CONFRONTING RELIGION: VEILED MUSLIM WITNESSES AND THE CONFRONTATION CLAUSE

*Brian M. Murray**

INTRODUCTION

On October 11, 2006, Ginnnah Muhammad appeared in Michigan small claims court before District Judge Paul J. Paruk in her suit against Enterprise Rent-A-Car.[1] Muhammad is a practicing Muslim who wears the niqâb (hereinafter "veil"), which covers every part of her face except her eyes.[2] The judge asked Muhammad to remove the veil prior to testifying so that he could gauge her reliability and credibility.[3] She refused on religious grounds and Judge Paruk ultimately gave her a choice: remove the veil and continue testifying or continue to refuse and risk having her suit dismissed.[4] Muhammad

* Candidate for Juris Doctor, Notre Dame Law School, 2011; B.A. Philosophy and Political Science, Villanova University, 2008. Many thanks to Professor Richard Garnett for his guidance and assistance in the planning stages of this Note, the members of the *Notre Dame Law Review* for their diligent editing, and Alex Hermanny, Meghan Sweeney, and Michael Murray for their comments and suggestions. I would also like to extend a heartfelt thank you to my family, especially my parents and brothers, and Katherine Bering, for their continuous love, patience, support, and encouragement.

1 Transcript of Small Claims Hearing at 1, Muhammad v. Enter. Rent-A-Car, No. 06-41896 (Mich. Dist. Ct. Oct. 11, 2006).

2 For information on the niqâb (or nikab), see generally Eli Sanders, *Interpreting Veils: Meanings Have Changed with Politics, History*, SEATTLE TIMES, Oct. 5, 2001, at E1 (explaining the significance of the veil to the Islamic culture); BBC, Religions—Islam: Niqab, http://www.bbc.co.uk/religion/religions/islam/beliefs/niqab_1.shtml (last visited Mar. 31, 2010).

3 Transcript of Small Claims Hearing, *supra* note 1, at 3–4 ("The Court: 'One of the things that I need to do as I am listening to testimony is I need to see your face and I need to see what's going on and unless you take that off, 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 that I need to see in a court of law . . . .'").

4 *Id.* at 5–6 ("The Court: 'So you have a couple of options today . . . . You can either take it off and you can give me the testimony and after the hearing is all done

chose the latter option and her suit was ultimately dismissed.[5] In effect, Muhammad lost her day in court because of her desire to practice an aspect of her religion. This past summer, partially in response, the Michigan Judges Association and Michigan District Judges Association adopted a new statewide rule "giving judges 'reasonable' control over the appearance of parties and witnesses to observe their demeanor and ensure they can be accurately identified."[6]

Now imagine a similar situation in the criminal context: A lead prosecutor decides that the key witness is a Muslim woman, who happens to wear a veil, and he needs her to testify against the criminal defendant. The witness will appear in the courtroom before the judge, jury, and each side. But the Muslim believes, as Muhammad does, that removing her veil is a burden on her religious practice, offensive to her dignity, and an infringement of her Free Exercise rights under the First Amendment. She refuses to remove the veil but is willing to give her testimony while her face is covered. Defense counsel immediately cites the Sixth Amendment, quoting, "In all *criminal prosecutions*, the accused shall enjoy the right . . . *to be confronted with the witnesses against him* . . . ."[7]

Defense counsel claims that the defendant's general right to confront witnesses includes a face-to-face meeting in which the finder of fact is given ample opportunity to judge the credibility and reliability of the witness.[8] Meanwhile, the Muslim witness argues that she is entitled to an exemption from general court procedures concerning witness attire due to the protections of the Free Exercise Clause in the First Amendment. The government is caught in the middle because it has an interest in upholding both constitutional rights. Protecting religious freedom seems just as important as ensuring that criminal defendants receive a fair trial, especially given the explicit guarantees of both the First and Sixth Amendments.

The above hypothetical scenario has not occurred in any criminal case to date. However, in a post-9/11 world this scenario is certainly

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and over with and if you want to put it back on, I don't have any problems with that but if, in fact, you do not wish to do it, then I cannot go forward with your case and I have to dismiss your case.'").

5 *Id.* at 6 ("Ginnnah Muhammad: 'I wish to respect my religion and so I will not take off my clothes.'").

6 Associated Press, *New Rule Allows Michigan Judges to Control Witnesses' Dress*, FIRST AMENDMENT CTR., July 18, 2009, http://www.firstamendmentcenter.org/news.aspx?id=21717.

7 U.S. CONST. amend. VI (emphasis added).

8 *See* Maryland v. Craig, 497 U.S. 836, 864 (1990); Coy v. Iowa, 487 U.S. 1012, 1020–22 (1988).

foreseeable given the heightened awareness of the place of Muslims in American society and an increasing interest in the intersection of religious practice and the law. This is especially true considering the increase in the number of U.S. residents that identify as Muslims.[9] In such a situation, which constitutional right takes precedence? Is the liberty interest found in the Free Exercise Clause stronger than that found in the Confrontation Clause? Does the government have a stronger interest in the protection of either right and should the government take sides in such a conflict? Does current Supreme Court jurisprudence, concerning both clauses, provide an adequate solution to this problem? Is it possible to have a workable resolution of a conflict between two fundamental constitutional rights, grounded in both the history and text of the Constitution? These are the issues underlying the threshold question that this Note will address and attempt to answer: whether a Muslim witness must unveil while on the witness stand in a criminal trial. It seeks to elucidate future discussions about this topic.

Part I acknowledges the various interests held by the witness, the defendant, and the State. Part II discusses current doctrine regarding the Confrontation Clause as well as religious exemptions analysis under the Free Exercise Clause. Part III demonstrates why the witness could plausibly argue for an exemption given current doctrine for both constitutional provisions. Part IV recognizes the potential problems with granting such an exemption. Finally, this Note proposes two possible solutions to the constitutional conflict and analyzes each solution's shortcomings.

I. Strong and Seemingly Irreconcilable Interests

One of the major difficulties with the above scenario is that it implicates various constitutional interests. Indeed, deciding whether to grant a religious exemption to a witness in a criminal case has ramifications for the witness, the criminal defendant, and the state. Thus, this Part explicates the numerous interests competing for attention.

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9 More Muslims are coming to the United States than at any time in the last two decades. Andrea Elliott, *More Muslims Are Coming to U.S. After a Decline in Wake of 9/11*, N.Y. Times, Sept. 10, 2006, at 1; *see also* Associated Press, *Federal Court Dismisses Muslim Woman's Suit Against Michigan Judge*, First Amendment Ctr., May 15, 2008, http://www.firstamendmentcenter.org/news.aspx?id=20059 ("'One could easily see the . . . continuous litigants that are going to step into district court with this (veil) on . . . . This issue is going to come up over and over again.'" (first alteration in original) (quoting Nabih Ayad, Ginnnah Muhammad's attorney)).

A. The Criminal Defendant

Criminal trials revolve around the guilt or innocence of the defendant. The trial determines whether the liberty that the defendant enjoys to act as a normal citizen will cease to exist in the future.[10] The potential loss of liberty warrants granting individuals a right to defend themselves.[11] This concern is the rationale for affording the accused certain constitutional safeguards with the intent of establishing a fair trial. Indeed, nearly the entire Bill of Rights—and especially the Sixth Amendment—reflects the need to take these principles seriously in a free and democratic society.[12]

A criminal defendant has two explicit constitutional interests in the above case. First, and more broadly, he is entitled to a fair trial.[13] The government must meet its burden through lawful procedures in order to convict, including court procedures that protect a number of individual constitutional rights.[14] Second, and more specifically, every criminal defendant is guaranteed the opportunity to "be confronted

10 Ted Chiricos et al., *The Labeling of Convicted Felons and Its Consequences for Recidivism,* 47 CRIMINOLOGY 547, 548 (2007) ("The label of 'convicted felon' strips an individual of the right to vote, serve on juries, own firearms, or hold public office.").

11 *See* Margaret H. Lemos, *The Commerce Power and Criminal Punishment: Presumption of Constitutionality or Presumption of Innocence?*, 84 TEX. L. REV. 1203, 1228 (2006) ("Given the significance of [the consequences of criminal conviction], 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.'" (second alteration in original) (quoting *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring)).

12 Individuals must be able to defend themselves against the power of the state in a liberal democratic society. Daniel H. Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381, 384–87 (1959); *see also* Daniel Shaviro, *The Confrontation Clause Today in Light of Its Common Law Background*, 26 VAL. U. L. REV. 337, 340–47 (1991) (discussing the common law development of modern trial procedures sympathetic to individual rights). Sir Walter Raleigh, in the closing statement during his trial, "warned the jury that none of them was safe if one could be convicted of treason 'by suspicions and presumptions . . . without the open testimony of a single witness.'" *Id.* at 343 (alteration in original) (quoting DAVID JARDINE, CRIMINAL TRIALS 442 (1832)). Professor Shaviro also notes that affording rights to the accused was a response to "improper behavior by the State . . . used to convict the innocent or the guilty." *Id.* at 344.

13 *See* U.S. CONST. amend. VI.

14 The prosecution must comply with a number of procedures outlined in the Constitution, *see id.* amends. IV, VII, and subsequently interpreted by the Supreme Court. *See generally* A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249 (1968) (describing the Warren Court's contributions to the development of constitutional criminal procedure). The applicability of such procedures remains a developing area of the law.

with" the individuals that will testify against him.[15] The Supreme Court has held that the Confrontation Clause affords defendants a strong preference for face-to-face confrontations.[16] These constitutional safeguards and protections are ancillary to significant intangible interests, such as the maintenance of one's good reputation and avoidance of social stigma attached to one's name as a result of a criminal conviction.[17]

B. The Muslim Witness

Like any religious believer entitled to protection under the Free Exercise Clause of the First Amendment, the Muslim witness has a strong claim that her religious freedom should be protected. She can claim that wearing the veil is an expression of religious belief,[18] and that removing it to reveal her face would burden her free exercise because it would force her to choose between following the law and following the dictates of her religion.[19] And she is not without ample support for this position: the text of the First Amendment, numerous Supreme Court decisions describing the nature of burdens and granting exemptions, and a comprehensive history and tradition of religious accommodation in the United States provide strong legal justification for taking her position very seriously.[20] Furthermore, the

15 U.S. CONST. amend. VI. The text of the Sixth Amendment includes the word "confront," even if its application may apply differently in certain factual scenarios.

16 Maryland v. Craig, 497 U.S. 836, 849 (1990); *accord* Ohio v. Roberts, 448 U.S. 56, 63 (1980). *But see* Coy v. Iowa, 487 U.S. 1012, 1016, 1021–22 (1988) (holding that allowing witnesses to testify behind a screen that prevented them from viewing the defendant while they testified violated the defendant's right to confrontation). For discussion of several important Confrontation Clause cases, see *infra* Part II.A.

17 *See* Lemos, *supra* note 11, at 1228.

18 THE MUSLIM VEIL IN NORTH AMERICA 115–16 (Sajida Sultana Alvi et al. eds., 2003) [hereinafter THE MUSLIM VEIL].

19 Sherbert v. Verner, 374 U.S. 398, 403–04 (1963) (characterizing a burden on free exercise as forcing a choice between complying with the law and exercising religious belief); *see also* Ira C. Lupu, *Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171, 199 (1995) (describing pre-*Smith* burdens as direct and coercive restrictions on religious practice, belief, and custom).

20 *See* MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE 115–29 (2008). Professor Nussbaum credits American toleration for religious difference as essential to civil peace:

> [S]ome credit for the absence of violence is due to the very tradition that I have been describing, a tradition that regards religious conscience as precious and worthy of respect, and worthy of respect even when it enjoins conduct that refuses assimilation. If people want to wear religious articles of dress, that has been their right ever since the Quakers and the Mennonites and the Jews dressed strangely. If they seek accommodations from general

witness may also have a protectable privacy interest in wearing her veil.[21] Finally, her refusal to remove the veil has drastic implications for her access to courts in both the criminal and civil contexts, thereby impacting her ability to participate as a citizen.[22]

C. The State

The situation is unique for the State because it has strong interests on each side. The integrity of the criminal justice system, which includes its ability to procure truth and justice as well as protect the rights of individuals, is at stake. The State is interested in ensuring that the criminal justice system is reliable and credible.[23] The State must also adhere to the procedural guarantees outlined in the Constitution. At the same time, the State maintains a strong interest in protecting religious freedom, especially given the considerable history of religious accommodation in America.[24] Further, the State might consider crafting public policies cognizant of non-Western traditions given the pluralistic composition of the United States.[25]

The tension between these interests is ripe for analysis because it involves the interplay of the Constitution and its textual guarantees,

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> laws on a religious basis, that again has been seen to be their right ever since Jews were exempted from testifying on their Sabbath and Quakers from taking off their hats in court.

Id. at 347–48; *see infra* notes 56–59.

21 *See* Peninna Oren, Note, *Veiled Muslim Women and Driver's License Photos: A Constitutional Analysis*, 13 J.L. & POL'Y 855, 878 (2005).

22 Wearing the veil resulted in Muhammad's inability to bring claims or testify in the pursuit of justice, thereby precluding participation in certain civic opportunities afforded to other citizens solely on the basis of religious practice. *See* Claire McCusker, Comment, *When Church and State Collide: Averting Democratic Disaffection in a Post-*Smith *World*, 25 YALE L. & POL'Y REV. 391, 392 (2007) ("[T]hese conflicts risk causing religious organizations and people to opt out of public life, thereby threatening democratic participation.").

23 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).

24 *See* NUSSBAUM, *supra* note 20, at 115–29; *see also* 16A AM. JUR. 2D *Constitutional Law* § 443 (2009) ("The Free Exercise Clause of the 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." (footnote omitted)).

25 THE MUSLIM VEIL, *supra* note 18, at xiii ("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.").

Supreme Court jurisprudence, history and traditions, public policy, and the legitimate boundaries of religious practice in a society governed by the rule of law. The question is whether a careful balancing of the interests may occur so as to minimize encroachment on these respective interests or whether a tragic choice must be made.[26]

II. Historical Values and Current Supreme Court Jurisprudence

It is crucial to understand the historical underpinnings of each constitutional protection as well as current understandings of their meaning and scope in order to determine a possible resolution to the conflict. Any workable solution must account for the current state of the law.

A. The Confrontation Clause: From Absolute to Preferential Right

Underlying many decisions concerning the Confrontation Clause is a concern for fundamental fairness, reflected through a desire for adequate truth-seeking processes that are both reliable and credible: "[T]he central mission of the Confrontation Clause . . . is 'to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that the trier of fact [has] a satisfactory basis for evaluating the truth of the [testimony].'"[27]

In *Mattox v. United States*,[28] the Supreme Court highlighted the central concerns of the Confrontation Clause: fairness and the reliability of testimony.[29] At the same time, however, it left the door open for exceptions to the general right of confrontation for public policy reasons and the necessities of a particular case.[30] The Court also has linked the confrontation right to cross-examination throughout the

26 *See generally* Guido Calabresi & Philip Bobbitt, Tragic Choices: The Conflicts Society Confronts in the Allocation of Tragically Scarce Resources (1978) (arguing that society allocates scarce resources by prioritizing certain values and outcomes).

27 Lee v. Illinois, 476 U.S. 530, 548 (1986) (Blackmun, J., dissenting) (third alteration in original) (quoting Dutton v. Evans, 400 U.S. 74, 89 (1970)).

28 156 U.S. 237 (1895).

29 *See id.* at 242–43 (finding that the Confrontation Clause's primary function is to ensure the reliability of evidence presented at criminal trials through adversarial testing).

30 *See id.* at 258 (Shiras, J., dissenting) ("The books disclose many instances in which rules of evidence, much more fundamental and time-honored than the one we are treating, have been dispensed with, because of an overruling necessity. . . . Necessity, either physical or moral, dispenses with the ordinary rules of evidence.").

twentieth century.[31] Almost a century after *Mattox*, the Supreme Court held in *Coy v. Iowa*[32] that the Clause guaranteed a literal right to confrontation. The opinion, written by Justice Scalia, utilized literal textualism and pointed to anecdotal history, human values, and precedent for support.[33] The case involved a state statute that allowed child abuse victims to sit behind a screen while testifying in order to avoid making eye contact with the defendant.[34] The Court held that the Clause guarantees a face-to-face meeting with witnesses and effective cross-examination.[35] Fundamental notions of fairness and the importance of reliable evidence established the literal right of confrontation.[36] Quoting *Lee v. Illinois*,[37] Justice Scalia wrote how the right of confrontation "'contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails.'"[38] The integrity of the trial process, including its fairness, reliability, and credibility, favor providing defendants with the right to confront witnesses. Affording defendants this right is not without costs either: "[T]hat 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."[39] Interestingly, Justice Scalia did acknowledge that exceptions could exist; however, he noted that they "would surely be allowed only when necessary to further an important public policy."[40]

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31 *See* Jacqueline Miller Beckett, Note, *The True Value of the Confrontation Clause: A Study of Child Sex Abuse Trials*, 82 GEO. L.J. 1605, 1619 (1994).

32 487 U.S. 1012 (1988).

33 *See id.* at 1017–21.

34 *Id.* at 1014–15.

35 *See id.* at 1017 ("[W]e 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.'" (quoting California v. Green, 399 U.S. 149, 157 (1970))).

36 Justice Scalia pointed to President Eisenhower's remarks that meeting one's accusers face-to-face was an unspoken rule in his 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 [sic], if someone dislikes you, or accuses you, he must come up in front. He cannot hide behind the shadow."

Id. at 1017–18 (alterations in original) (quoting Press Release, President Dwight D. Eisenhower's Remarks at B'nai B'rith Anti-Defamation League (Nov. 23, 1951), *reprinted in* Pollitt, *supra* note 12, at 381).

37 476 U.S. 530 (1986).

38 *Coy*, 487 U.S. at 1019 (quoting *Lee*, 476 U.S. at 540).

39 *Id.* at 1020.

40 *Id.* at 1021.

The concurring and dissenting opinions highlighted the Clause's preferential nature. In concurrence, Justice O'Connor noted that the Court had stated on numerous occasions that the Clause "'reflects a *preference* for face-to-face confrontation at trial'"[41] and pointed to precedent to demonstrate that significant state interests could overcome the general confrontation right.[42] In dissent, Justice Blackmun agreed with this general proposition and emphasized how the screen did not preclude achievement of the guarantees of fairness and reliability because the jury could view the demeanor of the witnesses and defense counsel could engage in cross-examination.[43] Each acknowledged that protecting child abuse victims from "fear and trauma" could amount to a significant public policy interest, as determined by the legislature, to overcome the preferential right.[44]

Two years following *Coy*, the Supreme Court revisited the issue in *Maryland v. Craig*,[45] which also involved sexual abuse victims, and held that the Clause only "'reflects a *preference* for face-to-face confrontation at trial.'"[46] Justice O'Connor, writing for the majority, affirmed that the fundamental purpose of the Confrontation Clause was to ensure reliability in testimony.[47] Nevertheless, face-to-face confrontation is "not the *sine qua non* of the confrontation right."[48] Most significantly for the purposes of this Note, the opinion held that the Confrontation Clause "may be satisfied *absent a physical, face-to-face con-*

41 *Id.* at 1024 (O'Connor, J., concurring) (quoting Ohio v. Roberts, 448 U.S. 56, 63 (1980)).

42 *Id.* at 1024–25. Justice O'Connor quoted, among other cases, *Chambers v. Mississippi*, 410 U.S. 284 (1973), in which the Court held that "the right to confront . . . is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Chambers*, 410 U.S. at 295, *quoted in Coy*, 487 U.S. at 1024 (O'Connor, J., concurring).

43 *Coy*, 487 U.S. at 1033–34 (Blackmun, J., dissenting) ("Because the girls testified under oath, in full view of the jury, and were subjected to unrestricted cross-examination, there can be no argument that their testimony lacked sufficient indicia of reliability.").

44 *Id.* at 1032 ("[T]he fear and trauma associated with a child's testimony in front of the defendant have two serious identifiable consequences: They may cause psychological injury to the child, and they may so overwhelm the child as to prevent the possibility of effective testimony, thereby undermining the truth-finding function of the trial itself. . . . [A] State properly may consider the protection of child witnesses to be an important public policy." (footnote omitted)).

45 497 U.S. 836 (1990).

46 *Id.* at 849 (quoting *Roberts*, 448 U.S. at 63).

47 *Id.* at 845 ("The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.").

48 *Id.* at 847.

frontation 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."[49] O'Connor specifically wrote that the "combined effect" of a witness's physical presence, taking of the oath, submission to cross-examination, and the availability of demeanor evidence to the jury ensured reliability absent face-to-face confrontation.[50] As long as the defense "'is given the full and fair opportunity to probe and expose [testimonial] infirmities [such as forgetfulness, confusion, or evasion] through cross-examination,'" the Confrontation Clause is "'generally satisfied.'"[51]

Because the Clause is not absolute, significant public policy interests may overcome the confrontation right, although the "requisite finding of necessity must . . . be a case-specific one."[52] Further, exceptions to the right must still guarantee the reliability of the evidence in question through the seriousness of the oath, cross-examination, and the fact-finder's ability to observe the demeanor of the witness.[53] The significance of *Craig* is that it allows exceptions for significant public policy interests, to the preference for face-to-face confrontation, by recognizing that demanding a potentially traumatic confrontation would undermine the reliability goals of the Confrontation Clause.[54] It also characterizes the confrontation right in terms of cross-examination, thereby allowing exceptions so long as the defendant can legitimately examine the witness.[55]

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49 *Id.* at 850 (emphasis added). If reliability can be assured and the witness is subject to "rigorous adversarial testing in a manner *functionally equivalent* to that accorded live, in-person testimony," then the procedure probably satisfies the constitutional right. *Id.* at 851 (emphasis added).

50 *Id.* at 846, 851.

51 *Id.* at 847 (alterations in original) (quoting *Roberts*, 448 U.S. at 69).

52 *Id.* at 855. The Court noted that the trial court must find that the witness will be traumatized by the presence of the defendant. *Id.* at 856. This leaves room for judges to exercise discretion, thereby broadening the possibility of granting an exemption. Beckett, *supra* note 31, at 1641 ("By not creating an objective test, Justice O'Connor opened the door for emotions and social opinion to weigh heavily in the decision of whether or not an issue constitutes a pertinent public policy. By providing the opportunity for judges to follow their hearts instead of their minds, Justice O'Connor has left the labeling of exceptions wide open." (footnote omitted)).

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

54 *See id.* ("Indeed, where face-to-face confrontation causes significant emotional distress in a child witness, there is evidence that such confrontation would in fact *disserve* the Confrontation Clause's truth-seeking goal.").

55 *See* Frank R. Herrmann & Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 VA. J. INT'L L. 481, 483 (1994).

B. The Free Exercise Clause, General Applicability, and Religious Exemptions

American constitutional history is a seesaw when it comes to religious accommodations[56] and scholars disagree about whether the Free Exercise Clause should require religious exemptions. Professor Michael McConnell highlights the fact that early state constitutions allowed for liberty of conscience provided that it did not interfere with good and peaceable order.[57] He also points out that James Madison was more amenable to religious exemptions if they did not conflict with private rights.[58] On the contrary, Professor Philip Hamburger argues that early Americans did not support a general right of religious exemption, although they may have allowed accommodations in a few specific situations: "Although some dissenters asked for grants of exemption from a few specified civil obligations, such as military service, dissenters typically did not demand a general exemption from objectionable civil laws, let alone a constitutional right to such an exemption."[59]

The Supreme Court waffled between each approach for more than a century before attempting to settle the exemption question in *Employment Division v. Smith*.[60] The Court scrapped individual case-by-case analysis of burdens and state interests[61] for a presumption of con-

56 *See generally, e.g.*, Reynolds v. United States, 98 U.S. 145 (1878) (discussing the criminal prohibition against polygamy); People v. Phillips (N.Y. Ct. Gen. Sess. June 14, 1813), *reprinted in* 1 W.L.J. 109 (1843) (discussing the priest-penitent privilege). Scholars disagree about early American sentiment toward religious exemptions. *See* Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 932–33 (1992) (arguing that early Americans did not assume that the Free Exercise Clause granted a general right of religious exemption); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1439–42 (1990) (discussing how Madison's jurisdictional distinction between church and state and state constitutional provisions acknowledges the possibility of viable religious accommodation).

57 *See* McConnell, *supra* note 56, at 1462 ("[T]he state provisions make sense only if free exercise envisions religiously compelled exemptions from at least some generally applicable laws.").

58 *Id.* at 1463 n.267 (discussing how Madison saw religion as immune from government unless it trespassed on private rights).

59 Hamburger, *supra* note 56, at 944–45; *see also id.* at 939 ("The assumption that religious liberty would not, or at least should not, affect civil authority over civil matters was so widely held that a general right of religious exemption rarely became the basis for serious controversy.").

60 494 U.S. 872 (1990).

61 *See* Wisconsin v. Yoder, 406 U.S. 205, 218–19 (1972) (allowing exemption for Amish schoolchildren from mandatory public school attendance law under the *Sherbert* test); Sherbert v. Verner, 374 U.S. 398, 403, 406 (1963) (performing a two-part

stitutionality concerning neutral and generally applicable laws. Neutral and generally applicable laws that incidentally affect or burden religious practices are presumptively constitutional.[62] Significantly, the Court preferred that the political process afford religious exemptions instead of the judiciary.[63] Hence, the Free Exercise Clause neither compels nor requires religious exemptions from generally applicable laws, including criminal statutes and constitutional provisions. The Confrontation Clause, on its face, is a neutral and generally applicable constitutional provision. It does not discriminate against or target religious practice. Specifically, the existence of the confrontation right, afforded by the Sixth Amendment, incidentally burdens the wearer of the veil, thereby fitting neatly into the *Smith* framework.

Nevertheless, *Smith* did leave room for exemptions in a few areas.[64] Most importantly, the Court acknowledged that the State might need to justify refusing to extend exemptions to religious believers if it grants other exemptions to the law in question. This has remarkable implications regarding possible Confrontation Clause exemptions for child abuse victims. For example, because Iowa granted an exemption for child abuse victims as witnesses, *Smith* suggests that the state must have a compelling interest for denying a similar exemption to the Muslim woman wearing the veil. As a Third Circuit judge, Justice Samuel Alito expressed similar reasoning in *Fraternal Order of Police v. City of Newark*,[65] in which the Third Circuit held that a police department violated the Free Exercise Clause rights of two Muslim agents when it enforced a policy banning beards and refused to extend an exemption to the agents despite granting medical exemptions to the policy.[66] Judge Alito wrote that the police department's "decision to provide medical exemptions while refusing

analysis to determine whether state law imposed a burden on an individual's religious beliefs and, if so, whether a compelling state interest existed to supersede that burden).

62 *Smith*, 494 U.S. at 872.

63 *See id.* at 890 ("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 all religious beliefs.").

64 *Smith* does not apply to the regulation of belief, religious speech, parents' rights to control education, employment compensation, individualized assessments, or internal church matters. *See id.* at 877.

65 170 F.3d 359 (3d Cir. 1999).

66 *Id.* at 365–66.

religious exemptions [was] sufficiently suggestive of discriminatory intent" to trigger heightened scrutiny under *Smith*.[67] Affording a secular exemption but not a religious one is the basis for heightened scrutiny despite the otherwise generally applicable law.[68] In other words, "when the government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny."[69] Hence, the Muslim witness might argue for heightened scrutiny and a religious exemption because child abuse victims received a secular accommodation.

A governmental interest underlying a law is compelling if it is stronger than the interest connected to the religious exemption and granting the exemption will undermine the efficacy of the law.[70] One way to apply this standard is by analyzing the effect of granting multiple religious exemptions.[71] The strength of the case for an exemption corresponds to whether granting it will have a negligible or minimal effect on the administration, enforcement, and viability of the law. Further, it is important to note that such analysis usually involves compelling *state* interests. This has significant implications for the present inquiry because the Confrontation Clause primarily implicates the interest of the criminal defendant, although the state certainly has an interest in the legitimacy of the criminal justice system.[72] For example, it might be argued that under *Smith,* the Court only takes into consideration the relevant state interests. However, because heightened scrutiny acknowledges the *nature of the interest* and the *effect of granting exemptions on the efficacy of the law*, the latter consideration likely includes the rights of the criminal defendant because the Con-

67 *Id.* at 365.

68 *Id.*

69 *Id.* at 366. The court ultimately applied intermediate scrutiny because the police department failed to pass even that standard. *Id.* at 366 n.7.

70 *See* United States v. Lee, 455 U.S. 252, 258–59 (1982) ("[T]he Government's interest in assuring mandatory and continuous participation in and contribution to the social security system is very high.").

71 *See* Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 435 (2006) ("[T]he Government can demonstrate a compelling interest in uniform application of a particular program by offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program.").

72 *See supra* notes 10–17, 23–26 and accompanying text.

frontation Clause affords private rights.[73] In other words, state interests and private interests often overlap.[74]

III. Possible Room for an Exemption in Current Supreme Court Doctrine

Current doctrine makes granting the proposed exemption plausible for a few reasons. First, the Court characterizes the confrontation right as preferential rather than absolute.[75] This opens any decision involving the confrontation right to judicial discretion. Second, the witness can argue that protecting religious liberty interests amounts to a "significant public policy" under *Craig*. Third, the witness might claim that when states allow secular exemptions for witnesses the law must survive heightened scrutiny.[76] This last argument is perhaps the witness's strongest because she can question the validity of the premise that demeanor evidence is crucial to maintaining reliability. Finally, consistently wearing the veil might implicate privacy rights.

A. Significance of Preferential v. Absolute Right

Craig grants judicial discretion to trial courts concerning the confrontation right. The trial court must find, on a case-by-case basis, that necessity justifies the exemption.[77] First, the exemption must implicate the welfare of the particular witness.[78] Second, the court must

73 *Lee* sheds light on this point; the Court acknowledged the necessity of citizen participation in order to reach the goals of the social security system. *See Lee*, 455 U.S. at 258–59. Granting religious exemptions, which could be numerous, would impose severe costs on fellow citizens: "[I]t would be difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs." *Id.* at 259–60. If *Smith* only guaranteed consideration of state interests, then a court would never consider the costs of granting exemptions on other individuals. This would probably strengthen the Muslim witness's case. However, courts have consistently considered such costs, either individually or as part of the overall state interest. *See* Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 Ohio St. L.J. 65, 76–83 (1996) (discussing balancing as a free exercise doctrine).

74 Indeed, both the state and the criminal defendant have a strong interest in maintaining a reliable and credible criminal justice system. *See supra* notes 10–17, 23–26 and accompanying text.

75 Maryland v. Craig, 497 U.S. 836, 849 (1990).

76 This analysis would occur in the same vein as *Fraternal Order of Police*. *See* discussion *infra* Part III.C.

77 *Craig*, 497 U.S. at 855.

78 *Id.* ("The trial court must . . . determine whether use of the [proposed] procedure is necessary to protect the welfare of the particular child witness who seeks to testify.").

find that the witness will be traumatized by the presence of the defendant.[79] Third, the court "must find that the [witness's] emotional distress . . . is more than *de minimis*."[80]

It appears that the veiled witness should have no difficulty passing the first and third tests, or at least can argue strongly for each. This is especially true given judicial reluctance to judge the merits or sincerity of religious practices for individual believers.[81] Forcing the witness to unveil has major implications for her welfare, and as Muhammad expressed, might cause severe emotional distress. The event could be traumatizing, especially considering that the believer may perceive removal of her veil as an attack on both her religion and her dignity.[82] This is because veiling "may be for the fulfillment of a religious obligation, cultural practice, or as a symbol of political conviction."[83] *Craig* held that the method of exemption must be necessary to protect the witness's welfare. Allowing a witness to retain her veil is analogous to shielding the child witness from viewing the defendant because both correspond to the root of the potential trauma. The potential trauma suffered is more than general nervousness concerning offering testimony; it is a product of religious concerns—involving personal beliefs concerning sin and punishment—which is in the same vein as the child witness's fear of viewing the defendant.

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79 *Id.* at 856.

80 *Id.* The Court defined the standard for emotional distress as "more than 'mere nervousness or excitement or some reluctance to testify.'" *Id.* (quoting Wildermuth v. State, 530 A.2d 275, 289 (Md. 1987)).

81 The Court has been wary to define religion and deferential to individual conscience. *See* Welsh v. United States, 398 U.S. 333, 339–40 (1970) (plurality opinion) (allowing moral and ethical beliefs to be characterized as "religious"); United States v. Seeger, 380 U.S. 163, 187–88 (1965) (holding that religious belief in some "Supreme Being" satisfied the test for conscientious objectors); *see also* Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1066 (1978) ("*Torcaso*, *Seeger*, and *Welsh* suggest a willingness, in contexts raising free exercise questions, to adopt an expansive definition of religion.").

82 *See generally* THE MUSLIM VEIL, *supra* note 18 (explaining that some women view the veil as an expression of their individual identity or fidelity to their belief system). The Qur'an states: "O' (*Our*) Prophet (*Muhammed*)! Say thou unto thy wives and thy daughters and the women of the believers that they let down upon them their cover garments . . . ." *Qur'an* 33:8 (S.V. Mir Ahmed Ali et al. trans., 2009). Finally, it also advises "believing women . . . display not their adornment . . . ." *Id.* 24:31.

83 Steven R. Houchin, Comment, *Confronting the Shadow: Is Forcing a Muslim Witness to Unveil in a Criminal Trial a Constitutional Right, or an Unreasonable Intrusion?*, 36 PEPP. L. REV. 823, 834 (2009) (footnotes omitted). Ginnnah Muhammad sacrificed her right to sue, perhaps unwittingly, due to her religious beliefs. *See* Transcript of Small Claims Hearing, *supra* note 1, at 6.

However, the second finding is more problematic. *Craig* specifically instructs that a trial court "must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant."[84] The presence of the defendant must cause the trauma. This means that "if the state interest were merely the interest in protecting child witnesses from courtroom trauma generally, denial of face-to-face confrontation would be unnecessary because the child could be permitted to testify in less intimidating surroundings, albeit with the defendant present."[85] This is problematic because the veiled witness is probably more traumatized by unveiling in the courtroom generally rather than specifically in front of the defendant. Indeed, the defendant is only one small part of the larger audience that is the source of the trauma due to exposure. This suggests that the veiled witness's trauma is not solely a result of the defendant's presence, which is the basis of granting exemptions to child abuse victims. There could be a case in which the trauma suffered is *mostly* due to the defendant. The Court left the door open for a finding of necessity in such a case by holding that the right is preferential and by granting trial courts wide judicial discretion.

B. Religious Liberty as a "Significant Public Policy"

Craig involved Maryland's statutory procedure, which prevented the child witness from seeing the defendant while testifying.[86] A majority of states had similar or analogous procedures at the time.[87] *Craig* applies in all federal courts and in thirty-four states with constitutional provisions that parallel the Confrontation Clause.[88] Further, the Court emphasized that Maryland's procedure ensured other factors in favor of reliability.[89] Nevertheless, the critical inquiry was whether the procedure furthered an important state interest.[90]

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84 *Craig*, 497 U.S. at 856.

85 *Id.*

86 *See id.* at 851 ("Maryland's statutory procedure, when invoked, prevents a child witness from seeing the defendant as he or she testifies against the defendant at trial.").

87 *See id.* at 853.

88 Houchin, *supra* note 83, at 848.

89 *Craig*, 497 U.S. at 851 ("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.").

90 *See id.* at 852.

Craig cited past decisions sustaining legislation aimed at protecting the psychological and physical well being of child abuse victims.[91] Multiple cases involved the clash of constitutional interests. For example, in *Globe Newspaper Co. v. Superior Court of Norfolk County*,[92] the Court found that the state's interest in the well being of minor victims justified depriving both the press and the public of their right to attend criminal trials.[93] The physical and psychological well being of child abuse victims trumped the constitutional rights of others given unique factual circumstances. The Court noted that multiple states had similar statutes, thereby proving its significance as a state interest.[94] Specifically, Maryland intended "'to safeguard the physical and psychological well-being of child victims by avoiding, or at least minimizing, the emotional trauma produced by testifying.'"[95] Further, *Craig* highlighted the "State's traditional and 'transcendent interest in protecting the welfare of children.'"[96] It cited academic literature concerning the trauma suffered by child abuse victims.[97] Significantly, the Court refused to second-guess the Maryland legislature.[98]

This reasoning allows the veiled witness to make several arguments that religious liberty amounts to a significant public policy. At the most basic level, unveiling implicates the psychological and physical well being of the Muslim woman.[99] Religious expression cuts to the very core of human dignity, and as Muhammad stated, unveiling would lead to major shame and embarrassment.[100] There is widespread literature on the significance of the veil to demonstrate the

91 *Id.* ("We have of course recognized that a State's interest in 'the protection of minor victims of sex crimes from further trauma and embarrassment' is a 'compelling' one." (quoting Globe Newspaper Co. v. Superior Court of Norfolk County, 457 U.S. 596, 607 (1982))).

92 457 U.S. 596 (1982).

93 *See id.* at 608–09; *see also* Osborne v. Ohio, 495 U.S. 103 (1990) (upholding a statute proscribing the possession of child pornography against an individual's right to free speech).

94 *See Craig*, 497 U.S. at 853.

95 *Id.* at 854 (quoting Wildermuth v. State, 530 A.2d 275, 286 (Md. 1987)).

96 *Id.* at 855 (quoting Ginsberg v. New York, 390 U.S. 629, 640 (1968)).

97 *Id.* at 854.

98 *Id.* at 855 ("[W]e will not second-guess the considered judgment of the Maryland Legislature regarding the importance of its interest in protecting child abuse victims from the emotional trauma of testifying.").

99 *See* THE MUSLIM VEIL, *supra* note 18, at 115–16.

100 Transcript of Small Claims Hearing, *supra* note 1, at 4 ("Ginnnah Muhammad: 'Well, first of all, I'm a practicing Muslim and this is my way of life and I believe in the Holy Koran and God is first in my life. I don't have a problem with taking my veil off if it's a female judge, so I want to know do you have a female that I could be in front of then I have no problem but otherwise, I can't follow that order.'").

psychological effect of having victims face their supposed abuser.[101] Nevertheless, her strongest argument probably lies in the vast history of religious exemptions granted through the political process by legislatures that often cite the protection of religious liberty as a state interest. Some Founders thought that the State had an interest in protecting religious belief.[102] The Court also affirmatively deferred to the judgment of the Maryland legislature; political communities that recognize the significance of religious practices may be afforded the same level of deference. This deference, coupled with the Court's openness to individualized assessments on a case-by-case basis, affords judges ample discretion to determine the immediate effects of accommodation on the trial at hand.

C. State Secular Accommodation, Heightened Scrutiny, Reliability, and Demeanor Evidence

Smith left open the possibility of exceptions to generally applicable laws. *Fraternal Order of Police v. City of Newark* found room for religious exemptions when such laws provide secular exceptions.[103] This has major implications for the veiled witness, especially because so many states have granted secular accommodations for child abuse victims. Allowing accommodations based on secular reasons but not religious ones triggers heightened scrutiny.[104] Further, the Religious

101 *See generally* THE MUSLIM VEIL, *supra* note 18 (discussing the moral, cultural, and interpersonal implications of veiling).

102 John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 386 (1996) ("[C]ivic republicans sought to imbue the public square with a common religious ethic and ethos—albeit one less denominationally specific and rigorous than that countenanced by the Puritans."). As Professor Witte notes, George Washington once declared, "'Religion and Morality are the essential pillars of Civil society.'" *Id.* (quoting Letter from George Washington to the Clergy of Different Denominations Residing In and Near the City of Philadelphia (Mar. 3, 1797), *in* 36 THE WRITINGS OF GEORGE WASHINGTON, 1745–1799, at 416 (John C. Fitzpatrick ed., 1931)).

103 *See supra* notes 65–69 and accompanying text; *see also* Rader v. Johnston, 924 F. Supp. 1540, 1555 (D. Neb. 1996) (holding that a state university did not have a compelling state interest in diverse freshmen housing and that the housing policy was not being enforced in a neutral manner). The Religious Freedom and Restoration Act (RFRA), 42 U.S.C. § 2000bb-1 (2006), because it restores heightened scrutiny under federal law, would lead to the same analysis given that the Sixth Amendment is part of the federal Constitution. *See id.*

104 Fraternal Order of Police v. City of Newark, 170 F.3d 359, 366 (3d Cir. 1999) ("[W]hen the government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny.").

Freedom and Restoration Act[105] (RFRA) restored the pre-*Smith* exemption analysis, as articulated in *Sherbert*, to federal laws.[106] Thus, the veiled witness needs to show that the policy behind the Confrontation Clause, namely reliability, fails to outweigh her individual liberty interest and that granting a religious exemption would not seriously undermine the efficacy of the provision.[107]

As mentioned above, the Court consistently acknowledges reliability and fairness as the linchpin of the confrontation right. Demeanor evidence, as viewed by the defendant, defense counsel, and the judge and jury, is thought essential to ensuring a credible, reliable, and fair criminal proceeding in pursuit of both truth and justice.[108] Indeed, reliance on this assumption, namely the necessity of demeanor evidence, pervades the criminal justice system:

> The weight given to non-verbal expression in jury instructions, the appellate courts' limited review because of its inability to perceive them, juror disqualification because of an inability to view these expressions, and prejudice resulting from judges' inappropriate use of them all demonstrate the dilemma created by a witness wearing a niqab.[109]

Hence, it appears that the best way to question the strength of the purported state interest under heightened scrutiny is to demonstrate that demeanor evidence is not as necessary to judge the reliability of witness testimony as originally believed.

There are three reasons why the veiled witness might claim that the state interest is less than compelling. First, it is not clear that all types of demeanor evidence must be made available for adequate fact-finding to occur. Demeanor evidence consists of nonverbal cues and

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105 42 U.S.C. § 2000bb-1.

106 *Id.* § 2000bb-1(b)(1)–(2).

107 *See supra* notes 70–74 and accompanying text.

108 *See supra* notes 29–55 and accompanying text; *see also* People v. Sammons, 478 N.W.2d 901, 910 (Mich. Ct. App. 1991) (finding that masking of the prosecution's chief witness during his testimony violated the Confrontation Clause because the trier of fact could not evaluate the witness's demeanor); Romero v. State, 173 S.W.3d 502, 506–07 (Tex. Crim. App. 2005) (finding that obstruction of a witness's face by a disguise of sunglasses, a baseball cap, and a turned-up collar violated the defendant's confrontation right); FED. JUDICIAL CTR., BENCHBOOK FOR U.S. DISTRICT COURT JUDGES §§ 2.07, 7.04, at 102, 226–27 (5th ed. 2007), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/Benchbk5.pdf/$file/Benchbk5.pdf (advising judges to instruct criminal juries of their duty to assess the credibility and demeanor of witnesses).

109 Aaron J. Williams, Comment, *The Veiled Truth: Can the Credibility of Testimony Given by a Niqab-Wearing Witness be Judged Without the Assistance of Facial Expressions?*, 85 U. DET. MERCY L. REV. 273, 278 (2008).

contributes to one person's absorption of information communicated by another person.[110] Many commentators believe that this form of communication contributes significantly to the trier of fact's ability to assess credibility because "[g]estures and facial expressions are transmitted and observed by every individual in the courtroom. . . . A witness on the stand, under the scrutiny of the jury, reveals more through fidgeting with his clothes and shifting his body than he does through his testimony."[111] But is this true?

Common sense and scientific research indicate that verbal and nonverbal communications deserve equal consideration. Evaluating the veracity of testimony focuses on verbal responses to questions and the consistency of statements.[112] At the same time, both shared experience and scientific research tell us that facial expressions and other nonverbal expressions do not always follow verbal representations.[113] But most important to this inquiry is whether fact-finders can actually perceive such discrepancies. Scientific research casts doubt on the proposition that individuals can determine when they are being lied to through nonverbal expressions.[114] Further, the ability to even perceive such expressions is "inaccurate at best."[115] One study found that judges only detected untruthfulness approximately fifty-seven percent

110 *See* Jeremy A. Blumenthal, *A Wipe of the Hands, a Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 NEB. L. REV. 1157, 1164 (1993) (discussing the operational definitions of demeanor, including external appearances and physical cues); Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1078 (1991) (discussing three categories of "cues" that comprise demeanor in the law); Martin S. Remland, The Importance of Nonverbal Communication in the Courtroom 4 (Apr. 29, 1993) (unpublished manuscript), *available at* http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/13/96/b7.pdf.

111 Elizabeth A. LeVan, *Nonverbal Communication in the Courtroom: Attorney Beware*, 8 LAW & PSYCHOL. REV. 83, 83–84 (1984).

112 *See* FED. JUDICIAL CTR., *supra* note 108, § 7.04, at 226–27.

113 *See* Remland, *supra* note 110, at 6; Sharon Jayson, *It's Written All over Your Face*, USA TODAY, July 21, 2005, at 9D.

114 *See* Paul Ekman & Maureen O'Sullivan, *Who Can Catch a Liar?*, 46 AM. PSYCHOLOGIST 913, 914 (1991). *See generally* Bella M. DePaulo & Roger L. Pfeifer, *On-the-Job Experience and Skill at Detecting Deception*, 16 J. APPLIED SOC. PSYCHOL. 249 (1986) (determining that individuals were generally unable to accurately perceive deceptive communication).

115 Williams, *supra* note 109, at 284 (citing Ekman & O'Sullivan, *supra* note 114, at 913); *see also* Blumenthal, *supra* note 110, at 1159 (1993) ("[S]tudies establish that typical subjects are unable to use the manner and conduct of a speaker to successfully detect deceptive information on any reliable basis." (internal quotation marks omitted)); Wellborn, *supra* note 110, at 1075 (noting that "social scientists have tested the legal premise concerning demeanor" and "the experimental results indicate that this legal premise is erroneous").

of the time[116]—a particularly glaring statistic. Thus, the questionable ability of fact-finders to determine the truth of statements uttered in court based upon demeanor or nonverbal expressions renders the rationale underlying removal of the veil questionable at the very least.[117] As one commentator puts it: "If a fact finder's ability to ascertain deceit through nonverbal communication is slightly greater than fifty percent, how compelling is the court's interest in requiring a witness to remove her veil, especially when the only nonverbal cues inhibited by the niqab are facial expressions?"[118] This is especially true given that some studies suggest that nonverbal and nonfacial cues are better indicators of untruthfulness than facial expressions.[119] Such cues are also easier to perceive.[120] Simply put, given the perceptiveness of juries, a witness's tone of voice, body language, and verbal testimony may be just as important and even sufficient to convey his or her credibility .

Further, the elements outlined by Justice O'Connor in *Craig* that support reliability should be considered. The witness would still take an oath.[121] Also, the presence of the veil does not wholly preclude a face-to-face meeting. The majority in *Coy* and *Craig*, as well as Justice Scalia's dissent in *Craig*, emphasized the importance of face-to-face confrontation. However, neither opinion offered explanation about the exact meaning of face-to-face. In fact, if confronted by a witness in a veil, the defendant retains the ability to look into her eyes.[122]

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116 Ekman & O'Sullivan, *supra* note 114, at 916. It should also be noted that, unlike juries, judges are professional.

117 *See* Blumenthal, *supra* note 110, at 1190–95 (discussing disconnect between behaviors thought to indicate deception and those actually observed); Williams, *supra* note 109, at 286 ("The common idea held by many, that one has the ability to detect deception based on the facial expressions of another, appears to be largely incorrect. Although most research suggests that many forms of nonverbal communication provide indicators of untruthfulness, when focusing on facial expressions perception appears to be the problem." (footnote omitted)).

118 Williams, *supra* note 109, at 288.

119 *See generally* LeVan, *supra* note 111 (discussing the effects of nonverbal communication on the judge, witness, client, and attorney).

120 *See* Ekman & O'Sullivan, *supra* note 114, at 914.

121 *See* Houchin, *supra* note 83, at 860–61 ("[T]he veil . . . does not prevent a witness from testifying under oath. . . . [T]he seriousness of the matter and the possibility of the penalty of perjury are still impressed upon the veiled witness . . . . The fulfillment of the oath element weighs toward reliability." (footnote omitted) (internal quotation marks omitted)).

122 *But see* Houchin, *supra* note 83, at 858 ("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."). "Confront" is defined as "to stand face to face with." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 477 (1986).

Finally, the veil does not directly inhibit cross-examination, although one commentator suggests that the inability to observe demeanor entirely precludes a legitimate opportunity for comprehensive cross-examination.[123] However, the defendant retains the ability to question the witness extensively, thereby eliciting responses to questions, exposing inconsistent statements, and showing hesitation in responses and changes in nonfacial body language. Strict observation is unnecessary to uncover doubt, hesitation, lack of confidence, and even lies; this information is the product of verbal responses as well.[124] It is true that the veil might cover "tiny signals revealed in facial expressions."[125] But given that individuals have severe difficulty detecting such signals or their meaning,[126] this justification demands reevaluation at the very least and cannot stand alone.

That demeanor evidence remains available indicates that the veil might not undercut reliability or cross-examination as much as originally thought. Many individuals have difficulty accurately perceiving and judging the veracity of nonverbal cues. Furthermore, facial expressions are not always dispositive when it comes to demeanor and it is possible that nonfacial body language is actually more indicative of truthfulness. At the very least, this research should spur reconsideration of the idea that the need for physical demeanor evidence is sufficient justification for forcing the witness to unveil.

D. Does the Muslim Witness Have a Privacy Interest in Her Face?

One author suggests that the witness maintains privacy rights supplemental to the general free exercise interest.[127] Individuals enjoy a reasonable expectation of privacy if a person exhibits an actual and subjective expectation of privacy and society is prepared to recognize the expectation as reasonable.[128] The veiled woman would have to claim an expectation of privacy in her face; however, multiple courts have denied such an expectation with respect to voices, handwriting,

123 *See* Houchin, *supra* note 83, at 861 ("[L]egal 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.").

124 *See id.* at 862. *But cf.* Jack B. Swerling, "*I Can't Believe I Asked That Question": A Look at Cross-Examination Techniques*, 50 S.C. L. REV. 753, 777 (1999) (advising cross-examiners to "not take [their] eyes off the witness," because "[t]he eyes reveal many secrets and conceal very little").

125 *See* Houchin, *supra* note 83, at 862.

126 *See supra* notes 112–19 and accompanying text.

127 *See* Oren, *supra* note 21, at 868.

128 *See* Katz v. United States, 389 U.S. 347, 361 (1967).

hands, and eyes.[129] One's voice is "constantly exposed to the public"[130] and with handwriting "nothing is exposed to the grand jury that has not previously been exposed to the public."[131] However, a woman that chooses to cover her face daily and in public would seem to fall outside of this public exposure category because the particular physical attribute is not ordinarily in plain view.[132] A veiled Muslim woman seeks to preserve her face as private, thereby heightening an expectation of privacy.[133] Hence, any court would need to determine whether she has an expectation of privacy in her unexposed physical features.[134]

It remains unclear whether society would recognize this privacy expectation as reasonable, especially on the witness stand. Expectations related to social customs have been found reasonable if they contribute to societal values.[135] It is at least arguable that society not only recognizes religious garments as reasonable, but that it also believes they contribute positively to the propagation of societal values, such as freedom of religion.[136] However, this prong of the *Katz* test may be problematic for one apparent reason: the reasonableness of the expectation of privacy and the subsequent search are within the

129 *See* United States v. Dionisio, 410 U.S. 1, 14 (1973) (voice); United States v. Doe, 457 F.2d 895, 900–01 (2d Cir. 1972) (handwriting samples); United States v. Richardson, 388 F.2d 842, 845 (6th Cir. 1968) (hands); State v. Shearer, 30 P.3d 995, 1000 (Idaho Ct. App. 2001) (eyes).

130 *Dionisio*, 410 U.S. at 14.

131 *Doe*, 457 F.2d at 899. In *Shearer,* the Idaho court spoke of eyes as a "facial characteristic that is ordinarily and frequently exposed to the public." *Shearer*, 30 P.3d at 1000.

132 *See* Oren, *supra* note 21, at 882, 894 ("[I]t is possible that a court may conclude that a veiled Muslim woman whose face has not been exposed to the public has an actual expectation of privacy in her face.").

133 *See id.* at 894.

134 The veiled Muslim woman may be analogous to the "rare recluse" who could have an expectation of privacy in normally exposed physical attributes. *See Doe*, 457 F.2d at 898; *see also* Oren, *supra* note 21, at 883 ("Because no court has ever ruled on whether there is a privacy interest in the case of a person who regularly keeps private a physical feature freely exposed by the general population, such a case would be one of first impression in the United States.").

135 *See* Bond v. United States, 529 U.S. 334, 338 (2000) ("When a bus passenger places a bag in an overhead bin, he expects that other passengers or bus employees may move it for one reason or another."); Minnesota v. Olson, 495 U.S. 91, 98 (1990) ("Staying overnight in another's home is a longstanding social custom that serves functions recognized as valuable in society.").

136 *See generally* President George W. Bush, Remarks at the Islamic Center of Washington (Sept. 17, 2001), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=63740 (discussing how Muslim women who wear head coverings should be treated with respect).

context of a criminal proceeding. Here the Court's decision in *Hudson v. Palmer*[137] is illuminating: Although prisoners retained a subjective expectation of privacy in their cells, society was not prepared to recognize it as reasonable given "the concept of incarceration and the needs and objectives of penal institutions."[138] In *Hudson*, the larger institutional concern outweighed the privacy interest of the individual. Criminal trials and the integrity of the criminal justice system arguably are analogous.

IV. Problems with Granting the Exemption

Despite the openings making an exemption plausible, there are strong reasons, born from legal, historical, and normative considerations, for denying the exemption. As mentioned above, the traditional test for heightened scrutiny does not neatly fit the situation given that affording an exemption will have a direct impact on another's *constitutional* interest rather than individual or societal interests in the aggregate.[139] Second, although the reliability of demeanor evidence might be suspect in some situations, its mere existence serves as a baseline of fairness for the criminal defendant and contributes to overall faith in the criminal justice system. Third, embedded within the American psyche is a belief in the power and value of confrontation and the adversarial system, both inside and outside of the legal realm, for procuring truth.[140] Related to this belief is a strong presumption in favor of protecting individuals against raw government power, which is reflected in the numerous protections afforded crimi-

137 468 U.S. 517 (1984). In *Hudson*, the Court held that American society is not prepared to recognize the privacy rights of prisoners in their cells. *Id.* at 536.

138 *Id.* at 526. *But see* Lupu, *supra* note 19, at 203 (noting that RFRA overruled *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), thereby subjecting institutions, such as prisons, to pre-*Smith* standards).

139 *Cf. United States v. Lee*, 455 U.S. 252, 260–61 (1982) (declining to extend a statutory exemption to the social security program for self-employed Amish to Amish employers). The proposed exemption differs from *Lee*, because even had the exemption been granted, the cost of losing one taxpayer did not directly and immediately impact the vitality of the system, whereas allowing veiled testimony might have significant consequences for the individual defendant. Further, entitlement benefits are a matter of statutory law rather than a constitutional guarantee. *See id.*

140 *See* Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77, 94–116 (1995). According to Professor Jonakait, "American adversary procedure with defense cross-examination at its core furthered such rights by acting as a check on the government and by granting the citizenry control over their lives." *Id.* at 113. "[T]he right to confrontation was guaranteeing an accused the right to cross-examine witnesses as part of the adversary system that had emerged." *Id.* at 115.

nal defendants. Finally, in a society with scattered resources for promoting and protecting liberty, it is more logical to allocate such resources to the party with the most to lose.

Heightened scrutiny in the free exercise context normally balances the burden on free exercise with state interests, which must be compelling in order to deny the exemption.[141] Courts normally acknowledge public policy objectives, aggregate individual interests, and broader societal interests born from history or culture when calculating how compelling the case is for denying the exemption from the generally applicable law at issue. Undeniably this analysis may occur in the situation at hand; the state interest, namely a fair and reliable criminal justice system, competes with the individual free exercise interest of the Muslim witness. It is at least plausible to make the argument that the witness should prevail given possible doubts about the veil's effect on the reliability of demeanor evidence and its significance for guaranteeing a fair trial. However, in the case at hand, the free exercise interest must be balanced against both the relevant state and individual interests, which admittedly overlap for the most part. The major difference is that the Confrontation Clause is a constitutional liberty interest that can be directly and immediately affected if an exemption is allowed.

There are no heightened scrutiny cases on record attempting to choose between the free exercise interest and another individual *constitutional* interest.[142] In *Lee*, the Court highlighted that granting exemptions could undermine the individual statutory rights of citizens entitled to social security benefits.[143] While *Lee* is distinguishable on its face because it involved statutory interests, it is informative because the Court took seriously such individual interests and combined them with the overall interest of the state in a healthy and workable social security system. The costs of granting exemptions on other individuals were too high to allow the exemption, even when they were attenuated given the vastness of the entitlement system. The same can occur here, although the aggregation is unnecessary because the interest in confrontation is constitutional rather than statutory and the consequences are immediate rather than systemic. The state interest in assuring fair and reliable criminal proceedings com-

141 *See supra* Parts II.B, III.C.

142 *Lee* involves statutory entitlement benefits. *See Lee*, 455 U.S. at 259–60 (finding that the social security tax payment requirement was applicable to Amish employers despite their objection because of the government's overriding interest in preserving social security system).

143 *See id.* at 258–59.

bines with the individual constitutional liberty interest of the defendant to justify burdening the veiled witness.

Second, although demeanor evidence may be unreliable in some situations, this possibility alone does not justify granting an exemption. It is impossible to know and anticipate when and how much jurors will rely on demeanor evidence in any given trial. Put simply, demeanor evidence serves as another piece of information for the jury, and others in the courtroom, to include in its decisionmaking process. The availability of such evidence serves as a baseline of information guaranteed to everyone in the courtroom. This sort of rational deliberation should be promoted, especially in a criminal justice system that prioritizes the rule of law. Further, not only does the presence of such information promote fairness in fact, it also promotes a perception of fairness, which is arguably equally significant.[144] Perhaps most importantly, granting an exemption on reliability grounds continues the trend of converting the confrontation right afforded the defendant into a rule of evidence rather than a viable constitutional interest.[145]

There are also historical and normative considerations to take into account. Most scholars agree that although the Framers' specific understanding of the Confrontation Clause is ambiguous, there are ample sources tracing its history almost two thousand years.[146] Early

144 The Confrontation Clause "serves ends related both to appearances and to reality." Coy v. Iowa, 487 U.S. 1012, 1017 (1988); *see also* Penny J. White, *Rescuing the Confrontation Clause*, 54 S.C. L. REV. 537, 614 (2003) ("While confrontation's purpose is to secure fairness, it must also secure the perception of fairness.").

145 *See* White, *supra* note 144, at 618–19 (arguing that the Court has equated reliability with confrontation). This trend arguably began with *Mattox v. United States*, 156 U.S. 237 (1895), when the Court's decision led to the "unfortunate misjoinder of evidence principles with the constitutional right to confrontation." White, *supra* note 144, at 557. The approach has led to judicial inquiries into reliability and effective cross-examination in order to balance the interests of witnesses and defendants, leading one commentator to argue "the Supreme Court has redefined the Confrontation Clause as an element of cross-examination, rather than as a fundamental right." Beckett, *supra* note 31, at 1614 (footnote omitted).

146 *See, e.g.*, Herrmann & Speer, *supra* note 55, at 482–89 (discussing how Roman law required that the accuser be present in court and that the accused have an opportunity to encounter the accuser); White, *supra* note 144, at 540 (noting that while many people trace the Confrontation Clause's origin to the trial of Sir Walter Raleigh in the early 1660s, "most recognize much earlier beginnings . . . and attach the Clause's origin to ancient civilizations"). Evidence of the importance of confrontation can be found also in religious and literary texts. *See, e.g.*, *Acts* 25:16 (New American) ("I replied that it was not the Roman practice to hand an accused man over before he had been confronted with his accusers and given a chance to defend himself against their charge."); WILLIAM SHAKESPEARE, RICHARD II, act 1, sc. 1 ("Then call

Roman law, which required that accusers be present in court, reflects an accusatorial system analogous to that established by the colonies and constitutionalized by the United States.[147] Both systems emphasized the significance of comprehensive cross-examination in the pursuit of justice.[148] Cross-examination via confrontation was a significant component of the accusatorial criminal justice system because it enabled the discovery of truth.[149] Blackstone, who informed many of the state constitutions serving as the foundation of the Sixth Amendment confrontation right, summarized the power of confrontation:

> This open examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination taken down in writing before an officer . . . . [T]he persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behaviour, and inclinations of the witness . . . .[150]

Behind each of these historical sources is the underlying belief that those willing to make factual assertions, accusations, or claims when liberty hangs in the balance cannot do so stealthily. President Eisenhower's comment quoted in *Coy* echoes the same idea: a free and democratic society frowns upon those who "sneak up from behind."[151] In this sense, confrontation is a two-way street: it is both a right for the defendant and an obligation for the witness.[152] Thus, the

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them to our presence; face to face, [a]nd frowning brow to brow, ourselves will hear [t]he accuser and the accused freely speak . . . .").

147 *See* Herrmann & Speer, *supra* note 55, at 484–85; White, *supra* note 144, at 540–41 ("[T]he American right to confrontation is not an outgrowth of either the English common law or constitutional law, but is rather a byproduct of the American adversarial system created by the American colonists.").

148 *See* Herrmann & Speer, *supra* note 55, at 488 ("When witnesses were present . . . they testified on direct examination and were subject to cross-examination by the adverse party."); Jonakait, *supra* note 140, at 81 (noting how state constitutions emphasized the adversarial system "with defense cross-examination at its core"). Jonakait also writes that "the Sixth Amendment sought to constitutionalize [an] adversary system" inherited from the colonies. *Id.* at 108.

149 *See* Beckett, *supra* note 31, at 1609 ("[F]rom the very beginning of the Anglo-American judicial structure, confrontation played a crucial role in determining the fate of an accused.").

150 3 WILLIAM BLACKSTONE, COMMENTARIES *373–74.

151 *See supra* note 36 and accompanying text. President Eisenhower's remark demonstrates the fact that Americans place faith in an adversarial process that sheds light on the darkness in order to discover truth. Accusations jeopardizing liberty must withstand the light of day before they can be considered credible.

152 *See* Sherman J. Clark, *An Accuser-Obligation Approach to the Confrontation Clause*, 81 NEB. L. REV. 1258, 1266 (2003) ("The language of the clause itself suggests a wit-

history of Western civilization indicates a preference for the practice of looking one's accuser in the eye and reaching resolutions face-to-face. That confrontation is part of the social ethos cannot be discounted in calculations of perceptions of fairness and reliability and favors erring on the side of the criminal defendant.[153]

Favoring the interests of the criminal defendant is consistent with the American prioritization of rights against the government and the modern trend in criminal procedure toward granting defendants ample protection.[154] As a normative and historical matter, the American scheme prioritizes individual rights before those of government.[155] The Clause affords defendants a legitimate tool to counteract the power of prosecutions on behalf of the government.[156] Further, criminal defendants are potentially vulnerable members of society when put against the powers of the state. The law should place the proper burdens on the government before it severely limits someone's liberty, especially when it can take it away for a very long time or potentially forever.[157] And this should be the case even if imposing such burdens on the government has an incidental effect on the rights of others. Though costly, affording defendants rights is consistent with American traditions.

Some might charge that this amounts to judging the merits of religious expression, or unfairly prioritizing some liberties over others without cause; however, such a result is merely the unfortunate consequence of living under a regime that affords ample liberty interests without quantifying or ranking their value from the outset. Simply put, when two constitutional interests conflict, it makes sense to pro-

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ness-centered approach. The defendant's right is not 'to confront' but 'to be confronted with' the witnesses against him. The witness is the one who must do the confronting—who must not 'hide' or 'sneak.'").

153 *See* Beckett, *supra* note 31, at 1629 ("The primary goal of a criminal trial is to determine truth so that the innocent will be acquitted and the guilty will be convicted. Our society has created many tools for uncovering the truth. One such tool is face-to-face confrontation. This tool is part of our social ethos . . . ."); *supra* note 149.

154 JEROLD H. ISRAEL & WAYNE R. LAFAVE, CRIMINAL PROCEDURE 1–9 (2009) (discussing the "criminal justice revolution" beginning in the second half of the twentieth century).

155 *See* White, *supra* note 144, at 549 ("Government was to be feared, not trusted, and the rights set forth in the Bill of Rights, in particular, were intended to assure that government could not encroach upon certain fundamental liberties.").

156 *See* Jonakait, *supra* note 140, at 167 ("Power, including the power of the government in criminal trials, needed to be checked. Confrontation, and the related rights, as part of the development government of checks-and-balances, affirmatively gave the accused the power to truly test the prosecution's case.").

157 *See supra* notes 10–11 and accompanying text.

tect the one that implicates the broader purposes of the constitutional scheme, namely skepticism of government encroachment and protection against the most dangerous violations of liberty. The fact that more than one of the amendments in the Bill of Rights addresses the rights of criminal defendants, and other provisions of the Constitution touch on criminal procedure, is strong evidence that the Founders were serious about safeguarding the rights of criminal defendants who are subject to the whims of the state. No other category of rights receives similar repeated treatment in the Constitution. Although the witness may claim that religious freedom is also consistent with limited government, the displacement in this case of the right is a result of another compelling constitutional interest rather than government encroachment. While forcing the witness to unveil may undermine some successful prosecutions, the temporary loss of religious liberty does not outweigh the potential loss of significantly more freedoms due to wrongful conviction.[158]

Conclusion

There is certainly room in current Supreme Court doctrine for granting an exemption to the veiled witness. *Craig*, characterizing the confrontation right as general and preferential, provides criteria for allowing significant public policy exceptions, as long as reliability and cross-examination remain unscathed. It is at least arguable that wearing a veil does not undermine reliability because demeanor evidence may not be as helpful as originally and historically thought and because the defendant would retain the ability to cross-examine the witness. Of course, this argument presumes what science cannot definitively prove, namely the degree to which jurors, attorneys, and judges utilize such demeanor evidence. That perception sometimes fails does not necessarily lead to the conclusion that providing the most information possible, through demeanor evidence, is unnecessary or not worthwhile. Indeed, it would seem that Justice Scalia, among others, is onto something when he notes that the perception of fairness is almost as important—if not as important—as fairness itself. This is especially true given the historical underpinnings of the confrontation right, namely precluding accusations, cast from behind

158 *See* White, *supra* note 144, at 620 ("Adhering to the right of confrontation, just as adhering to all fundamental constitutional rights, will cause some criminal prosecutions to fail. Its application should not be viewed as a hurdle to efficient, successful prosecution, but rather as a barrier to unfair, unconfronted convictions. It is not a rule to be maneuvered around in order to assure more convictions; rather it is a rule to be demanded in order to guarantee ultimate fairness.").

a shadow, from taking liberty unjustly. These normative bases underlying the confrontation right should not be ignored.

But is there a workable constitutional solution to this problem? The answer might lie in the fact that the Supreme Court has allowed both constitutional rights to be subject to exceptions. Religious exemptions are permissible in some instances but not required in the case of generally applicable laws, and confrontation is a general right that might give way in rare situations. I believe there are two possible avenues given the current pliability of the provisions.

Justice O'Connor's insistence on individualized analysis, regarding the necessity of the exception to the general confrontation right, seems to be a workable standard, albeit an imperfect one. The question of unveiling could occur on a case-by-case basis and be left to the discretion of trial level judges, although guided by a few factors.[159] Judges, when deciding this question, might consider various factors peculiar to the case at hand: the significance of the particular testimony to the case; the magnitude of the trauma on the witness; the effect unveiling will have on reliability; and whether the defendant can truly cross-examine the witness. Exemptions would be nearly entirely case-specific, and if the witness continues to refuse after being directed to unveil, the state might just have to lose the witness's testimony and both interests would be protected as a result. The judge would also remind the jury at the close of the trial to take the testimony, in its entirety, veil or no veil, into consideration. Reviewing courts could review trial court decisions according to a harmless error standard in light of other testimony and evidence within the particular case. Finally, as the number of cases increases, lower-level courts could look to analogous fact patterns to avoid inconsistent results.[160]

The alternative is to leave the question to legislatures, as *Smith* and *Craig* seem to advise. Because the Court has refused to cast each liberty interest as absolute, the legislative process could answer the question and the courts would show deference to the preference of

159 This balancing approach seems to be consistent with a preferential confrontation right as well as heightened scrutiny for religious exemption questions. *See* Gressman & Carmella, *supra* note 73, at 78 n.55 ("With *Sherbert,* balancing became the normative practice of determining constitutional doctrine.").

160 *See id.* at 81 (discussing "definitional balancing," which "determines that some *classes* of religious claims are presumptively outweighed"). However, this approach is not without criticism because it often leads to balancing at very abstract levels, thereby avoiding the particularities of each case, which have real world implications for religious burdens. *See id.* at 82 ("[T]he Court evaluates the claimed liberty against social interests at a high level of generality (and consequent abstractness) in order to produce a rule directly applicable in future cases without the need to balance.").

the particular legislature. This avenue is attractive because it places the decision in the hands of the community.[161] At the same time, it leads to the unfortunate problem of allowing the community, through legislators, to judge the legitimacy or seriousness of particular religious practices.[162] But the legislature could choose to never or always allow the exemption and even mandate the reading of certain instructions before the close of trial if the state chooses to use a veiled witness.

The question of the veiled witness must be taken very seriously in light of the above considerations and in a post-9/11 world. As more Muslims become U.S. citizens, entitled to the same religious freedoms as their fellow Americans, the law must prepare to account for religious practices that might impact their ability to participate as citizens. The challenge is to allow such participation within the context of the constitutional rights of others. At the very least, judges, legislatures, jurors, and citizens should consider the foregoing analysis when such decisions have to be made.

161 *See* McCusker, *supra* note 22, at 399–400 ("[A] carve-out system has the virtue of allowing legislators to consider each religious practice and its effects in turn, to see how dangerous or hostile to civil order it actually is and how often the prohibiting of the practice would cause the exclusion of religious groups and people from public life."); *see also* Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 600 (1940) ("Judicial review . . . is a fundamental part of our constitutional scheme. But to the legislature no less than to courts is committed the guardianship of deeply-cherished liberties.")

162 *See* McCusker, *supra* note 22, at 400 ("This virtue, though, is also the practice's weakness: it provides for the sort of discretionary judgment by public officials on the merits of religious practices that the Court held unconstitutional . . . ."); *see also* Gressman & Carmella, *supra* note 73, at 74 ("Courts develop and use balancing tests not to reflect majoritarian accommodations, but to define constitutional principles."). The politicization of constitutional rights is not always preferable, if ever.