may suffer from flashbacks, an intense or prolonged psychological distress at exposure to anything that reminds them of the traumatic event.<sup>181</sup> An adult rape victim would experience less psychological distress testifying with the protective barrier of a television screen than if she had to relive her trauma in the physical presence of her attacker.<sup>182</sup> In Criterion C, the victim may attempt to avoid people, places, or feelings that remind them of the traumatic event.<sup>183</sup> This explains why many victims who avoid reporting their attack would be hesitant to physically testify in the same courtroom and why there should be an urgency to relieve the victims of these fears while still encouraging victims to testify.<sup>184</sup> In Criterion D, the victim may begin to form negative mental and mood associations with their attack, and suffer from a persistent negative belief about themselves and the cause of the traumatic event.<sup>185</sup> While many of

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<sup>178</sup> See DSM-V, *supra* note 54, at § 309.81 (explaining that Criterion A for PTSD involves the direct exposure to sexual violence).

<sup>179</sup> See DSM-V, *supra* note 54, at § 309.81 (listing the ways that a victim can re-experience their trauma, such as intrusive memories and flashbacks).

<sup>180</sup> See DSM-V, *supra* note 54, at § 309.81 (explaining Criterion B for PTSD, which involves the presence or intrusion symptoms associated with the traumatic event, beginning after the traumatic event occurred).

<sup>181</sup> See DSM-V, *supra* note 54, at § 309.81 (laying out the intrusion symptoms that a victim may suffer from after a traumatic event). Specifically, Criterion B states that the presence of one or more of the intrusion symptoms associated with the traumatic event will satisfy the criterion. *Id.*

<sup>182</sup> See GARVIN ET AL., *supra* note 4, at 1 (opining that "access to justice should not require any victim to suffer needless additional trauma").

<sup>183</sup> See DSM-V, *supra* note 54, at § 309.81 (outlining the Criterion C factors for PTSD, which includes the persistent avoidance of stimuli associated with the traumatic event, beginning after the traumatic event occurred).

<sup>184</sup> See GARVIN ET AL., *supra* note 4, at 1 (noting that case law and public policy support allowing adult rape victims the ability to testify using video conferencing to reduce serious emotional distress).

<sup>185</sup> See DSM-V, *supra* note 54, at § 309.81 (setting forth Criterion D for PTSD, which examines the negative alterations in cognitions and mood associated with the traumatic event, which begins or worsens after the traumatic event occurred, such

the symptoms of PTSD will remain even with remote testimony, furthering the trauma when alternatives exist is unnecessary.<sup>186</sup> The courtroom is where the victim should be finding justice and closure, not where their PTSD symptoms are aggravated.<sup>187</sup>

### E. Proposed Reform

The right to confront one's accusers face-to-face does not require that the witness be physically present in the courtroom.<sup>188</sup> With the Confrontation Clause not specifically stating a requirement of physical presence in the right to be "face-to-face," legislatures should interpret that a victim is allowed to testify remotely using video conferencing in situations that require such necessity, while still maintaining the spirit of the clause.<sup>189</sup> Federal statutory reform to include video conferencing testimony would meet the standard for constitutionality established in *Craig* and further the state's interest in protecting adult rape victims.<sup>190</sup>

In declining to allow changes to the Federal Rules of Criminal Procedure Rule 26, which focused on remote testimony, the Supreme Court failed to recognize that the victim would still be within the defendant's presence.<sup>191</sup> The proposed changes to Rule 26 would have allowed victims to testify remotely if the requesting party established

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as the inability to remember an important aspect of the traumatic event, persistent and exaggerated beliefs or expectations about oneself, and persistent negative emotional state such as fear, horror, anger, guilt, or shame, etc.).

<sup>186</sup> See Thielmeyer, *supra* note 44, at 813 (opining that allowing a victim to testify remotely is necessary to reduce the trauma experienced from the rape).

<sup>187</sup> See GARVIN ET AL., *supra* note 4, at 1 (arguing that rape victims should not suffer further trauma in a courtroom).

<sup>188</sup> See Perry, *supra* note 39, at 573 (noting that the right to confront one's accusers is not absolute).

<sup>189</sup> See Perry, *supra* note 39, at 589-90 (opining that the face-to-face requirement does not specify the testimony be within the physical presence of the defendant in that "nowhere in the text of the Sixth Amendment do the words 'face-to-face' or 'physical' appear").

<sup>190</sup> See Thielmeyer, *supra* note 44, at 814 (setting forth that a statute similar to *Craig*, which applied to protect adult rape victims, would meet the constitutionality established in *Craig*).

<sup>191</sup> See Smith, *supra* note 45, at 6 (explaining that Rule 26 of the Federal Rules of Criminal Procedure, which revolve around taking testimony, was not changed in 2002 by the Judicial Conference of the United States to include remote testimony).

exceptional circumstances.<sup>192</sup> In the denial of accepting the proposed changes to Rule 26, the federal courts were deprived "of affirmative authorization for remote testimony, leaving United States district judges to make case-by-case individual decisions when remote testimony is proposed."<sup>193</sup> In examining the situation where the witness was unavailable, the Court was concerned that the remote testimony would not have been the same as physical presence.<sup>194</sup> With two-way video conferencing, the victim would in fact be testifying within the presence of the defendant, the only difference being that the victim is projected through the medium of a television screen.<sup>195</sup> Regardless of the decision not to pass this amendment to Congress, Justice Breyer and O'Connor dissented; concluding that the amendment was constitutional under the decision in *Craig*.<sup>196</sup> Additionally, lower federal courts and state courts have held that two-way video conferencing satisfies the test established in *Craig*, showing the trend that video conferencing abilities are becoming more of the norm.<sup>197</sup> By enacting a similar amendment, or a federal statute that would provide for remote video conferencing testimony of adult rape victims, the trauma suffered by the victim will be reduced or eradicated, while still providing the defendant the right to confront.

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<sup>192</sup> See Smith, *supra* note 45, at 6 (noting that the requirements would include: the requesting party establish exceptional circumstances for such transmission, appropriate safeguards for the transmission are used, and the witness is unavailable under Federal Rule of Evidence 804(a)(4)-(5)).

<sup>193</sup> See Lederer, *supra* note 90, at 28 (highlighting the denial of the proposed amendments to Rule 26, noting that "the Court's action, however, clearly signals the severe doubts held by many of its members as to at least the desirability of remote testimony").

<sup>194</sup> See Smith, *supra* note 45, at 7 (noting Justice Scalia's concern that remote testimony is not the same as physical presence).

<sup>195</sup> See Perry, *supra* note 39, at 587 (explaining that live video conferencing allows the victim to testify before the defendant and that the victim and defendant are able to see each other when testifying).

<sup>196</sup> See Smith, *supra* note 45, at 7 (asserting that while Justice Scalia stated that the one-way remote testimony was "not equivalent to making them in a room that contains a television set beaming electrons that portray a defendant's image," Justices Breyer and O'Connor dissented, arguing that virtual confrontation survives under *Craig*).

<sup>197</sup> See Smith, *supra* note 45, at 8 (listing lower federal courts and state courts that allowed two-way video conferencing, including: *United States v. Abu Ali*, 528 F.3d 210, 238-43 (4th Cir. 2008), *United States v. Yates*, 438 F.3d 1307, 1313 (11th Cir. 2006), *State v. Stock*, 256 P.3d 899, 903-04 (Mont. 2011), etc.).

State statutes allow for remote testimony when the situation warrants such a transmission, such as Washington Court Rule 43, which allows “for good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.”<sup>198</sup> A statute that allows remote testimony in necessary circumstances, and for good cause, is a good policy in certain situations, such as when a witness cannot travel to the courthouse or is seriously ill, for example.<sup>199</sup> Additionally, providing an adult rape victim the ability to give remote testimony is good policy where the victim would suffer from trauma in testifying, and may indeed refuse to testify, effectively forcing the case to be dropped by the state.<sup>200</sup> While states have begun to establish statutes and regulations regarding remote testimony, a blanket federal statute would provide the best solution because it would grant the victim the ability to testify using video conferencing in all jurisdictions.

If a federal statute were not enacted, a statute similar to Hawaii’s provision to allow victims and witnesses to testify through two-way video conferencing that is viewed by the court, the accused, and the jury would be ideal.<sup>201</sup> While Hawaii’s statute does not specify whether good cause or necessity must be established before granting the victim the right to use the video conferencing systems, it ensures that the judge, jury, and accused will be able to see and hear the testimony live, circumventing any Confrontation Clause issues.<sup>202</sup> With the defendant’s right to confront as the main concern for allowing adult rape victims to testify using two-way video conferencing, a statute that would ensure that the victim and defendant were able to see each other, in real time, through the medium of a television screen would make that a moot issue.

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<sup>198</sup> See WASH. CT. R. 43 (allowing a witness to testify from a remote location when deemed necessary and with proper precautions taken).

<sup>199</sup> See Walker & Carlsen, *supra* note 11 (addressing the Washington statute that allows the usage of Skype under necessary circumstances).

<sup>200</sup> See Walker & Carlsen, *supra* note 11 (opining that video conferencing is common sense in a scenario where there is great concern about a witness physically being in the courtroom).

<sup>201</sup> See HAW. REV. STAT. § 801D-7 (2015) (granting victims and witnesses the blanket ability to testify using two-way video conferencing).

<sup>202</sup> See *id.* (guaranteeing the right to use televised two-way video conferencing with no specifications as to whether good cause or necessity must be proven).

If a state or federal statute were not to be enacted, the use of remote testimony may be available under the former testimony exception to the hearsay rule.<sup>203</sup> If the rape victim were to be too traumatized by testifying or will offer useless testimony, that would render the victim unavailable.<sup>204</sup> As a result, because the adult victim would be unable to testify as an available witness, the closed-circuit television testimony could be admitted as a last resort.<sup>205</sup> While this hearsay exception would provide a means for a victim to still be able to find justice and not have to testify in the physical presence of her attacker, a statute, enacted at the state or federal level, that would allow for two-way video conferencing would be ideal because closed-circuit television does not give the same real-time aspect to testimony as video conferencing.

## V. CONCLUSION

Rape in the United States is a serious problem. States have an interest in protecting adult rape victims and in encouraging victims to seek justice through the legal system. Two-way video conferencing systems protect adult rape victims who fear reporting their attack for fear of testifying in court where their attackers are present. By not forcing adult rape victims to physically be present to give testimony and be cross-examined during trial, victims are still able to testify without exasperating their trauma. While there are drawbacks to this technology, the continuous advancement and the widespread availability of such technology outweigh any drawbacks. Giving an adult rape victim the right to testify remotely, when necessary, does not impinge on a defendant's right to confront the accuser. Rather, extending the right to adult rape victims minimizes the inherent symptoms of PTSD that an adult victim suffers following rape. Ultimately, two-way video conferencing is an effective solution to minimize

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<sup>203</sup> See Thielmeyer, *supra* note 44, at 814 (explaining that in the absence of an explicit statute allowing adult rape victims to testify remotely, the victim may be able to use the former testimony hearsay exception).

<sup>204</sup> See Thielmeyer, *supra* note 44, at 814 (highlighting that under Federal Rule of Evidence 804, which includes admissible hearsay from an unavailable declarant, a witness who would be traumatized by testifying or offer useless testimony would be essentially unavailable).

<sup>205</sup> See Thielmeyer, *supra* note 44, at 814 (noting that as long as the victim meets the "standard of emotional distress upheld in *Craig*" that the victim could admit television testimony, which has presumed reliability).

trauma suffered by adult rape victims and increase their access to justice.