

## NOTE

# ASSESSING WITNESS Demeanor IN THE AGE OF COVID-19 AND BEYOND

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## INTRODUCTION

The COVID-19 pandemic has had a major global impact. As of January 2023, there have been over 600 million reported cases of the virus worldwide with over 5 million reported deaths.<sup>1</sup> The United States has been an epicenter of the disease with over 100 million reported cases and over 1 million reported deaths.<sup>2</sup> As a result, the pandemic has caused major changes to American institutions. When the virus struck, numerous schools and offices shifted to remote practices<sup>3</sup> and the virus

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<sup>1</sup> *Tracking Coronavirus' Global Spread*, CNN, <https://www.cnn.com/interactive/2020/health/coronavirus-maps-and-cases/> (last visited Jan. 24, 2023).

<sup>2</sup> *United States COVID-19 Cases and Deaths by State*, CTR. FOR DISEASE CONTROL & PREVENTION, [https://covid.cdc.gov/covid-data-tracker/#cases\\_casesper100klast7days](https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days) (last visited Jan. 24, 2023).

<sup>3</sup> See *The Coronavirus Spring: The Historic Closing of U.S. Schools*, EDUC. WK. (July 1, 2020), <https://www.edweek.org/ew/section/multimedia/the-coronavirus-spring-the-historic-closing-of.html>; Jennifer Liu, *How Companies Are Preparing Employees for Long-Term Work-From-Home*, CNBC (Aug. 26, 2020), <https://www.cnbc.com/2020/08/25/how-companies-are-supporting-work-from-home-until-2021-or-forever.html>.

vastly affected the economy and job market.<sup>4</sup> The pandemic also affected court proceedings in the United States. In the wake of the pandemic, courts stalled their proceedings.<sup>5</sup> In fact, every state court system implemented either statewide or local suspensions of in-person court proceedings.<sup>6</sup> Courts had to balance the competing demands of maintaining court functioning while protecting public health.<sup>7</sup> Jurisdictions met these aims in different ways. Some courts required masks in in-person courtrooms.<sup>8</sup> Others conducted proceedings using video conferencing.<sup>9</sup> Some even made special provisions such as requiring that witnesses wear transparent masks.<sup>10</sup>

While states eventually relaxed COVID-19 restrictions<sup>11</sup>, the impact of COVID-19 will likely last far beyond the lifespan of the virus. Some have speculated, for example, that the proliferation of remote and hybrid work set-ups is likely to continue.<sup>12</sup> In fact, in a poll by Gallup in October 2020, 35% of remote workers in the United States expressed a desire to continue working remotely not because they were concerned about catching COVID-19, but because they simply preferred remote work-

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<sup>4</sup> See Ella Koeze, *6 Months After Coronavirus Shutdowns, the Shape(s) of the Economic Crisis*, N.Y. TIMES (Oct. 5, 2020), <https://www.nytimes.com/interactive/2020/10/05/business/economy/coronavirus-unemployment-recovery.html>.

<sup>5</sup> See Alan Feuer et al., *Coughing Lawyers. Uneasy Jurors. Can Courts Work Under Coronavirus?*, N.Y. TIMES (Mar. 20, 2020), <https://www.nytimes.com/2020/03/20/nyregion/coronavirus-new-york-courts.html> (“In the past two weeks, in New York and other cities, the courts have not quite come to a halt, but they have slowed to a crawl. Trials have been delayed; grand juries have been put on hold; and sentencings have been postponed.”).

<sup>6</sup> *State Court Closures in Response to the Coronavirus (COVID-19) Pandemic between March and November, 2020*, BALLOTEDIA, [https://ballotpedia.org/State\\_court\\_closures\\_in\\_response\\_to\\_the\\_coronavirus\\_\(COVID-19\)\\_pandemic\\_between\\_March\\_and\\_November,\\_2020](https://ballotpedia.org/State_court_closures_in_response_to_the_coronavirus_(COVID-19)_pandemic_between_March_and_November,_2020) (last visited July 20, 2021).

<sup>7</sup> See Feuer et al., *supra* note 5 (“In New York and across the country, officials have had to improvise to keep the system running, struggling to balance the need to maintain public order and ensure people’s rights with growing concerns about public health.”).

<sup>8</sup> See, e.g., *Updates on Court Operations*, N.Y. ST. UNIFIED CT. SYS., <http://nycourts.gov/limited-filings.shtml> (last visited Nov. 21, 2020) (requiring all visitors to New York State courts to wear masks).

<sup>9</sup> See, e.g., *Sonrai Sys., LLC v. Romano*, No. 16 CV 3371, 2020 WL 3960441, at \*2 (N.D. Ill., July 13, 2020) (“[F]ederal courts around the country . . . have authorized video teleconferencing for both criminal and civil proceedings . . .”).

<sup>10</sup> See, e.g., Maria Dinzeo, *Judge Orders Transparent Masks for Witnesses in Criminal Trial*, COURTHOUSE NEWS SERV. (July 16, 2020), <https://www.courthousenews.com/judge-orders-transparent-masks-for-witnesses-in-criminal-trial/> (San Francisco Superior Court Judge Vedica Puri held that testifying witnesses must wear transparent face masks).

<sup>11</sup> Forrest Brown & Megan Marples, *Covid-19 Travel Restrictions State by State*, CNN, <https://www.cnn.com/travel/article/us-state-travel-restrictions-covid-19/index.html> (last visited July 21, 2021).

<sup>12</sup> Ashley Stahl, *5 Lasting Changes To Expect In The Workplace Post-Covid*, FORBES (Feb. 1, 2021), <https://www.forbes.com/sites/ashleystahl/2021/02/01/5-lasting-changes-to-expect-in-the-workplace-post-covid/>.

ing.<sup>13</sup> Similarly, the COVID-19 pandemic may have a lasting impact on the legal system. The use of online court proceedings during the pandemic has led to an increased acceptance of online courts in the legal profession.<sup>14</sup> Certainly, there are benefits to online court proceedings besides the prevention of the spread of disease. For example, Richard Susskind, an expert on legal technology, has noted that “many report that video hearings are more accessible than conventional courts, both to the public and the media.”<sup>15</sup> In a survey of participants in remote hearings in England and Wales, “71.5% of respondents described their experience as positive or very positive.”<sup>16</sup> While the Confrontation Clause of the Sixth Amendment is currently interpreted to restrict video testimony absent an individual assessment that video testimony is necessary<sup>17</sup>, some have argued that two-way video testimony should be deemed constitutional.<sup>18</sup> As the pandemic comes to an end, it is useful to evaluate the advantages and disadvantages of pandemic court practices and determine which ones can feasibly be continued. Additionally, medical experts have noted that the frequency of epidemics in recent years suggests that the next pandemic may occur within the next few decades.<sup>19</sup> Therefore, an understanding of the costs and benefits of the regulations that were put in place during the COVID-19 pandemic will likely allow courts to better prepare for the next pandemic.

One concern that stems from the regulations that were used during the COVID-19 pandemic is that they may limit the ability of factfinders to assess the demeanor of witnesses. Traditionally, demeanor assessments have been considered an important part of court proceedings. For

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<sup>13</sup> Megan Brenan, *COVID-19 and Remote Work: An Update*, GALLUP (Oct. 13, 2020), <https://news.gallup.com/poll/321800/covid-remote-work-update.aspx>.

<sup>14</sup> See, e.g., Richard Susskind, *The Future of Courts*, 6 THE PRACTICE (2020) (noting that during the COVID-19 pandemic “[t]he uptake of various technologies, especially video, was accelerated in the justice systems of numerous countries” and that this in turn led to “greater acceptance . . . amongst lawyers, judges, officials, and court users—that judicial and court work might be undertaken very differently in years to come.”).

<sup>15</sup> *Id.*

<sup>16</sup> Natalie Byrom, Sarah Beardon, & Abby Kendrick, *The Impact of COVID-19 Measures on the Civil Justice System*, JUDICIARY 6, 8 (2020), <https://www.judiciary.uk/wp-content/uploads/2020/06/CJC-Rapid-Review-Final-Report-f.pdf>.

<sup>17</sup> See *infra* Part I.

<sup>18</sup> See, e.g., Hadley Perry, *Virtually Face-to-Face: The Confrontation Clause and the Use of Two-Way Video Testimony*, 13 ROGER WILLIAMS U. L. REV. 565, 593 (2008) (concluding that “[p]resenting testimony via two-way video conference is constitutional under the Confrontation Clause of the Sixth Amendment because it is consistent with the goals and protections intended by witness confrontation throughout history.”).

<sup>19</sup> David Murdoch, *The Next Once-a-Century Pandemic is Coming Sooner Than You Think – but COVID-19 Can Help Us Get Ready*, THE CONVERSATION (June 14, 2020), <https://theconversation.com/the-next-once-a-century-pandemic-is-coming-sooner-than-you-think-but-covid-19-can-help-us-get-ready-139976>.

example, the Confrontation Clause of the Sixth Amendment<sup>20</sup> has generally been interpreted to compel witnesses “to stand face to face with the jury,” so that jury members can use demeanor evidence to determine whether they should believe the witness.<sup>21</sup> The importance of demeanor evidence is also, in part, why the Federal Rules of Evidence consider prior statements by a witness as hearsay, thus barring them from being admitted as evidence.<sup>22</sup> Therefore, it is important to consider whether alternatives to in-person trials are legally permitted. Additionally, there is the question of whether demeanor evidence helps factfinders to discriminate between truthful and deceptive testimony. While courts have generally emphasized the importance of demeanor evidence, some scholars have argued that access to a witness’s demeanor may actually harm the assessment of that witness’s credibility.<sup>23</sup> Some researchers, however, have cautioned courts from restricting access to witness demeanor because nonverbal behaviors serve functions besides informing witness credibility assessments, such as facilitating comprehension of the statements that a witness makes.<sup>24</sup> This raises the question: can masks and video proceedings allow factfinders to assess a witness’s truthfulness?

In this Note, I will argue that assessment of witness credibility is better in an in-person courtroom with masked witnesses than over a video conferencing system because of concerns that demeanor evidence from facial expressions may impair deception detection. In Part I, I will present cases that provide precedent for questions about whether non-live testimony should be permitted and how courts have recently dealt with such issues in response to the COVID-19 pandemic. In Part II, I will present empirical research findings on: (1) what non-verbal factors of a witness’s demeanor predict the truthfulness of the witness’s testimony, (2) how accurate people are in assessing the credibility of witness testimony, and (3) what factors people use to assess witness credibility. I will argue that while there may be some nonverbal indicators of deception, overall, people are not accurate at assessing witness

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<sup>20</sup> U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with witnesses against him.”).

<sup>21</sup> *Mattox v. United States*, 156 U.S. 237, 242–43 (1895).

<sup>22</sup> See FED. R. EVID. 801(a)-(d)(1)(A) advisory committee’s notes to proposed rules (explaining that a prior statement by a witness is considered hearsay because “the conditions of oath, cross-examination, and demeanor observation did not prevail at the time the statement was made and cannot adequately be supplied by the later examination.”).

<sup>23</sup> See, e.g., Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1091 (1991) (arguing that “[t]ranscripts are probably superior to live testimony as a basis for credibility judgments because they eliminate distracting, misleading, and unreliable nonverbal data and enhance the most reliable data, verbal content.”).

<sup>24</sup> Vincent Denault & Miles L. Patterson, *Justice and Nonverbal Communication in Post-pandemic World: An Evidence-Based Commentary and Cautionary Statement for Lawyers and Judges*, J. NONVERBAL BEHAV. 1, 6 (2020).

credibility and that they often overuse nonverbal behavioral cues to inform their assessments. In Part III, I will apply the empirical evidence to discussions of whether the commonly used COVID-19 regulations should be used in future litigation. Specifically, I will argue that video testimony is much more likely to impair assessments of witness credibility than masked in-person testimony. Firstly, I will argue that because people tend to overuse facial cues, there are concerns that video teleconferencing will exacerbate this problem by focusing more closely on the witness's face. Secondly, I will argue that masked testimony, unlike video testimony, enables factfinders to better view non-facial body cues, which may help facilitate comprehension of testimony. I will also make recommendations for how to approach video teleconferencing when it proves to be the only viable option for witness testimony.

### I. LEGAL CONSIDERATIONS FOR COVID-19 RESTRICTIONS

Before addressing the psychological concerns about mask-wearing and video teleconferencing for trials, it is important to address whether these provisions are even legal. The Confrontation Clause of the United States Constitution states that “in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with witnesses against him.”<sup>25</sup> In *Mattox v. United States*, the Supreme Court held that the Confrontation Clause compelled a witness “to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.”<sup>26</sup> *Mattox*, however, also noted that “general rules of law of this kind . . . must occasionally give way to considerations of public policy and the necessities of the case.”<sup>27</sup> In *Mattox*, the Court ultimately ruled that testimony a witness had provided in a previous trial could be admitted when the witness had since died.<sup>28</sup>

Nearly 100 years later, the Supreme Court addressed the limits of the face-to-face requirement in two child abuse cases: *Coy v. Iowa* and *Maryland v. Craig*. In *Coy v. Iowa*, the Court specified that the Confrontation Clause's requirement of a literal face-to-face meeting could only be violated “when necessary to further an important public policy.”<sup>29</sup> In *Coy*, the alleged teenaged victims of sexual assault gave their testimony behind a screen where they could not see the defendant.<sup>30</sup> The Court ultimately concluded that the testimony violated the Confrontation

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<sup>25</sup> U.S. CONST. amend. VI.

<sup>26</sup> *Mattox*, 156 U.S. at 242–43.

<sup>27</sup> *Id.* at 243.

<sup>28</sup> *Id.* at 250.

<sup>29</sup> 487 U.S. 1012, 1021 (1988).

<sup>30</sup> *Id.* at 1020.

Clause because there had not been an individualized finding that the witnesses needed protection.<sup>31</sup> In contrast, the Court permitted the use of testimony by one-way closed circuit television in *Maryland v. Craig*.<sup>32</sup> Defendant Sandra Ann Craig, the owner of a school, had been accused of sexually and physically abusing students.<sup>33</sup> The State of Maryland requested that the alleged victims be permitted to give testimony by one-way closed circuit television because they would have difficulty providing testimony in the presence of Craig.<sup>34</sup> Unlike *Coy*, there was an individualized finding that the witnesses needed special protection.<sup>35</sup> The Supreme Court eventually received the case with the question of whether the testimony by television violated Craig's Confrontation Clause rights.<sup>36</sup> The Court reiterated the rule from *Coy* with the addition that the reliability of the testimony must be assured.<sup>37</sup> The Court ultimately concluded that the use of one-way closed circuit televisions was necessary to further the important public policy goal of protecting child victims of abuse from trauma related to testifying.<sup>38</sup> The Court additionally concluded that there were sufficient indicia of reliability because the witnesses "testified under oath, were subject to full cross-examination, and were able to be observed by the judge, jury, and defendant as they testified."<sup>39</sup>

When criminal trials resumed around the United States during the COVID-19 pandemic, trial courts had to balance the constitutional right to confrontation and the state interest in preventing the spread of COVID-19. In multiple criminal cases, parties challenged the use of video testimony as a violation of the Confrontation Clause.<sup>40</sup> District Courts have often relied upon the *Maryland v. Craig* rule in their analyses of whether video testimony is sufficient to satisfy the Confrontation Clause. Accordingly, a trial provision must be necessary to further an important policy and there must be sufficient indicia of the reliability of

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<sup>31</sup> *Id.* at 1021–22.

<sup>32</sup> 497 U.S. 836, 852 (1990).

<sup>33</sup> *Id.* at 840.

<sup>34</sup> *Id.* at 842.

<sup>35</sup> *Id.* at 845.

<sup>36</sup> *Id.* at 843.

<sup>37</sup> *Id.* at 850 ("As we suggested in *Coy*, our precedents confirm that a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured.").

<sup>38</sup> *Id.* at 852.

<sup>39</sup> *Id.* at 857.

<sup>40</sup> See, e.g., *United States v. Pangelinan*, No. 19-10077, 2020 WL 5118550, at \*2 (D. Kan. Aug. 31, 2020) ("Defendant objects to the witnesses appearing by video, asserting that it violates her right to confrontation."); *United States v. Casher*, No. 19-CR-65, 2020 WL 3270541, at \*1 (D. Mont. June 17, 2020) ("[Defendant] object[s] to allowing videoconference testimony on Confrontation Clause grounds.").

the testimony.<sup>41</sup> Courts addressing video testimony acknowledged that preventing the spread of COVID-19 was an important public policy goal<sup>42</sup> and that video testimony provided sufficient indicia of reliability.<sup>43</sup>

Courts, however, came to different conclusions on whether video testimony was *necessary* to further the important public policy goal of preventing the spread of COVID-19. For example, in *U.S. v. Davis*, the District of Delaware found that video testimony was necessary.<sup>44</sup> The court considered that the witnesses lived far away from the courthouse and some would likely have to fly to get to the courthouse, possibly exposing themselves to COVID-19.<sup>45</sup> The court also considered that three of the witnesses were at least 66 years old and thus, were at higher risk for a more severe case of the disease.<sup>46</sup>

In contrast, the courts in *U.S. v. Pangelinan* and *U.S. v. Casher* concluded that video teleconferencing was not necessary and thus did not satisfy the Confrontation Clause.<sup>47</sup> In *Pangelinan*, the District of Kansas held that video testimony was not necessary despite health concerns about the pandemic because the witnesses could physically travel to the courtroom, the witnesses were providing translations which could be provided by an alternative witness, and the court could continue the case until the virus rates decreased.<sup>48</sup> Similarly, in *Casher*, the District of Montana held that video testimony was not necessary even though one of the witnesses had serious medical conditions, which could put him at risk for complications with COVID-19.<sup>49</sup> The court concluded that “necessary” was a high bar that the witnesses had not met.<sup>50</sup> The court highlighted that the witnesses could drive rather than fly to the court from their home states in order to reduce exposure to COVID-19 and that

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<sup>41</sup> *Craig*, 497 U.S. at 850.

<sup>42</sup> *See, e.g., Pangelinan*, 2020 WL 5118550, at \*3 (acknowledging that “limiting the spread of [COVID-19]” is an important public policy); *United States v. Donziger*, No. 19-CR-561, 11-CV-691, 2020 WL 4747532, at \*3 (S.D.N.Y. Aug. 17, 2020) (acknowledging that there is “a strong public interest in avoiding exposing at-risk individuals to COVID-19 and minimizing spread of the virus”).

<sup>43</sup> *See United States v. Davis*, No. 19-CR-101, 2020 WL 6196741, at \*5 (D. Del. Oct. 22, 2020) (finding that “remote testimony ‘preserve[s] all of [the] characteristics of in-court testimony,’ including (1) the giving of testimony under oath; (2) the opportunity for cross examination; (3) the ability of the factfinder to observe demeanor evidence; and (4) the reduced risk that a witness will wrongfully implicate an innocent defendant when testifying in the presence of that defendant”) (citing *United States v. Gigante*, 166 F.3d 75,79–80 (2d Cir. 1999)).

<sup>44</sup> *Id.* at \*4.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at \*3.

<sup>47</sup> *Pangelinan*, 2020 WL 5118550, at \*4; *U.S. v. Casher*, No. 19-CR-65, 2020 WL 3270541, at \*3–4 (D. Mont. June 17, 2020).

<sup>48</sup> *Pangelinan*, 2020 WL 5118550, at \*4.

<sup>49</sup> *Casher*, 2020 WL 3270541, at \*3.

<sup>50</sup> *Id.* at \*2, \*4.

Montana at the time had the second lowest per capita rate of COVID-19 in the United States.<sup>51</sup> In *U.S. v. Donziger*, while the Southern District of New York did not rule on a motion that the Government had filed for remote testimony, the court noted that “[a]t least in some instances, allowing remote testimony may be needed to promote the strong public interest in avoiding exposing at-risk individuals to COVID-19 and minimizing further spread of the virus.”<sup>52</sup> This is an accurate characterization of how Confrontation Clause precedent<sup>53</sup> was generally applied to video testimony during COVID-19. Trial courts made individual assessments to determine whether video testimony was needed to protect witnesses and prevent the spread of COVID-19.

When a witness physically entered the courtroom for a criminal trial, Confrontation Clause issues related to COVID-19 were still not necessarily solved. Courts also had to consider whether in-person witnesses wearing face masks violated the Confrontation Clause. In fact, parties challenged the use of face masks by witnesses in multiple criminal cases.<sup>54</sup> In cases concerning face masks, trial courts also used the rule from *Maryland v. Craig* to determine whether masked testimony violates the right to face-to-face confrontation.<sup>55</sup> Courts addressing masked witnesses acknowledged that preventing the spread of COVID-19 was an important public policy goal.<sup>56</sup> Additionally, courts acknowl-

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<sup>51</sup> *Id.* at \*3.

<sup>52</sup> United States v. Donziger, No. 19-CR-561, 11-CV-691, 2020 WL 4747532, at \*3 (S.D.N.Y. Aug. 17, 2020).

<sup>53</sup> Eric Christofferson, John Hillebrecht & Paul Lewis, *The Pandemic’s Toll on Criminal Defendant Rights: Part 2*, LAW360 (Dec. 2, 2020, 4:12 PM), <https://www.law360.com/articles/1332476/the-pandemic-s-toll-on-criminal-defendant-rights-part-2>.

<sup>54</sup> See, e.g., United States v. Robertson, No. 17-CR-02949, 2020 WL 6701874, at \*1 (D.N.M. Nov. 13, 2020) (“[Defendant] moves the Court to ‘require all testifying witnesses [to] remove their face masks while testifying during trial and that all jurors during voir dire remove their masks’ as well.”) (internal citations omitted); United States v. Clemons, No. RDB-19-0438, 2020 WL 6485087, at \*2 (D. Md. Nov. 4, 2020) (“[T]he Defendant argues that his counsel will not be able to properly examine and cross-examine witnesses, he cannot confront witnesses face to face, and his counsel will be unable to effectively converse with their client due to the alterations in the courtroom and the requirement that all courtroom participants wear masks during the proceedings.”); United States v. James, No. CR-19-08019-001, 2020 WL 6081501, at \*1 (D. Ariz. Oct. 15, 2020) (“Defendant objects to the mask and social distancing mandates by arguing that . . . requiring witnesses to wear masks violates Defendant’s Sixth Amendment right to confrontation.”); U.S. v. Crittenden, No. 20-CR-7, 2020 WL 4917733, at \*5 (M.D. Ga. Aug. 21, 2020) (“The Government is concerned that by requiring witnesses to wear a mask that covers their nose and mouth during their testimony, the Court may infringe upon the Defendant’s right to face-to-face confrontation of the witnesses against him as guaranteed by the Confrontation Clause of the Sixth Amendment.”).

<sup>55</sup> See, e.g., *Crittenden*, 2020 WL 4917733, at \*5–\*6.

<sup>56</sup> See, e.g., *Clemons*, 2020 WL 6485087, at \*2 (holding that public safety during the pandemic is an important public policy); *James*, 2020 WL 6081501, at \*2 (holding that public safety during the pandemic is an important public policy); *Crittenden*, 2020 WL 4917733, at \*6 (acknowledging that “ensuring the safety of everyone in the courtroom in the midst of a unique global pandemic” is an important public policy).



edged that masked testimony provides sufficient indicia of reliability.<sup>57</sup> For example, in *U.S. v. Crittenden*, the Middle District of Georgia noted that masked witnesses are testifying in-person, under oath and can be cross-examined by the defendant.<sup>58</sup> While the court noted that the defendant and jury would not be able to observe demeanor from the witness's mouth and nose, it highlighted that the "Confrontation Clause does not guarantee the right to see the witness's lips move or nose sniff, any more than it requires the jurors to subject the back of a witness's neck to a magnifying glass to see if the hair raised during particularly probative questioning."<sup>59</sup> The court acknowledged that the defendant and jury would be able to see enough of the witnesses' demeanor to ensure reliability.<sup>60</sup> In cases addressing masked testimony, the issue that courts seem to differ on was again whether masks are *necessary* to further the important public policy goal. In *Crittenden*, the court concluded that masks were necessary to prevent the spread of the virus.<sup>61</sup> The court concluded that based on scientific data, face shields and plexiglass screens "are not an adequate substitute and standing alone do not provide reasonable protection for the trial participants" and therefore concluded that face masks were necessary.<sup>62</sup> Other courts followed *Crittenden's* lead in concluding that masks are necessary to achieve an important public policy goal.<sup>63</sup> In contrast, the court in *U.S. v. Robertson* concluded that masked testimony was not necessary.<sup>64</sup> The court concluded that a combination of social distancing, face shields, and plexiglass was sufficient to prevent risk from COVID-19 and therefore, the court could require testifying witnesses to remove their masks.<sup>65</sup> Overall, these cases

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<sup>57</sup> See, e.g., *Crittenden*, 2020 WL 4917733, at \*6 (holding that there are sufficient indicia of reliability because "under the Court's mask procedure, witnesses against the Defendant will be physically present in the courtroom, they will testify under oath, [the] Defendant will be able to have these witnesses cross-examined in the open courtroom in front of the Defendant and the jurors[.]" and "[t]he Defendant and jury will also be able to observe the witnesses' demeanor.").

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at \*7.

<sup>60</sup> *Id.* ("Here, the jurors will be able to observe most facets of the witnesses' demeanor.").

<sup>61</sup> *Id.* at \*6.

<sup>62</sup> *Id.*

<sup>63</sup> See, e.g., *United States v. Clemons*, No. RDB-19-0438, 2020 WL 6485087, at \*2 (D. Md. Nov. 4, 2020) (holding that "[t]he mask requirement, which denies the Defendant the ability to observe a witness' nose and mouth movement during confrontation, 'is necessary to further an important public policy: ensuring the safety of everyone in the courtroom in the midst of a unique global pandemic'" (citing *Crittenden*, 2020 WL 4917733, at \*6.); *United States v. James*, No. CR-19-08019-001, 2020 WL 6081501, at \*1 (D. Ariz. Oct. 15, 2020) (holding that masks are necessary to achieve an important public policy goal).

<sup>64</sup> *United States v. Robertson*, No. 17-CR-02949, 2020 WL 6701874, at \*2 (D.N.M. Nov. 13, 2020).

<sup>65</sup> *Id.*

show that courts had to make individual findings as to the necessity of masks in furthering the important public policy goal of preventing the spread of COVID-19.

While courts were consistent in holding that prevention of the spread of COVID-19 was an important public policy goal, they were less consistent in their analyses of whether video testimony and masked testimony are necessary to further that goal. Some courts ruled that these provisions violate the Confrontation Clause because they are not necessary to prevent the spread of COVID-19, while others ruled that these provisions were needed to ensure that trial participants were safe from the virus. As prescribed by *Coy v. Iowa* and *Maryland v. Craig*, courts considered the individual situations of the witnesses to determine whether using such provisions as an alternative to face-to-face testimony was permitted by the Confrontation Clause. While many courts concluded that these provisions provide sufficient indicia of the reliability of the testimony, they also noted that provisions may have some effect on the ability to observe witnesses' demeanor.<sup>66</sup> These results suggest that the Confrontation Clause would likely prevent video teleconferencing or masked testimony during more routine court proceedings, but that these provisions may be allowed during a future pandemic if deemed necessary to the prevent the spread of disease.

## II. ARE NONVERBAL INDICATORS OF DECEPTION USEFUL FOR FACTFINDERS?

### A. *Nonverbal Indicators of Deception*

Throughout history, it has widely been assumed that liars exhibit different nonverbal behaviors than truth-tellers, thereby allowing observers to detect deception. For example, the Vedas, a set of Hindu sacred texts written around 900 B.C., suggest that secret poisoners reveal themselves by rubbing their big toes on the ground, shivering, and rubbing the roots of their hair with their fingers.<sup>67</sup> But does empirical evidence support the belief that there are nonverbal indicators of deception? The answer is "yes," but the probative value of nonverbal behaviors for deception detection may be weaker than people assume.

A number of laboratory studies have found that there are facial indicators of deception. Duchenne de Boulogne, a 19th century French researcher, identified that there are distinct structural differences between

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<sup>66</sup> See, e.g., *Crittenden*, 2020 WL 4917733, at \*7 ("Of course, the masks will eliminate two aspects of demeanor for the jury to consider: movement of the nose and mouth. But the Confrontation Clause does not require that the jury be able to see every language of the body.").

<sup>67</sup> Paul V. Trovillo, *A History of Lie Detection*, J. OF CRIM. L. & CRIMINOLOGY 848, 849 (1939).

spontaneous and posed smiles.<sup>68</sup> Specifically, he found that people contract the orbicularis oculi muscle for genuine smiles, but not for posed smiles.<sup>69</sup> Future researchers would eventually refer to genuine smiles as “Duchenne smiles” and posed smiles as “non-Duchenne smiles.”<sup>70</sup> Research has found that the distinction between Duchenne and non-Duchenne smiles can be used to detect deception. In one study, participants watched a pleasant film and an unpleasant film.<sup>71</sup> After watching each film, an interviewer asked participants questions about the film that they had just watched. A researcher asked the participants to describe their honest feelings to the interviewer after the pleasant film. In contrast, after the participants had watched the unpleasant film, the researcher asked the participants to convince the interviewer that they had actually watched the pleasant film and to conceal any negative emotions.<sup>72</sup> The researchers found that participants displayed Duchenne smiles when describing the pleasant film and non-Duchenne smiles when describing the unpleasant films.<sup>73</sup> The smiles that participants made when describing the non-pleasant films also showed leakage of negative emotions.<sup>74</sup> This evidence suggests that the Duchenne versus non-Duchenne smile distinction may provide some utility in assessing a witness’s credibility in specific instances; however, it is by no means a perfect cue for deception. For example, Krumhuber and Manstead found that people can fake Duchenne smiles.<sup>75</sup> In their study, participants were first presented with amusing stimuli and their facial expressions were recorded.<sup>76</sup> They were then presented with neutral stimuli and asked to fake an amusing expression with a reward of £10 for the most convincing expression.<sup>77</sup> The researchers found that there were about equal rates of Duchenne and non-Duchenne smiles across the two conditions, suggesting that Duchenne smiles may not be predictive of truthfulness.<sup>78</sup>

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<sup>68</sup> G.-B. DUCHENNE DE BOULOGNE, *THE MECHANISM OF HUMAN FACIAL EXPRESSION* 126 (R. Andrew Cuthbertson, ed., trans. 1990) (1862).

<sup>69</sup> *Id.* Contraction of the orbicularis oculi causes a lifting of the cheeks and wrinkling around the eyes, which is commonly referred to as “crow’s feet.” Eva G. Krumhuber & Antony S. R. Manstead, *Can Duchenne Smiles Be Feigned? New Evidence on Felt and False Smiles*, 9 *EMOTION* 807, 807 (2009).

<sup>70</sup> See Paul Ekman, *The Argument and Evidence about Universals in Facial Expressions of Emotion*, in *HANDBOOK OF SOCIAL PSYCHOPHYSIOLOGY* 155 (Hugh Wagner & Antony Manstead eds., 1989) (proposing that smiles with a contraction of the orbicularis oculi muscle be referred to as “Duchenne smiles”).

<sup>71</sup> Paul Ekman, Wallace V. Friesen, & Maureen O’Sullivan, *Smiles When Lying*, 54 *J. PERSONALITY & SOC. PSYCHOL.* 414, 415 (1988).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 417.

<sup>74</sup> *Id.* at 418.

<sup>75</sup> Krumhuber & Manstead, *supra* note 69, at 817.

<sup>76</sup> *Id.* at 809–10.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 817.

Laboratory studies have also found evidence of other differences in facial features between truthful and deceptive individuals. In one study, participants were asked to recount two stories from their actual experiences: one in which they felt genuine remorse and one in which they did not feel remorse.<sup>79</sup> For the latter story, participants were asked to feign remorse.<sup>80</sup> The researchers found that in the false remorse condition, participants exhibited a greater range of emotional expressions.<sup>81</sup> Participants who were faking remorse were more likely to display expressions of happiness and surprise, which may indicate the difficulty of faking sadness expressions and the leakage of inconsistent, more genuine expressions.<sup>82</sup> This study provides useful information for assessment of witness testimony because factfinders often consider a witness's remorse in their decisions.<sup>83</sup> Researchers have also found that the speed at which a facial expression is made may predict deception. In one study, for example, it was found that spontaneous expressions of happiness and disgust had slower onsets and offsets than deliberate facial expressions.<sup>84</sup> This suggests that not only the structure of a facial expression, but also its timing may predict deception.

Studies have also examined the utility of eye gaze in the assessment of deception with often mixed results. While laypeople generally believe that averted gaze signals lying, some empirical studies have not found this to be true and some have even found the opposite to be true.<sup>85</sup> One study found that young children averted their gaze when lying, but older

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<sup>79</sup> Leanne ten Brinke et al., *Crocodile Tears: Facial, Verbal and Body Language with Genuine and Fabricated Remorse*, 36 LAW & HUM. BEHAV. 51, 54 (2012).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 57.

<sup>82</sup> *Id.* at 57–58.

<sup>83</sup> See, e.g. Brian H. Bornstein, Lahna M. Rung, & Monica K. Miller, *The Effects of Defendant Remorse on Mock Juror Decisions in a Malpractice Case*, 20 BEHAV. SCI & THE L. 393, 405 (2002) (finding that expressions of remorse affect juror decision making in a mock malpractice case).

<sup>84</sup> Ursula Hess & Robert E. Kleck, *Differentiating Emotion Elicited and Deliberate Emotional Facial Expressions*, 20 EUROPEAN J. OF SOC. PSYCHOL. 369, 382 (1990).

<sup>85</sup> See, e.g., Charles F. Bond, Jr., Karen Nelson Kahler & Lucia M. Paolicelli, *The Miscommunication of Deception: An Adaptive Perspective*, 21 J. OF EXPERIMENTAL SOC. PSYCH. 331, 338 (1985) (finding that both lying and truth-telling undergraduate participants maintained eye-contact); Jo Ann Burns & B. L. Kintz, *Eye Contact While Lying During an Interview*, 7 BULL. OF THE PSYCHONOMIC SOC. 87, 88 (1976) (finding that there was no significant difference in eye contact while lying and telling the truth); Sarah C. Sitton & Susan T. Griffin, *Detection of Deception from Clients' Eye Contact Patterns*, 28 J. COUNSELING. PSYCHOL. 269, 270 (1981) (finding that participants increased eye contact when trying to deceive); Siegfried L. Sporer & Barbara Schwandt, *Moderators of Nonverbal Indicators of Deception*, 13 PSYCH., PUB. POL'Y, & L. 1, 19 (2007) (meta-analysis finding that avoiding eye contact did not predict deception).

children and adults did not.<sup>86</sup> This may suggest that people learn to make direct eye-contact in order to more effectively lie.<sup>87</sup> Overall, however, the laboratory data suggests that eye gaze is not a good predictor of deception.

Not only can some facial features predict deception, but so too can body expressions. In a study by Vrij and colleagues, participants were asked to tell the truth in one interview and to lie in a second interview.<sup>88</sup> Researchers examined differences in body movements between the truthful and deceptive interviews.<sup>89</sup> They found that deceptive individuals moved their hands, fingers, feet, and legs less than truthful individuals.<sup>90</sup> The authors concluded that they found this result because lying requires a greater cognitive load than telling the truth does.<sup>91</sup> In a meta-analysis analyzing the nonverbal indicators of deception, Sporer and Schwandt confirmed these results, finding that deceptive individuals exhibited less nodding, less foot and leg movements, and less hand movements than truthful individuals.<sup>92</sup> While these results suggest that body movements can indicate deception, it is important to acknowledge that there are individual differences in body movements.<sup>93</sup> Therefore, it may be difficult to use these cues without knowing a person's baseline movements.<sup>94</sup>

The studies presented here provide some evidence that nonverbal expressions can indicate deception. One limitation of these studies, however, is that they are conducted in a laboratory and therefore potentially have low ecological validity. There have, however, also been studies examining which nonverbal behaviors may predict deception in real-life settings. Pérez-Rosas and colleagues examined nonverbal behaviors exhibited by truthful and deceptive witnesses in the courtroom.<sup>95</sup> The re-

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<sup>86</sup> Anjanie McCarthy & Kang Lee, *Children's Knowledge of Deceptive Gaze Cues and its Relation to their Actual Lying Behavior*, 103 J. OF EXPERIMENTAL CHILD PSYCH. 117, 130 (2009).

<sup>87</sup> *Id.* at 131.

<sup>88</sup> Aldert Vrij, Gün R. Semin, & Ray Bull, *Insight into Behavior Displayed During Deception*, 22 HUM. COMM. RES. 544, 548 (1996).

<sup>89</sup> *Id.* at 549–50.

<sup>90</sup> *Id.* at 556.

<sup>91</sup> *Id.* at 557–58.

<sup>92</sup> Sporer & Schwandt, *supra* note 85, at 19.

<sup>93</sup> See, e.g., Aldert Vrij, Lucy Akehurst, & Paul Morris, *Individual Differences in Hand Movements During Deception*, J. OF NONVERBAL BEHAV. 87, 97 (1997) (finding that individuals with high public self-consciousness and high ability to control behavior are less likely to make hand movements during deception as opposed to truth-telling than individuals with low public self-consciousness and low ability to control behavior).

<sup>94</sup> See, e.g., Paul Ekman & Wallace V. Friesen, *Detecting Deception from the Body or Face*, 29 J. OF PERSONALITY & SOC. PSYCH. 288, 294 (1974) (finding that people are better at identifying deception from body cues than facial cues, but only if the observer has seen the deceiver's baseline nonverbal behaviors when telling the truth).

<sup>95</sup> Verónica Pérez-Rosas et al., *Deception Detections using Real-life Trial Data*, PROC. 2015 ACM 59, 59 (2015).

searchers analyzed 121 video clips from real court trials.<sup>96</sup> They operationalized deception and truthfulness by considering when other evidence corroborated the witness testimony and by the outcomes of the trials.<sup>97</sup> The researchers found that truthful witnesses raised their eyebrows, repeatedly shook their heads, and repeatedly closed their eyes more than deceptive witnesses.<sup>98</sup> In contrast, deceptive witnesses were found to move both their hands when speaking and to scowl more than truthful witnesses.<sup>99</sup> The results of this study suggest that there are observable nonverbal behavioral cues to deception that present themselves on the witness stand in actual trials. Another study found that nonverbal behavioral cues of deception were present in public appeals for help.<sup>100</sup> In this study, the researchers examined video clips of people asking the public for help for a missing or murdered relative.<sup>101</sup> The researchers categorized the people as deceptive if there was overwhelming evidence that they had been involved in the death or disappearance of their relative and as truthful if there was overwhelming evidence that they had not been involved in the death or disappearance.<sup>102</sup> They found that people making deceptive pleas were significantly more likely to avert their gaze and shake their heads than people making truthful pleas.<sup>103</sup> This study further supports that there are observable differences between the non-verbal behaviors of deceptive and truthful individuals in real-world settings. One limitation of these studies is that the experimenters are unable to unequivocally discriminate between truthful and deceptive individuals, however, approximations using the ultimate verdicts of the cases and the strength of the evidence likely approach the truth and allow these real-world studies to complement laboratory studies.

To sum up, empirical evidence from both laboratory studies and real-life settings shows that there are observable differences between truthful and deceptive individuals. These studies, however, are not conclusive. Some of the studies reported here, for example, have found opposing results.<sup>104</sup> In fact, Timothy J. Luke recently argued that many of

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<sup>96</sup> *Id.* at 60.

<sup>97</sup> *Id.* For example, defendants who received a guilty verdict were considered deceptive, while those who testified against them were considered truthful. *Id.*

<sup>98</sup> *Id.* at 63.

<sup>99</sup> *Id.*

<sup>100</sup> Clea Wright Whelan, Graham F. Wagstaff, & Jacqueline M. Wheatcroft, *High-Stakes Lies: Verbal and Nonverbal Cues to Deception in Public Appeals for Help with Missing or Murdered Relatives*, 21 *PSYCHIATRY, PSYCH. & L.* 523, 525 (2014).

<sup>101</sup> *Id.* at 526.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 532.

<sup>104</sup> *E.g., compare* Vrij, Semin, & Bull, *supra* note 88, at 548 (finding that less hand movements are associated with deception in a laboratory study) and Pérez-Rosas et al., *supra* note 95, at 63 (finding that moving both hands more is associated with deception in real-life trials).

the differences found between deceptive and truthful individuals in studies may be the result of inflated effect sizes.<sup>105</sup> Many researchers in this field acknowledge that there is no “Pinocchio’s nose”<sup>106</sup> signal of deception.<sup>107</sup> Overall, we must consider that the findings of nonverbal behavioral differences between deceptive and truthful witnesses are at best weak.

### B. *How Accurate Are People at Detecting Deception?*

Empirical evidence, while by no means conclusive, suggests that there may be some observable differences between deceptive and truthful individuals.<sup>108</sup> However, these differences may not be useful in the courtroom if judges and juries are not accurately using them in their assessments. If factfinders can effectively use nonverbal behaviors to assess witness credibility, we should be able to observe the following three patterns. Firstly, we should observe that people can discriminate between deceptive and truthful witnesses at above chance rates. Secondly, we should observe that nonverbal behaviors vary between deceptive and truthful witnesses. Thirdly, we should observe that the nonverbal behaviors that factfinders use to make judgments about truthfulness would be consistent with those nonverbal behaviors that actually vary between deceptive and truthful witnesses.

Numerous studies have examined how accurately people are able to discriminate between truthful and deceptive witnesses. The general conclusion is that people are not able to effectively identify deception. In 2006, Bond and DePaulo conducted a meta-analysis of 206 documents, which included 24,483 deception judgments.<sup>109</sup> These documents produced 292 samples in which participants made lie-truth classifications.<sup>110</sup> The researchers found that the accuracy of lie-truth classifications in the studies varied from a high of 73% to a low of 31%.<sup>111</sup> They found that laypeople had an average accuracy of 53.31%, only slightly better than chance.<sup>112</sup> This suggests that, absent training, people are not able to reliably discriminate between truths and lies. The analysis also found that people who are motivated to be believed are often perceived as deceptive

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<sup>105</sup> Timothy J. Luke, *Lessons from Pinocchio: Cues to Deception May Be Highly Exaggerated*, 14 PERSPS. ON PSYCH. SCI. 646, 647 (2019).

<sup>106</sup> Pinocchio is a character from a classic children’s novel whose nose would grow whenever he lied. See generally CARLO COLLodi, PINOCCHIO (M.A. Murray trans., Thomas Nelson & Sons 1928) (1883).

<sup>107</sup> Luke, *supra* note 105, at 646.

<sup>108</sup> See *supra* Part II.A.

<sup>109</sup> Charles F. Bond, Jr. & Bella M. DePaulo, *Accuracy of Deception Judgments*, 10 PERSONALITY & SOC. PSYCH. REV. 214, 219 (2006).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 230.

whether or not they are lying.<sup>113</sup> From a forensic standpoint, this is concerning because litigants are often especially motivated to be believed in order to win a case. These results suggest that juries may not be able to accurately assess whether a witness is telling the truth.

While studies of laypeople suggest that jurors may not be able to accurately discriminate between truthful and deceptive testimony, if experts can discriminate, it might suggest that at least judges are able to make these assessments. In their meta-analysis, Bond and DePaulo also considered studies of experts.<sup>114</sup> They found that experts achieved an average accuracy of 54.51% for lie-truth classifications, only slightly better than laypeople.<sup>115</sup> In 1991, Ekman and O'Sullivan examined the accuracy of various experts at discriminating between truthful and deceptive testimony.<sup>116</sup> They also found that experts generally achieved only slightly higher deception detection accuracy than laypeople.<sup>117</sup> The researchers found that deception accuracy for college students (52.82%) was near chance.<sup>118</sup> Individuals who had completed a one day course on deceit (55.34%) and experts such as federal polygraphers (55.67%), robbery investigators (55.79%), judges (56.73%), and psychiatrists (57.61%) achieved only slightly higher rates than college students.<sup>119</sup> Secret Service members (64.12%) achieved the highest rates of deception detection accuracy in the study.<sup>120</sup> The researchers concluded that one reason that may account for differences between Secret Service members and criminal justice professionals is that they deal with different base rates of lying.<sup>121</sup> In their occupation, Secret Service members believe that most people are telling the truth and are therefore more attuned to signals of lying.<sup>122</sup> In contrast, criminal justice professionals, in the capacity of their occupation, may be more likely to believe that most people are lying and are thus focused more on obtaining evidence than on detecting signs of lying.<sup>123</sup> The job of Secret Service members may also require them to pay greater attention to nonverbal behaviors than other experts and that may also account for the differences in accuracy.<sup>124</sup> In another study by Ekman, O'Sullivan, and Frank, the researchers found that while

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<sup>113</sup> *Id.* at 231.

<sup>114</sup> *Id.* at 230.

<sup>115</sup> *Id.*

<sup>116</sup> Paul Ekman & Maureen O'Sullivan, *Who Can Catch a Liar?*, 46 AM. PSYCH. 913, 913 (1991).

<sup>117</sup> *Id.* at 916.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 919.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*



general law-enforcement officers scored at about chance in a deception detection task (50.8%), other law enforcement groups such as federal officers with a special interest in deception (73.0%), sheriffs (66.7%), and federal judges (62.0%) scored higher.<sup>125</sup> They also found that deception-interested clinical psychologists (67.5%), regular clinical psychologists (62.1%), and academic psychologists (57.7%) scored higher than the general law enforcement officers.<sup>126</sup> These studies suggest that experience may help people improve their ability to detect deception.

There is some evidence that even minimal training may improve deception detection. Studies in which participants only receive feedback containing the correct results have had mixed results.<sup>127</sup> Porter and colleagues, however, found that the detection deception of federal parole officers in Canada could be improved after only two days of training if more extensive training methodologies are used.<sup>128</sup> In this study, federal parole officers received training which included the debunking of deception myths, information about verbal and nonverbal cues of deception, and practice with feedback.<sup>129</sup> Parole officers who participated in the training improved from a baseline score of 40.4% to a score of 76.7% accuracy in a deception detection task.<sup>130</sup> Learning effects may be easier to achieve for certain cues than others. For example, in 1985, Zuckerman and colleagues found that while learning effects were found for facial cues, learning was significantly greater for vocal cues than for facial cues.<sup>131</sup> Overall, these results suggest that judges may be more equipped to make deception judgments because they have more judicial experience. To supplement judicial experience, it may be useful for judges to receive additional training on techniques for detecting deception. Research suggests that even two days of training can make an observable

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<sup>125</sup> Paul Ekman, Maureen O'Sullivan, & Mark G. Frank, *A Few Can Catch A Liar*, 10 PSYCH. SCI. 263, 265 (1999).

<sup>126</sup> *Id.*

<sup>127</sup> See Günter Köhnken, *Training Police Officers to Detect Deceptive Eyewitness Statements: Does It Work?*, 2 SOC. BEHAV. 1 (1987) (finding that training did not increase the accuracy of police officers in detecting deception); Miron Zuckerman, Richard Koestner, & Audrey O. Alton, *Learning to Detect Deception*, 46 J. OF PERSONALITY & SOC. PSYCH. 519, 525 (1984) (finding that practice and feedback can improve deception detection, but only for the same deceiver); Miron Zuckerman, Richard Koestner, & Michele J. Colella, *Learning to Detect Deception from Three Communication Channels*, 9 J. OF NONVERBAL BEHAV. 188, 191, 194 (1985) (finding that practice and feedback can improve deception detection both for the same deceiver and for other deceivers).

<sup>128</sup> Stephen Porter, Mike Woodworth, & Angela R. Birt, *Truth, Lies, and Videotape: An Investigation of the Ability of Federal Parole Officers to Detect Deception*, 24 L. & HUM. BEHAV. 643, 655-56 (2000).

<sup>129</sup> *Id.* at 648-49.

<sup>130</sup> *Id.* at 655.

<sup>131</sup> Zuckerman, Koestner & Collella, *supra* note 127, at 193.

difference in people's ability to discriminate between truthful and deceptive individuals.<sup>132</sup>

Overall, the results of empirical studies suggest that laypeople are not generally able to effectively discriminate between truthful and deceptive individuals. The results, however, do suggest that, with experience and training, people can learn to detect deception. Studies have found that both professionals who focus on deception detection and those who have completed comprehensive training are able to accurately detect deception at rates above chance. It is important to acknowledge, however, that the rates at which people can identify deception are far from infallible even with extensive experience or training.

### C. *What Nonverbal Behavioral Cues Do People Rely Upon When Assessing Deception?*

Research has found that people do rely on non-verbal behaviors when assessing a person's trustworthiness. For example, one study found that people identify Duchenne smiles as more trustworthy than non-Duchenne smiles even if they are only able to view the lower part of the face.<sup>133</sup> The problem is that studies often find that people rely on evidence that is not empirically supported to predict trustworthiness. Studies generally have found that people focus too much on the face in their assessments of a person's trustworthiness. This is because when people focus on the face, they often rely on the wrong cues. For example, in a study by Zebrowitz and colleagues, participants were asked to rate the honesty of people's faces.<sup>134</sup> The researchers found that babyfacedness, attractiveness, facial symmetry, eye size, and expression positivity all predicted ratings of trustworthiness.<sup>135</sup> Research has found that people often make judgments about a person's trustworthiness within 100 milliseconds.<sup>136</sup> These judgments do not change significantly when an observer looks at the face for a longer amount of time.<sup>137</sup> People may also overemphasize the role of certain facial expressions in predicting deception. For example, a global team of deception researchers asked people from 58 countries the open-ended question: "How can you

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<sup>132</sup> Porter, Woodworth & Birt, *supra* note 128, at 656.

<sup>133</sup> Eva Krumbhuber et al., *Facial Dynamics as Indicators of Trustworthiness and Cooperative Behavior*, 7 *EMOTION* 730, 734 (2007).

<sup>134</sup> Leslie A. Zebrowitz, Luminita Voinescu, & Mary Ann Collins, "Wide-Eyed" and "Crooked-Faced": Determinants of Perceived and Real Honesty Across the Life Span, 22 *PERSONALITY & SOC. PSYCHOL. BULL.* 1258, 1261-62 (1996).

<sup>135</sup> *Id.* at 1264.

<sup>136</sup> Janine Willis & Alexander Todorov, *First Impressions: Making Up Your Mind After a 100-Ms Exposure to a Face*, 17 *PSYCH. SCI.* 592, 597 (2006).

<sup>137</sup> *Id.*

tell when people are lying?”<sup>138</sup> The most common answer that participants provided was that liars averted their gaze more than truth-tellers, with 63.66% of participants including gaze aversion in their open-ended answers.<sup>139</sup> In a follow-up in which the experimenters asked participants which behaviors were associated with deception, the researchers found that 71.5% of participants responded with gaze aversion.<sup>140</sup> This suggests that people around the world may over-emphasize the role of gaze aversion in predicting deception.

One problem with relying too much on the face when assessing deception is that deceivers may be more conscious of their facial expressions and may manipulate them to fit their deception. Ekman and Friesen argued that a deceiver is likely to use their macro-expressions as a means of perpetuating a lie.<sup>141</sup> Only leaked micro-expressions may cue an observer to the speaker’s actual feelings and these may be less easily observable.<sup>142</sup> Ekman and Friesen explained that “the face is equipped to lie the most and leak the most, and thus can be a very confusing source of information during deception.”<sup>143</sup> In support of this, Ekman and Friesen found in a later study that if observers could see a person’s baseline body expressions when truthful, they could more accurately assess deception from body expressions than from facial expressions.<sup>144</sup> Zuckerman and colleagues argued that the face is simply “not a good source of cues to deception.”<sup>145</sup> Empirical results seem to confirm this for two reasons: (1) the face is already a weak cue to deception, and (2) people are focused on the wrong features of the face.

While likely a less confusing source of information than the face, body expressions may also mislead people attempting to detect deception. In the worldwide study by the Global Deception Research Team, the researchers found that when they asked participants to answer closed-ended responses, 65.2% reported that liars shift their posture more than truth-tellers and 64.8% reported that liars touch and scratch themselves.<sup>146</sup> This research suggests that people consider body expressions that are not empirically supported as cues to deception in their assessments of deception.

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<sup>138</sup> Glob. Deception Rsch. Team, *A World of Lies*, 37 J. CROSS-CULTURAL PSYCH. 60, 62 (2006).

<sup>139</sup> *Id.* at 65.

<sup>140</sup> *Id.* at 68.

<sup>141</sup> Paul Ekman & Wallace V. Friesen, *Nonverbal Leakage and Clues to Deception*, 32 PSYCHIATRY 88, 98 (1969).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> Ekman & Friesen, *supra* note 94, at 294.

<sup>145</sup> Zuckerman, Koestner & Colella, *supra* note 127, at 193.

<sup>146</sup> Glob. Deception Rsch. Team, *supra* note 128, at 68.

Judges and other experts may also be misled by inaccurate nonverbal behavioral cues. Porter and ten Brinke took an informal survey of the beliefs that 16 judges held about witness credibility assessments.<sup>147</sup> Seven of the judges said that witnesses averted their gaze when they lied, six of the judges said there was no difference in the frequency of body movement between truthful and dishonest witnesses, six of the judges said that lying witnesses fidgeted or appeared nervous more than truthful witnesses, and seven of the judges believed that it was easier to detect deception from live testimony than from a transcript.<sup>148</sup> While some of these assumptions were incorrect, the judges also had high confidence in their own abilities to detect deception, with the average believing that their ability to detect deception was a 5.13 on a 7 point scale.<sup>149</sup> Similar results have also been found in other expert groups. For example, Strömwall and Granhag found that police officers in Sweden also believed that gaze aversion and increased body movements were associated with deception despite the sparse empirical evidence to support these beliefs.<sup>150</sup>

Inaccurate beliefs about nonverbal behavioral cues have been found to have real effects. In a study of police officers, Vrij and Mann found that less accurate lie detectors were more likely to rely on gaze aversion and fidgeting than more accurate lie detectors in their assessments of truthfulness.<sup>151</sup> In a later study Mann, Vrij, and Bull again found this pattern among police officers: accuracy in deception detection and belief that deception is associated with gaze aversion and fidgeting were negatively correlated with one another.<sup>152</sup> These results suggest that using these incorrect nonverbal behavioral cues can actually impair deception detection. In their paper, Porter and ten Brinke used empirical evidence to create a model called “dangerous decisions theory” to explain why judges came to incorrect assessments of witness truthfulness.<sup>153</sup> According to their model, judges make quick judgments of a witness’s trustworthiness based on intuition.<sup>154</sup> Judges then have high motivation to

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<sup>147</sup> Stephen Porter & Leanne ten Brinke, *Dangerous Decisions: A Theoretical Framework for Understanding How Judges Assess Credibility in the Courtroom*, 14 LEGAL & CRIMINOLOGICAL PSYCH. 119, 123 (2009).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> Leif A. Strömwall & Pär Anders Granhag, *How to Detect Deception? Arresting the Beliefs of Police Officers, Prosecutors and Judges*, 9 PSYCH., CRIME, & L. 19, 30 (2003).

<sup>151</sup> Aldert Vrij & Samantha Mann, *Telling and Detecting Lies in a High-Stake Situation: The Case of a Convicted Murderer*, 15 APPLIED COGNITIVE PSYCH. 187, 198 (2001).

<sup>152</sup> Samantha Mann, Aldert Vrij, & Ray Bull, *Detecting True Lies: Police Officers’ Ability to Detect Suspects’ Lies*, 89 J. OF APPLIED PSYCH. 137, 143 (2004).

<sup>153</sup> Porter & ten Brinke, *supra* note 147, at 125–26.

<sup>154</sup> *Id.*

determine whether the witness is telling the truth,<sup>155</sup> which Porter and ten Brinke note has been found to impair accuracy in deception detection tasks.<sup>156</sup> Judges follow this by overvaluing evidence that supports their intuition and undervaluing evidence that contradicts their intuition to come to a high degree of confidence in the initial judgment they made before they had received any substantive evidence.<sup>157</sup> Overall, this model suggests that initial impressions from nonverbal behavioral cues may be highly influential in a judge's assessment of whether a witness is providing truthful testimony.

The results of empirical studies suggest that laypeople and experts alike often attune to the wrong nonverbal behavioral cues. People consider irrelevant facial features as well as facial and body expressions which have not been found to correlate with deception. These beliefs may have real implications for deception detection accuracy. The effect of misleading nonverbal behaviors seems to be especially problematic for faces. This is likely because deceivers both have the greatest control over facial expressions and because facial expressions are most susceptible to leakage of true emotions, thus providing ambiguous cues of deception. Overall, these studies suggest that nonverbal behaviors may sometimes mislead more than they help for deception detection.

### III. IMPLICATIONS OF DECEPTION RESEARCH ON COVID-19 RESTRICTIONS

The empirical evidence suggests that there are some small differences between the nonverbal behaviors of truth-tellers and the nonverbal behaviors of liars. Nevertheless, observers are often not able to effectively use nonverbal cues to inform their own assessments of the truthfulness of witness testimony. As a result, some scholars such as Wellborn III have argued that nonverbal behavioral cues may cause more harm than good for assessment of witness credibility.<sup>158</sup> Wellborn argues that nonverbal behaviors are misleading, distracting, and unreliable and that transcripts would likely allow for better assessment of witness credibility than live testimony.<sup>159</sup> While this would violate the Confrontation Clause in criminal trials, it does provide an interesting proposition. Empirical research has found that limiting access to nonverbal behavior can

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<sup>155</sup> *Id.* at 128.

<sup>156</sup> *Id.* See Stephen Porter et al., 'Genius is 1% Inspiration and 99% Perspiration' . . . Or Is It? An Investigation of the Impact of Motivation and Feedback on Deception Detection, 12 LEGAL & CRIMINOLOGICAL PSYCH. 297, 143 (2007) (finding "a 'motivation impairment' effect such that high motivation in observers lowered their accuracy relative to their less motivated counterparts" in a deception detection task).

<sup>157</sup> Porter & ten Brinke, *supra* note 147, at 128.

<sup>158</sup> Wellborn III, *supra* note 23, at 1091.

<sup>159</sup> *Id.*

improve assessments of witness truthfulness. In a study conducted by Leach and colleagues, female witnesses watched a video of a woman watching a stranger's bag.<sup>160</sup> Half of the witnesses also saw the woman steal from the bag.<sup>161</sup> All of the witnesses were asked to testify on the women's behalf, which required half of them to tell the truth and half to lie that they had not seen her steal from the bag.<sup>162</sup> Witnesses were randomly assigned to either wear a black niqab, a black hijab, or to not wear a veil during the testimony.<sup>163</sup> A second set of participants was asked to identify whether the witnesses were telling the truth or lying.<sup>164</sup> The researchers found that participants were significantly more accurate at detecting deception when the witnesses wore hijabs or niqabs than when they did not wear any veil.<sup>165</sup> This study suggests that less access to nonverbal facial expressions aids deception detection.

While Wellborn III and the Leach et al. study suggest that elimination or reduction of access to nonverbal behaviors may be positive for assessing witness truthfulness, there are downsides to restricting access to nonverbal behaviors. Denault and Patterson, for example, argue against the use of video conferencing for witness testimony because of the potential loss of access to nonverbal behavioral cues.<sup>166</sup> Gestures can communicate thoughts that might not be present in a person's vocal communication.<sup>167</sup> Gestures can also reiterate concepts communicated through speech thus facilitating understanding of testimony.<sup>168</sup> Therefore, courts should avoid completely eliminating access to nonverbal behavioral cues.

Overall, the empirical evidence presented in this Note suggests that, when epidemiologically appropriate, courts should continue to avoid using video conferencing in favor of in-person proceedings even if, in the case of a future pandemic, the participants are required to wear masks. Courts should avoid video conferencing mainly because it tends to augment the face over other parts of the body. While empirical evidence suggests that people misuse both facial and body expressions in

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<sup>160</sup> Amy-May Leach et al., *Less is More? Detecting Lies in Veiled Witnesses*, 40 L. & HUM. BEHAV. 401, 403 (2016).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 404.

<sup>166</sup> Denault & Patterson, *supra* note 24, at 4–5.

<sup>167</sup> See, e.g., Susan Goldin-Meadow & Martha Wagner Alibali, *Gesture's Role in Speaking, Learning, and Creating Language*, 64 ANNUAL REV. PSYCHOL. 257, 260 (2013) (providing an overview of the role of gestures in facilitating language comprehension).

<sup>168</sup> See, e.g., Susan Goldin-Meadow, San Kim, & Melissa Singer, *What the Teacher's Hands Tell the Student's Mind About Math*, 91 J. OF EDUC. PSYCH. 720, 727 (1999) (finding that children were able to better reiterate a teacher's spoken strategy when accompanied by congruent gestures).

their assessments of witness truthfulness, the empirical evidence also suggests that faces may be a more confusing source of nonverbal behavioral cues than the body. As Ekman and Friesen noted, the face is a confusing source of nonverbal communication because it is both the most easily controlled by the deceiver and is most susceptible to leakage of a person's true emotions.<sup>169</sup> Furthermore, gaze aversion is the single most cited nonverbal source that people use in their assessment of deception.<sup>170</sup> Not only does this imply that the face may be prone to mislead, but there is also a concern that gaze would be especially misleading over video teleconferencing where a witness may appear to be averting their gaze when they are actually making eye-contact with an image on their screen. The study by Leach et al. also suggests that not only may masks not impair the ability of factfinders to detect deception, but that they may even improve deception detection.<sup>171</sup> Additionally, in-person court sessions allow factfinders to more easily see nonverbal body gestures, which may facilitate communication in other ways.<sup>172</sup>

In-person witness testimony may also have other advantages over video teleconferencing besides those related to nonverbal behavior. While video teleconferencing has some advantages such as increased efficiency, there are also disadvantages such as a concern that witnesses may feel more comfortable lying from the comfort of their own homes.<sup>173</sup> There are also some concerns that online court proceedings may permit greater amounts of identity theft.<sup>174</sup>

Nevertheless, there are some cases in which a pandemic requires that a witness testify by video teleconferencing. For example, a witness may be out of town and therefore unable to travel to a courthouse without being unnecessarily exposed to people who may carry the virus. In these cases, witnesses should take special precautions to reduce any negative effects of demeanor evidence. For example, a video camera could be zoomed out far enough so that the focus on the screen is not the witness's face. This will serve the function of preventing factfinders from relying too heavily on nonverbal cues from the face and will also allow factfinders to better view body gestures which might help facilitate understanding between the witness and the factfinder.

These recommendations apply to both bench trials and jury trials. While judges may be more equipped to detect deception based on their greater experience, research suggests that experience effects are moder-

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<sup>169</sup> Ekman & Friesen, *supra* note 141, at 98.

<sup>170</sup> Glob. Deception Rsch. Team, *supra* note 138, at 65, 68.

<sup>171</sup> Leach et al., *supra* note 160, at 404.

<sup>172</sup> See, e.g., Denault & Patterson, *supra* note 24, at 4–5.

<sup>173</sup> Doron Menashe, *A Critical Analysis of the Online Court*, 39 U. PA. J. INT'L L. 921, 931–33 (2018).

<sup>174</sup> *Id.* at 933–34.

ate.<sup>175</sup> Additionally, experts often ascribe to the same mistaken beliefs about the nonverbal behavioral cues of deceptions.<sup>176</sup> While training may help judges increase their abilities to detect deception, courts are better off implementing a multi-faceted strategy to ensure that judges are best equipped to assess witnesses and thus, in-person testimony is still preferred over video testimony for bench trials.

#### CONCLUSION

The COVID-19 pandemic has had a major impact on American society, forcing numerous institutions including courtrooms to adjust. As a result, courts had to consider the balance between a return to the normalcy of court functions and the protection of public health. In enacting policies to prevent the spread of COVID-19, courts faced concerns that they might violate criminal defendants' Confrontation Clause rights. Some courts permitted COVID-19 provisions such as video testimony and masked testimony, while others deemed these provisions to infringe on defendants' rights. The concerns over these provisions were, however, not limited to legality. The ability to assess a witness's demeanor has long been of critical importance in the courtroom and courts had to consider this in their COVID-19 protocols.

Throughout history, people have believed that there are readily observable nonverbal behavioral cues to deceit. In reality, the ability to assess a person's truthfulness is much more challenging. Firstly, evidence of observable differences between the nonverbal behaviors of truthful and deceptive individuals is at best weak. Secondly, people are often inaccurate in their abilities to detect deception likely in part because they rely on the wrong features of nonverbal behaviors in their assessments. Empirical studies find that people often overly rely on facial features and facial expressions, thus impairing their abilities to effectively discriminate between truthful and deceptive witnesses. As a result, video testimony should not be extended post-COVID-19. The use of masked testimony, unlike the use of video teleconferencing, allows factfinders to access the nonverbal behaviors that facilitate communication, while preventing factfinders from focusing their attention on the witness's face, which may communicate confusing information about the witness's truthfulness. Therefore, despite the convenience of video teleconferencing for court proceedings, video teleconferencing should

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<sup>175</sup> See, e.g., Ekman & O'Sullivan, *supra* note 116, at 916 (finding that judges achieved an accuracy of 56.73%); Ekman, O'Sullivan & Frank, *supra* note 125, at 265 (finding that federal judges achieved an accuracy of 62.0%).

<sup>176</sup> See, e.g., Porter & ten Brinke, *supra* note 147, at 123 (finding that some judges ascribe to non-scientific backed nonverbal behavioral cues such as gaze aversion and increased fidgeting).



not be used, regardless of whether the Supreme Court someday permits video testimony when the *Maryland v. Craig* requirements have not been met. In the event of a future pandemic, courts should consider alternatives to video conferencing, such as masked testimony, which protect court participants while allowing factfinders to better assess witness credibility.

