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SIXTH AMENDMENT—DEFENDANT'S RIGHT TO CONFRONT WITNESSES: CONSTITUTIONALITY OF PROTECTIVE MEASURES IN CHILD SEXUAL ASSAULT CASES

Coy v. Iowa, 108 S. Ct. 2798 (1988)

I. INTRODUCTION

In *Coy v. Iowa*,¹ the United States Supreme Court held that a one-way mirror placed between the thirteen-year-old victims of an alleged sexual assault and the defendant during the victims' testimony at trial violated the defendant's sixth amendment² right to confront the witnesses against him.³ In the Supreme Court of Iowa, defendant Coy had challenged his sexual assault conviction on the grounds that the placing of the one-way mirror, in accordance with an Iowa statute,⁴ between himself and the children testifying at his trial violated his constitutional right to confront the witnesses against him and his constitutional right to due process.⁵ The Supreme Court of Iowa held that the defendant's rights were not violated by the screen.⁶ On appeal to the United States Supreme Court, Coy again argued that his constitutional rights were violated. The United States Supreme Court reversed the lower court

¹ 108 S. Ct. 2798 (1988).

² The sixth amendment provides in pertinent part: "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI.

³ *Coy*, 108 S. Ct. at 2799, 2802.

⁴ The relevant Iowa provision provides in pertinent part:

The court may require a party be confined [sic] to an adjacent room or behind a screen or mirror that permits the party to see and hear the child during the child's testimony, but does not allow the child to see or hear the party. However, if a party is so confined, the court shall take measures to insure that the party and counsel can confer during the testimony and shall inform the child that the party can see and hear the child during the testimony.

IOWA CODE ANN. § 910A.14 (West 1987).

⁵ *State v. Coy*, 397 N.W.2d 730, 730-31 (Iowa 1986), *rev'd*, 108 S. Ct. 2798 (1988).

⁶ *Id.* at 734.

decision.⁷

This Note argues that the Supreme Court was correct in deciding that in this case the defendant's rights were violated. However, this Note, in agreement with the concurring opinion, endorses a narrow interpretation of *Coy*. Although the sixth amendment confrontation rights include the right to the face-to-face meeting denied in this case, this right is not absolute and is subject to exceptions. Moreover, while the use of protective devices like the screen at issue in *Coy* is justifiable as a public policy exception to the right to confrontation, a court should require a case-specific showing of necessity before permitting the use of these devices. Since there was no such showing in *Coy* to justify the infringement of the defendant's confrontation right, the violation of this right was unconstitutional.

II. FACTUAL BACKGROUND

The defendant, John Avery Coy, lived with his girlfriend in a residential neighborhood next door to one of the victims.⁸ On the afternoon of August 2, 1985, Coy, sitting in a lawn chair in his backyard, watched as C.B., one of the thirteen-year-old victims, constructed a makeshift tent in her back yard in preparation for a camp out.⁹ The tent was not visible from the street, but was visible from Coy's home.¹⁰ C.B. and her friend, thirteen-year-old N.C., went to sleep in the tent at about 10:00 or 11:00 p.m.¹¹ During the night, a man crawled into the tent, grabbed the girls by the throat and threatened them, warning them not to scream.¹² The man ordered the girls to take off all their clothes except their underwear.¹³ He fondled their breasts and vaginal areas and took off their underwear, which he placed in a white bag he had brought with him.¹⁴ After removing his own clothing, he ordered the girls to perform oral sex on him and then to kiss each other.¹⁵ They obeyed.¹⁶ He also urinated into one of the cups which the girls had brought out to the tent with them.¹⁷ Before leaving, the man warned the girls not to tell anyone what had happened, and tied the girls with their

⁷ *Coy*, 108 S. Ct. at 2803.

⁸ Brief for Appellee at 3, *Coy v. Iowa*, 108 S. Ct. 2798 (1988)(No. 86-6757).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 4.

¹⁶ *Id.*

¹⁷ *Id.*

sweatpants.¹⁸

After the girls untied themselves, they went into the house to report the incident to C.B.'s parents, who called the police and took the girls to the hospital for an examination.¹⁹ C.B.'s father told the police that he suspected Coy, and Coy was arrested on an unrelated charge.²⁰ The girls could not identify their attacker because at the time of the assault he appeared to be wearing a nylon stocking over his head, and he shined a flashlight in their eyes.²¹ The girls' flashlight with Coy's fingerprints was found in Coy's garage and the cup into which the attacker urinated was found in the garbage just inside Coy's back door.²²

At the beginning of Coy's trial, the State of Iowa made a motion to allow the victims to testify either via closed-circuit television or behind a screen.²³ A recently enacted Iowa statute approved the use of such devices.²⁴ Coy objected to the use of the screen, arguing that the girls could not identify him as their attacker, and that the screen violated his sixth amendment right to confront the witnesses against him.²⁵ He also contended that the screen created an inference of guilt, thereby violating his fourteenth amendment right to a fair trial.²⁶

The court rejected the state's request to employ closed-circuit

¹⁸ *Id.* The man stated that if the girls "told anyone what had happened, they would go through a lot." *Id.*

¹⁹ *Id.*

²⁰ *Id.* The father suspected Coy because "only Coy had a vantage point to see the tent." *Id.* When arrested, Coy was wearing a wrist watch, pushed midway up his arm, with the face of the watch turned inward. *Id.* The girls testified that the intruder was wearing a watch midway up his arm, with the face turned inward. *Id.* at 5.

²¹ *Coy v. Iowa*, 108 S. Ct. 2798, 2806 n.1 (Blackmun, J., dissenting).

²² Brief for Appellee at 5. Coy testified that on the morning following the assault he found the flashlight and cup discarded at the corner of his driveway and took them inside. Brief for Appellant at 8, *Coy v. Iowa*, 108 S. Ct. 2798 (1988)(No. 86-6757). In addition, the girls stated that immediately after their attacker left the tent, they heard a nearby motorcycle start up and drive away. The defendant did not own a motorcycle, nor had he operated one in the area. During the search of the defendant's residence, the police did not find a mask or clothing that matched the description given by the girls, nor did they find the girls' panties. *Id.*

²³ *Coy*, 108 S. Ct. at 2799.

²⁴ *Id.* See *supra* note 4 for the text of the Iowa statute.

²⁵ Brief for Appellant at 3-4. See *supra* note 2 for the text of the sixth amendment. Defense counsel's argument that the girls could not identify their assailant implied that testifying in the defendant's presence would not be traumatic for the girls. Brief for Appellant at 4 n.6. The State countered that even if the girls could not identify their attacker, they would be traumatized by the presence of the defendant because they assumed he was guilty from the fact that he was charged. *Id.*

²⁶ *Coy*, 108 S. Ct. at 2799. The fourteenth amendment provides in pertinent part, "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV § 1.

television but permitted a screen to be used only during the girls' testimony.²⁷ During the girls' testimony, the lighting in the courtroom was dimmed and a one-way mirror was set up in front of the table where Coy sat.²⁸ The mirror allowed the defendant to hear and dimly see the witnesses, but the witnesses were only able to hear the defendant.²⁹ In addition, the mirror allowed the rest of the courtroom, including judge, jury, and spectators, to see and hear both the witness and the defendant.³⁰ The witnesses were told that the defendant could see and hear them while they were testifying.³¹ The trial court twice instructed the jury that the mirror was used in accordance with a recent Iowa statute.³² Both after the girls testified and at the close of the state's case, Coy moved for a mistrial based on the prejudicial impact the screening device had upon his trial.³³ These motions were overruled.³⁴

After jury trial, Coy was convicted on two counts of engaging in lascivious acts with a child.³⁵ On appeal to the Supreme Court of Iowa, Coy contended that the screen violated his sixth amendment right to confront his accusers.³⁶ Coy argued that the trial court was constitutionally required to find that the screen was necessary before permitting its use.³⁷ He also argued that the screen was prejudicial and therefore a violation of his right to a fair trial guaranteed by the fourteenth amendment.³⁸ The Iowa Supreme Court affirmed Coy's conviction and held that a finding of necessity was not constitutionally required because Coy's confrontation rights were not violated.³⁹ The court also held that the screen was not prejudicial and

²⁷ Brief for Appellant at 4.

²⁸ Brief for Appellee at 9-10.

²⁹ Brief for Appellant at 5-6.

³⁰ *Coy*, 108 S. Ct. at 2806 (Blackmun, J., dissenting).

³¹ *Id.* (Blackmun, J., dissenting).

³² Brief for Appellee at 11-12.

³³ Brief for Appellant at 7.

³⁴ *Id.*

³⁵ *State v. Coy*, 397 N.W.2d 730, 730 (Iowa 1986), *rev'd*, 108 S. Ct. 2798 (1988). Coy was convicted of violating § 709.8(1) of the Iowa code which provides:

It is unlawful for any person eighteen years of age or older to perform any of the following acts with a child with or without the child's consent unless married to each other, for the purpose of arousing or satisfying the sexual desires of either of them:

1. Fondle or touch the pubes or genitals of a child.
2. Permit or cause a child to fondle or touch the person's genitals or pubes.

....

Any person who violates a provision of this section shall, upon conviction, be guilty of a class "D" felony.

IOWA CODE ANN. § 709.8(1) (West 1985).

³⁶ *Coy*, 108 S. Ct. at 2800.

³⁷ *State v. Coy*, 397 N.W.2d at 730.

³⁸ *Coy*, 108 S. Ct. at 2800.

³⁹ *State v. Coy*, 397 N.W.2d at 733-34. The court stated that "the issue of necessity

thus the defendant was not denied his right to a fair trial.⁴⁰

On appeal to the United States Supreme Court, Coy again argued that the use of the screen, over his objections and without a finding that its use served an essential state interest, was a violation of his fourteenth amendment right to a fair trial and his sixth amendment confrontation right.⁴¹ Coy also contended that the Iowa Supreme Court's error was not harmless and therefore required reversal.⁴² The United States Supreme Court considered the issue of whether Coy's sixth amendment right to confrontation and Coy's fourteenth amendment right to a fair trial were violated by the use of the screen.⁴³

III. THE MAJORITY OPINION

The majority opinion, delivered by Justice Scalia,⁴⁴ rejected the Iowa Supreme Court's ruling and held for the defendant Coy.⁴⁵ Justice Scalia stated that the right to face-to-face confrontation violated in *Coy* is an essential element of the confrontation clause.⁴⁶ Justice Scalia added that certain rights guaranteed by the confrontation clause, such as the right to cross-examine or to restrict the admissibility of out-of-court statements, may be subjected to exceptions in the face of "other important interests."⁴⁷ However, the majority declined to comment on whether the right to face-to-face confrontation is subject to exceptions and whether the interest at issue in *Coy* of protecting the child witnesses was sufficient to justify an exception.⁴⁸ The majority stated that even if an exception to the face-to-face confrontation right were to be allowed, such an exception would be permitted only after a case-specific showing that the exception was necessary.⁴⁹ The majority held that since no case-specific showing of necessity was made in *Coy*, the defendant's sixth amendment right was violated.⁵⁰

arises when a witness is unavailable for trial and a party seeks to introduce some prior statement or testimony of that witness . . . Here, both girls were present at trial and testified under oath." *Id.* at 734.

⁴⁰ *Id.* at 735.

⁴¹ Brief for Appellant at 11, 31.

⁴² *Id.* at 41.

⁴³ See *Coy*, 108 S. Ct. at 2799, 2800, 2803.

⁴⁴ Justice Scalia was joined by Justices Brennan, Marshall, O'Connor, Stevens and White.

⁴⁵ *Coy*, 108 S. Ct. at 2803.

⁴⁶ *Id.* at 2801.

⁴⁷ *Id.* at 2802.

⁴⁸ *Id.* at 2803.

⁴⁹ *Id.*

⁵⁰ *Id.*

The opinion first stated that the defendant's sixth amendment right was violated because the confrontation clause guarantees the defendant face-to-face confrontation with the witnesses.⁵¹ After noting several historical examples of the right of confrontation,⁵² the majority conceded that most judicial treatment of the confrontation clause has dealt either with the admissibility of out-of-court statements or restrictions upon the scope of cross-examination.⁵³ The majority pointed out that judicial treatment of the right to cross-examination and the right to be present during testimony, rather than the right to face-to-face confrontation, exists because "there is at least some room for doubt (and hence litigation) as to the extent to which the Clause includes th[e] [former] elements."⁵⁴ The majority stated that, because confrontation is defined as a face-to-face encounter,⁵⁵ the right to face-to-face confrontation is a literal requirement and hence the most essential element of the confrontation right.⁵⁶ The other elements of the right are judicially mandated components of the right and hence not as well established as the right to face-to-face confrontation, which is a literal requirement of the amendment.⁵⁷

The majority explained that the right to face-to-face confrontation serves a symbolic as well as a functional purpose.⁵⁸ Traditionally, noted the Court, a face-to-face confrontation between accuser and accused gives the appearance of fairness which satisfies the public's feelings of what is just.⁵⁹ The rationale behind this sentiment is that "it is always more difficult to tell a lie about a person 'to his face' than 'behind his back.'" ⁶⁰ Moreover, the Court posited, "even if the lie is told, it will often be told less convincingly."⁶¹

⁵¹ *Id.* at 2800.

⁵² Justice Scalia referred to a quote from the Roman Governor Festus, who stated that the accused must be allowed to meet his accusers "face to face." *Id.* (citing *Acts* 25:16). In addition, Justice Scalia stated that "[i]t has been argued that a form of the right of confrontation" pre-dated the right to jury trial in England. *Coy*, 108 S. Ct. at 2800 (citing Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381, 384-387 (1959)).

⁵³ *Coy*, 108 S. Ct. at 2800.

⁵⁴ *Id.*

⁵⁵ The majority cited the Latin roots of the word "confront" to support its definition of confrontation as a face-to-face encounter. The word, noted the majority, is derived from the prefix "con" which means "against" or "opposed" and the noun "frons" which means "forehead." *Id.*

⁵⁶ *Id.* at 2801.

⁵⁷ *Id.* at 2800-01.

⁵⁸ *Id.* at 2801.

⁵⁹ *Id.* at 2801-02.

⁶⁰ *Id.* at 2802.

⁶¹ *Id.*

In a footnote, the majority addressed the minority's discussion of Dean Wigmore's treatment of the confrontation right.⁶² While conceding Wigmore's conclusion that the confrontation right's purpose was to provide for cross-examination, the majority stated that simply because cross-examination is one purpose of the confrontation right, the fulfillment of this purpose does not automatically discharge the right.⁶³ Moreover, the majority added that "Wigmore did mention . . . that a secondary purpose of confrontation is to produce 'a certain subjective moral effect . . . upon the witness.'" ⁶⁴

Having stated that the right to physical, face-to-face confrontation is an essential element of the sixth amendment confrontation right, the majority then turned to the question of whether this right was violated in *Coy*.⁶⁵ The Court reasoned that because the screen's sole purpose was to obstruct the witness' view of the defendant, *Coy's* right to face his accusers was violated.⁶⁶ Justice Scalia noted that some elements of the confrontation right, such as the right to cross-examine, the right to exclude out-of-court statements, and the right to face-to-face confrontation at proceedings other than trial, are subject to certain exceptions because they are "reasonably implicit" elements of the right.⁶⁷ These rights are not explicitly contained in the sixth amendment, but rather are incidents of the confrontation right, or traditional evidentiary rules covered by the amendment.⁶⁸ However, the right to face-to-face confrontation is "the right narrowly and explicitly set forth in the Clause" and a literal requirement of the sixth amendment.⁶⁹ Therefore, the Court explained, while the implicit elements of the right, such as the right to cross-examine, may be subject to exceptions, the right to face-to-face confrontation is absolute, as it is the most explicit and essential element of the confrontation right.⁷⁰ The Court, therefore, concluded that the mere existence of exceptions to the non-literal ele-

⁶² *Id.* at 2801-02 n.2.

⁶³ *Id.* (citing 5 J. WIGMORE, EVIDENCE § 1397, at 158 (J. Chadbourn rev. ed. 1974)). In support of this proposition, the Court noted that the right to a jury trial is similarly not discharged merely because "the accused is justly convicted and publicly known to be justly convicted—the purposes of the right to jury trial." *Id.*

⁶⁴ *Id.* (quoting 5 J. WIGMORE, *supra* note 63, § 1395, at 153). The majority conceded that Wigmore also asserted "without support, that this effect 'does not arise from the confrontation of the *opponent* and the witness,' but from 'the witness' presence before the *tribunal*' . . ." *Id.* (quoting 5 J. WIGMORE, *supra* note 63, § 1395, at 154)(emphasis in original).

⁶⁵ *Id.* at 2802.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 2800-01.

⁶⁹ *Id.* at 2802.

⁷⁰ *Id.* at 2803.

ments of the clause does not support the argument that exceptions may be made to the right to face-to-face confrontation.⁷¹

However, the Court declined to determine whether the right to face-to-face confrontation is subject to exceptions,⁷² stating that if exceptions existed, the right would be subject to only those exceptions "necessary to further an important public policy."⁷³ The Court went on to note that if compelling state interests existed which necessitated exceptions infringing upon the right to face-to-face confrontation, the prosecution had failed to establish the existence of any such interests in *Coy*.⁷⁴ The prosecution's suggestion that the statute permitting the screen's use created a "legislatively imposed presumption of trauma" to a child victim compelled to testify in open court was rejected by the majority.⁷⁵ The Court stated that "[s]ince there have been no individualized findings that these particular witnesses needed special protection, the judgment here could not be sustained by any conceivable exception."⁷⁶

Finally, the Court recognized that the trial court's violation of *Coy*'s confrontation right, like other confrontation clause violations, was subject to a harmless error analysis and remanded the case to the court below to conduct this analysis.⁷⁷ The Court added that

⁷¹ *Id.*

⁷² The Court stated: "[w]e leave for another day, however, the question whether any exceptions [to the confrontation right] exist." *Id.* at 2803.

⁷³ *Id.* The majority referred to *Ohio v. Roberts*, 448 U.S. 56 (1980). *Coy*, 108 S. Ct. at 2803. *Roberts* stated that "competing interests, if 'closely examined' . . . may warrant dispensing with confrontation at trial." *Roberts*, 448 U.S. at 64 (quoting *Chambers v. Mississippi*, 410 U.S. 294, 295 (1973))(citations omitted). In *Roberts*, the Court suggested that the "necessities of the case" and the interests of "effective law enforcement" are such competing interests. *Roberts*, 448 U.S. at 64. The Court in *Chambers* identified these interests as "other legitimate interests in the criminal trial process." *Chambers*, 410 U.S. at 295.

⁷⁴ *Coy*, 108 S. Ct. at 2803.

⁷⁵ *Id.* The Court explained that the presumption underlying the Iowa statute was not sufficient to support such a novel exception to the confrontation right as the exception advocated by the prosecution stating that: "[e]ven as to exceptions from the normal implications of the Confrontation Clause, as opposed to its most literal application, something more than the type of generalized finding underlying such a statute is needed when the exception is not 'firmly . . . rooted in our jurisprudence.'" *Id.* (quoting *Dutton v. Evans*, 400 U.S. 74, 91 (1970)).

⁷⁶ *Id.*

⁷⁷ *Id.* at 2803. The Court cited *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), for the principle that certain constitutional errors may be found to be "harmless beyond a reasonable doubt." *Coy*, 108 S. Ct. at 2803 (citing *Van Arsdall*, 475 U.S. at 681). In *Van Arsdall*, the Court held that "the constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to harmless error analysis" and remanded the analysis to the lower court, as did the Court in *Coy*. *Van Arsdall*, 475 U.S. at 684. The *Van Arsdall* Court explained that in *Chapman v. California*, 386 U.S. 18, 24 (1967), *reh'g denied*, 386 U.S. 987 (1967), "the Court rejected

because the violation of Coy's confrontation right required that the lower court's judgment be reversed, a discussion of the defendant's contention that the screen violated his right to a fair trial was unnecessary.⁷⁸

IV. CONCURRING OPINION

In her concurring opinion,⁷⁹ Justice O'Connor agreed with Justice Scalia that the defendant's sixth amendment right to confront the witnesses against him was violated by the use of the screen.⁸⁰ However, although Justice Scalia declined to determine whether the physical right to face-to-face confrontation was absolute, Justice O'Connor departed from the majority by arguing that the right, like other elements of the confrontation clause, is subject to exceptions.⁸¹ Justice O'Connor asserted that "in an appropriate case . . . procedural devices designed to shield a child witness from the trauma of courtroom testimony" may be used.⁸² The concurrence agreed with the majority that these devices should be permitted only after a case-specific showing of necessity, which was absent in *Coy*.⁸³ Thus, while the concurring opinion did not conflict with the majority's stance, it extended the majority's holding to permit the use of protective devices when there is a case-specific showing of necessity.⁸⁴

After emphasizing the gravity of the problem of child abuse and sexual assault, Justice O'Connor discussed the difficulties inherent in the prosecution of such cases, such as the lack of witnesses besides the victim and the trauma suffered by child witnesses.⁸⁵ She referred to other procedural devices aimed at protecting child witnesses, including one-way or two-way closed circuit television,

the argument that all federal constitutional errors, regardless of their nature or the circumstances of the case, require reversal of a judgment of conviction." *Van Arsdall*, 475 U.S. at 681. The Court, in *Van Arsdall*, reasoned that the Constitution entitles the defendant to a fair, but not a perfect, trial; and that certain errors may be "harmless" in terms of their effect on the fact finding process. *Id.* As articulated in *Van Arsdall*, the *Chapman* principle, which has been reaffirmed repeatedly, is that "an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *Id.*

⁷⁸ *Coy*, 108 S. Ct. at 2803. Accordingly, the Court did not reach the question of whether the screen was prejudicial. *Id.*

⁷⁹ Justice White joined in Justice O'Connor's concurring opinion.

⁸⁰ *Coy*, 108 S. Ct. at 2803 (O'Connor, J., concurring).

⁸¹ *Id.* (O'Connor, J., concurring).

⁸² *Id.* (O'Connor, J., concurring).

⁸³ *Id.* at 2805 (O'Connor, J., concurring).

⁸⁴ *Id.* (O'Connor, J., concurring).

⁸⁵ *Id.* at 2803-04 (O'Connor, J., concurring).

which broadcast the child's testimony to the jury from a room in which only the judge, counsel, technicians, and in some cases the defendant, are present.⁸⁶ Justice O'Connor suggested that these devices would present no violation of the confrontation right if the testimony is given in the presence of the defendant or if the defendant can see the countenance of the witness through two-way closed circuit television.⁸⁷

Justice O'Connor then indicated her agreement with Justice Scalia on the issue of whether face-to-face confrontation is guaranteed by the sixth amendment,⁸⁸ affirming that "the [Confrontation] Clause embodies a general requirement that a witness face the defendant."⁸⁹ However, Justice O'Connor added that this requirement, like the other requirements of the confrontation clause, is not absolute.⁹⁰ Even if certain protective devices are violative of the confrontation clause, Justice O'Connor stated, they should be permitted if necessary "to further an important public policy."⁹¹ She then stated that the protection of child witnesses was such a policy.⁹²

The concurrence agreed "with the Court that more than the type of generalized legislative finding of necessity present here is required" to allow use of a confrontation-violative procedure.⁹³ Thus, reversal of Coy's conviction was mandated. However Justice O'Connor noted that "if a court makes a case-specific finding of necessity, as is required by a number of state statutes, . . . the Confrontation Clause may give way to the compelling state interest of protecting child witnesses," and the use of protective devices would be permitted.⁹⁴

V. DISSENTING OPINION

Justice Blackmun's dissent⁹⁵ treated two undecided issues of the majority opinion: whether exceptions to the "literal" confrontation right exist,⁹⁶ and whether the screen had a prejudicial impact

⁸⁶ *Id.* at 2804 (O'Connor, J., concurring).

⁸⁷ *Id.* (O'Connor, J., concurring).

⁸⁸ *Id.* (O'Connor, J., concurring).

⁸⁹ *Id.* (O'Connor, J., concurring).

⁹⁰ *Id.* (O'Connor, J., concurring).

⁹¹ *Id.* at 2805 (O'Connor, J., concurring).

⁹² *Id.* (O'Connor, J., concurring).

⁹³ *Id.* (O'Connor, J., concurring).

⁹⁴ *Id.* (O'Connor, J., concurring)(citations omitted).

⁹⁵ Chief Justice Rehnquist joined in Justice Blackmun's dissent.

⁹⁶ *Coy*, 108 S. Ct. at 2808 (Blackmun, J., dissenting).

upon *Coy's* fourteenth amendment right to a fair trial.⁹⁷ Justice Blackmun concluded that: the confrontation right does not mandate, but merely manifests " 'a preference for face-to-face confrontation at trial; ' " ⁹⁸ the "preference" for face-to-face confrontation is subject to exceptions involving essential state interests;⁹⁹ the protection of child witnesses qualifies as such a state interest;¹⁰⁰ a specific showing that an essential state interest is present is unnecessary and the showing in *Coy* was sufficient;¹⁰¹ and finally, the use of the screen was not prejudicial to *Coy's* right to a fair trial.¹⁰²

Justice Blackmun began by asserting that the confrontation clause's primary purpose is to prevent the use of depositions or *ex parte* affidavits in lieu of live testimony and to ensure that the witnesses testify under oath and in the presence of the defendant.¹⁰³ In addition, the clause ensures that the witnesses are subject to cross-examination and that the jurors are able to observe the witnesses' demeanors as they testify.¹⁰⁴ Justice Blackmun pointed out that these purposes were fulfilled in *Coy* and that the screen's only effect was obstruction of the witness' view of the defendant.¹⁰⁵

The dissent clashed¹⁰⁶ with the majority over Dean Wigmore's treatment of the confrontation right.¹⁰⁷ The dissent pointed out that, according to Wigmore, " '[t]here was never at common law any

⁹⁷ *Id.* at 2809-10 (Blackmun, J., dissenting).

⁹⁸ *Id.* at 2808 (Blackmun, J., dissenting)(quoting *Ohio v. Roberts*, 448 U.S. 56, 63 (1980)).

⁹⁹ *Id.* (Blackmun, J., dissenting)(citations omitted).

¹⁰⁰ *Id.* (Blackmun, J., dissenting).

¹⁰¹ *Id.* at 2809 (Blackmun, J., dissenting).

¹⁰² *Id.* at 2810 (Blackmun, J., dissenting).

¹⁰³ *Id.* at 2805 (Blackmun, J., dissenting). Justice Blackmun relied on *Kentucky v. Stincer*, 107 S. Ct. 2658 (1987)(citing *Mattox v. United States*, 156 U.S. 237, 242-243 (1895)).

¹⁰⁴ *Coy*, 108 S. Ct. at 2805 (Blackmun, J., dissenting)(citing *Mattox*, 156 U.S. at 242-43).

¹⁰⁵ *Id.* at 2806 (Blackmun, J., dissenting).

¹⁰⁶ A lesser clash between the majority and the dissent began with the dissent's observation that the face-to-face element of the confrontation right is not essential since blind witnesses are allowed to testify and they cannot, as the witnesses in *Coy*, see the defendant. *Id.* at 2808 (Blackmun, J., dissenting). The majority responded that the dissent's contention is "no more true than that the importance of the right to live, oral cross-examination is belied by the possibility that speech and hearing-impaired witnesses might have testified." *Id.* at 2802 n.2. The dissent then countered that a deaf or mute witness who could not be cross-examined would also not be able to testify in the first place. The dissent added that "[m]ore importantly, if a deaf or mute witness were completely incapable of being cross-examined (as blind witnesses are completely incapable of seeing a defendant . . .), I should think a successful Confrontation Clause challenge might be brought against whatever direct testimony they did offer." *Id.* at 2808 n.4 (Blackmun, J., dissenting).

¹⁰⁷ *Id.* at 2807 (Blackmun, J., dissenting).

recognized right to an indispensable thing called confrontation *as distinguished from cross-examination.*' ”¹⁰⁸ The dissent also noted Wigmore's statement that the purpose of the confrontation right was to provide for cross-examination and to permit the court to view the witness' demeanor.¹⁰⁹ The dissent employed Wigmore's discussion in arguing that face-to-face confrontation is not an absolute, nor even a “‘secondary and dispensable’ ” requirement of the confrontation clause.¹¹⁰

This right, Justice Blackmun asserted, may be departed from “if it is justified by a sufficiently significant state interest.”¹¹¹ Justice Blackmun stated that the significance of the state's interest in protecting child witnesses lies not only in shielding the child witness from further trauma, but also in ensuring effective testimony, which may be impossible to obtain from an overwhelmed and traumatized child witness.¹¹² Justice Blackmun articulated his view that this state interest outweighed the “preference” for allowing the witness to see the defendant during the testimony.¹¹³

Justice Blackmun also stated that a specific showing of necessity should not be required to justify the use of screens and similar devices.¹¹⁴ In support of this, Justice Blackmun noted that other exceptions to the confrontation clause¹¹⁵ are generally admissible under the Federal Rules of Evidence without any special showing of necessity.¹¹⁶ Responding to the majority's assertion that the Iowa procedure is not “firmly . . . rooted in our jurisprudence,”¹¹⁷ Justice Blackmun stated that a “firm rooting in jurisprudence” was not a requirement for an exception to the face-to-face confrontation right.¹¹⁸ The requirement that an exception be firmly rooted in our jurisprudence, noted Justice Blackmun, is only imposed in the case of out-of-court statements, where reliability, not necessity, is ques-

¹⁰⁸ *Id.* (Blackmun, J., dissenting)(quoting 5 J. WIGMORE, EVIDENCE § 1397, at 158 (J. Chadbourn rev. ed. 1974))(emphasis in original).

¹⁰⁹ *Id.* (Blackmun, J., dissenting)(quoting 5 J. WIGMORE, *supra* note 108, §§ 1397, 1399 at 158, 199)

¹¹⁰ *Id.* (Blackmun, J., dissenting)(quoting 5 J. WIGMORE, *supra* note 108, § 1399, at 199).

¹¹¹ *Id.* at 2808 (Blackmun, J., dissenting).

¹¹² *Id.* at 2809 (Blackmun, J., dissenting).

¹¹³ *Id.* (Blackmun, J., dissenting).

¹¹⁴ *Id.* (Blackmun, J., dissenting).

¹¹⁵ The exceptions to which Justice Blackmun referred included statements of a co-conspirator, excited utterances, and business records. *Id.* at 2809 n.6 (Blackmun, J., dissenting).

¹¹⁶ *Id.* at 2809 (Blackmun, J., dissenting).

¹¹⁷ *Id.* at 2803.

¹¹⁸ *Id.* at 2809 (Blackmun, J., dissenting).

tioned.¹¹⁹ Because the testimony at issue was under oath, in view of the jury, and subject to cross-examination, it was deemed reliable and no specific showing of reliability or necessity was required.¹²⁰

Finally, the dissent rejected the defendant's argument that the screen was prejudicial, a question the majority declined to reach.¹²¹ Justice Blackmun pointed out that the screen was not a brand of guilt,¹²² especially as the jury was instructed to draw no inferences from the use of the screen.¹²³ Finally, Justice Blackmun noted that there are other practices, which single out the accused from all others in the courtroom, that are permissible.¹²⁴

VI. ANALYSIS

Although the majority was inaccurate in stating that face-to-face confrontation is the most essential requirement of the sixth amendment confrontation right,¹²⁵ the majority and concurring opinions were correct in holding that the right to face-to-face confrontation is an important element of the sixth amendment confrontation right. While the majority declined to comment on the susceptibility of the confrontation right to exceptions,¹²⁶ the concurring opinion was correct in stating that the right to face-to-face confrontation, like other elements of the confrontation right, is subject to exceptions

¹¹⁹ *Id.* (Blackmun, J., dissenting).

¹²⁰ *Id.* (Blackmun, J., dissenting).

¹²¹ *Id.* at 2810 (Blackmun, J., dissenting).

¹²² *Id.* (Blackmun, J., dissenting). Previous cases have held that practices such as clothing the defendant in prison garb or having the defendant shackled and gagged brand the defendant with a mark of guilt. *See Estelle v. Williams*, 425 U.S. 501, 505 (1976)(clothing the defendant in prison garb prejudicial); *Illinois v. Allen*, 397 U.S. 337, 344 (1970)(having the defendant shackled and gagged prejudicial). Coy argued that the use of the mirror, which was accompanied by a dimming of the courtroom lights and a shining of bright lights on the mirror, created a dramatic, eerie effect, and indicated to the jury that the defendant was guilty. *Coy*, 108 S. Ct. at 2810 (Blackmun, J., dissenting).

¹²³ *Coy*, 108 S. Ct. at 2810 (Blackmun, J., dissenting). The trial court instructed the jury as follows:

It's quite obvious to the jury that there's a screen device in the courtroom. The General Assembly of Iowa recently passed a law which provides for this sort of procedure in cases involving children. Now, I would caution you now and I will caution you later that you are to draw no inference of any kind from the presence of that screen. You know, in the plainest of language, that is not evidence of the defendant's guilt, and it shouldn't be in your mind as an inference as to any guilt on his part. It's very important that you do that intellectual thing.

Id. (Blackmun, J., dissenting)(quoting Joint Appendix at 17, *Coy v. Iowa*, 108 S. Ct. 2798 (1988)(No. 86-6757))(citation omitted).

¹²⁴ The dissent cited *Holbrook v. Flynn*, 475 U.S. 560, 567 (1986), in which four uniformed state troopers sitting behind the defendant throughout the trial were held not inherently prejudicial. *Coy*, 108 S. Ct. at 2810 (Blackmun, J., dissenting).

¹²⁵ *Coy*, 108 S. Ct. at 2800.

¹²⁶ *Id.* at 2803.

relating to essential state interests.¹²⁷ The protection of child witnesses from the trauma of facing the defendant, as articulated by Justice O'Connor in her concurring opinion,¹²⁸ and the enhancement of the truth-finding process, which the one-way mirror provides, are policy interests justifying an exception to the confrontation right. However, as Justice O'Connor stated, the use of these procedural devices should be allowed only where there has been a case-by-case showing of necessity.¹²⁹ Because there was no such showing in *Coy*, the defendant's confrontation right was violated.¹³⁰

A. FACE-TO-FACE CONFRONTATION AS AN ELEMENT OF THE CONFRONTATION RIGHT

Although support, in the form of factually analagous cases, for a finding that physical face-to-face confrontation is an element of the confrontation right is not extensive, support for the opposite conclusion is equally sparse. Whether the defendant has a right, guaranteed by the sixth amendment, to physically face the witness, thus was a question of first impression for the Supreme Court. The cases referred to in the majority opinion concern other aspects of the confrontation right, such as the well-established hearsay rules. None of the cases cited deal with the defendant's right to physically face the witness.¹³¹ Therefore, as the majority conceded, most judicial treatment of the confrontation right concerns the right to be present during testimony and to cross-examine.¹³²

¹²⁷ *Id.* at 2804 (O'Connor, J., concurring).

¹²⁸ *Id.* at 2805 (O'Connor, J., concurring).

¹²⁹ *Id.* (O'Connor, J., concurring).

¹³⁰ *Id.* (O'Connor, J., concurring).

¹³¹ For example, the leading case, *California v. Green*, 399 U.S. 149 (1970), involved prior statements by a witness. In *Green*, the Court held that the confrontation clause was not violated when prior statements made by a witness at a preliminary hearing and to a police officer were admitted to prove the truth of the matter contained therein. *Id.* at 152-53. A look at the facts of the other cases which the majority used to support the inclusion of the face-to-face confrontation right in the sixth amendment right reveals little similarity between these cases and *Coy*. For example, in *Ohio v. Roberts*, 448 U.S. 56 (1980), the Court held that, when the witness was unavailable, admission of a transcript of the witness' testimony at a preliminary hearing did not violate the sixth amendment confrontation right. *Id.* at 66. *Dutton v. Evans*, 400 U.S. 74 (1970), involved a witness who testified as to the statements of a co-conspirator. The Court upheld the admission of this hearsay. *Id.* at 89-90. *Kirby v. United States*, 174 U.S. 47 (1899), held the admission of prior convictions of defendants violative of the sixth amendment. *Id.* at 54. *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), also a child sexual assault case, differed substantially from *Coy*. In *Ritchie*, the Court held that the confrontation clause was not violated when the defendant was refused access to a confidential file which he sought for purposes of cross-examination. *Id.* at 51-54.

¹³² *Coy*, 108 S. Ct. at 2800.

However, the Court cannot conclude that the right to face-to-face confrontation is an undeniable element of the right simply because the Court has never had occasion to address the issue of whether face-to-face confrontation is required by the sixth amendment. The fact that the right to face-to-face confrontation has not been the subject of litigation does not mean that it is an undisputed element of the confrontation right. Judicial opinions concerning cross-examination and the other confrontation rights are more prevalent because these are the issues upon which defendants have commonly appealed their convictions; this does not reflect a belief of the Court that the right to cross-examination is somehow less essential than the right to face-to-face confrontation.

While a comparison of the facts of the other confrontation clause cases with those of *Coy* does not offer much support for inclusion of the face-to-face confrontation right in the sixth amendment right, an analysis of the language of the confrontation clause cases does support this principle.¹³³ Moreover, the Supreme Court's past discussions of the relationship between the hearsay rules and the confrontation clause lend further support for the majority's holding. As the Court pointed out in *Green*, the hearsay rules and the confrontation clause are somewhat parallel.¹³⁴ In *Green*, the Court outlined the three purposes of the confrontation right, which it held were fulfilled by the admission of prior statements of a witness present at trial and subject to cross-examination.¹³⁵ The purposes of the confrontation right, as delineated by the *Green* court, are that confrontation: "1) insures that the witness will give his statements under oath . . . ; (2) forces the witness to submit to cross-examination . . . ; [and] (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness . . . thus aiding the jury in assessing his credibility."¹³⁶

¹³³ For example, in *Ritchie*, the Court stated that "[t]he Confrontation Clause provides two types of protection for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination." *Ritchie*, 480 U.S. at 51 (citation omitted). In *Green*, Justice Harlan, concurring, stated that the confrontation clause confers "a right to meet face to face all those who appear and give evidence at trial." *Green*, 399 U.S. at 175 (Harlan, J., concurring). The Court also stressed that the "literal right to 'confront' the witness at the time of trial" formed "the core of the values furthered by the Confrontation Clause." *Id.* In *Mattox v. United States*, 156 U.S. 237 (1895), the Court stated that the confrontation right consists essentially of the defendant "seeing the witness face to face" and cross-examination. *Id.* at 244. Moreover, in *Kirby*, the Court stated that the defendant must be allowed to see the witness. *Kirby*, 174 U.S. at 55.

¹³⁴ *Green*, 399 U.S. at 155.

¹³⁵ *Id.* at 158-59.

¹³⁶ *Id.* at 158.

Although these purposes of the confrontation right, which are also the purposes of the hearsay rules, were fulfilled in *Coy*, the confrontation clause guarantees more than just protection against the admission of hearsay. The dissent was inaccurate when it suggested that the confrontation clause merely guarantees the enforcement of the hearsay rules.¹³⁷ As the Court stated in *Green*:

[w]hile it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception.¹³⁸

While the use of the one-way mirror in *Coy* fulfilled the three *Green* requirements, it nevertheless prevented face-to-face confrontation between the witnesses and the defendant. The screen completely obstructed the witnesses' view of the defendant and somewhat impeded the defendant's view of the witnesses.¹³⁹ The majority's contention that it is harder to lie about a person when facing that person, while not strongly substantiated, is persuasive. As pointed out by the Court in *Jay v. Boyd*,¹⁴⁰ "[a]n honest witness may feel quite differently when he has to repeat his story looking at the man, whom he will harm greatly by distorting or mistaking the facts." ¹⁴¹ The California Court of Appeals for the Third Circuit observed in *Herbert v. Superior Court*,¹⁴² that "[m]ost believe that in some undefined but real way recollection, veracity, and communica-

¹³⁷ *Coy*, 108 S. Ct. at 2807-08 (Blackmun, J., dissenting).

¹³⁸ *Green*, 399 U.S. at 149, 155-56.

¹³⁹ *Coy*, 108 S. Ct. at 2799. *Coy* argued that the screening barrier obstructed his view of the witnesses and their reactions as they testified and thus hindered his assistance of counsel during examination. Brief for Appellant at 36, *Coy v. Iowa*, 108 S. Ct. 2798 (1988)(No. 86-6757). *Coy* cited the trial court, which stated, after testing the device, that "[i]t is possible to dimly see a person seated in the witness chair" and later added that "[y]ou can see the features of the person seated in the witness chair, but it is dark." *Id.* at 36 n.44 (quoting Joint Appendix at 10-11, *Coy v. Iowa*, 108 S. Ct. 2798 (1988)(No. 86-6757)). *Coy* added that defense counsel was also unable to view the witnesses clearly unless he moved away from the defendant's table, thus restricting *Coy's* access to counsel during cross-examination. *Id.* at 36.

¹⁴⁰ 351 U.S. 345 (1956)(denial of deportation suspension to alien based on confidential information not disclosed to the alien upheld).

¹⁴¹ *Id.* at 375-76 (Douglas, J., dissenting)(quoting Z. CHAFEE, *THE BLESSINGS OF LIBERTY* 35 (1956)).

¹⁴² 117 Cal. App. 3d 661, 172 Cal. Rptr. 850 (1981)(confrontation rights of defendant in child sexual assault case violated when the defendant was seated so he could not see the complaining witness during her testimony).

tion are influenced by face-to-face challenge."¹⁴³ These principles provide an underlying rationale for the Court's inclusion of the face-to-face right in the confrontation clause.¹⁴⁴

The dissent's argument that the law reflects merely a preference for, rather than a requirement of, face-to-face confrontation is unsupported. The dissent emphasized the Court's statement in *Ohio v. Roberts*¹⁴⁵ that the Confrontation Clause embodies "a preference for face-to-face confrontation at trial."¹⁴⁶ However, this statement must be viewed in light of its accompanying footnote quoting *California v. Green*.¹⁴⁷ This footnote quoted *Green* in affirming the essential nature of the "literal right to 'confront' the witness."¹⁴⁸ Therefore, although the face-to-face confrontation right is not the most important element of the sixth amendment right, it is nevertheless a required element.

B. THE RIGHT TO FACE-TO-FACE CONFRONTATION IS NOT ABSOLUTE

The fact that the right to face-to-face confrontation is not the most essential element of the confrontation clause supports the conclusion that the face-to-face confrontation right is subject to exceptions, as are other elements of the confrontation right. Although the majority declined to resolve this issue, the concurring opinion accurately concluded that there are constitutionally permissible exceptions to the defendant's right to physically face the witness.¹⁴⁹

The Supreme Court has stated more than once that even the most well established elements of the confrontation clause, such as the right to cross-examination, are subject to exceptions.¹⁵⁰ Prior recorded testimony of an unavailable witness is an example of such exceptions. In *Roberts*, the witness' " 'whereabouts were entirely un-

¹⁴³ *Id.* at 670, 172 Cal. Rptr. at 855 (quoting *U.S. v. Benfield*, 593 F.2d 815, 821 (8th Cir. 1979)).

¹⁴⁴ *Coy*, 108 S. Ct. at 2802.

¹⁴⁵ 448 U.S. 56 (1980).

¹⁴⁶ *Coy*, 108 S. Ct. at 2808. (Blackmun, J., dissenting)(quoting *Roberts*, 448 U.S. at 63).

¹⁴⁷ 399 U.S. 149 (1970).

¹⁴⁸ *Roberts*, 448 U.S. at 63 n.5 (quoting *Green*, 399 U.S. at 157). *Roberts* quoted the Court's statement in *Green* that "it is this literal right to 'confront' the witness at the time of the trial that forms the core of the values furthered by the Confrontation Clause." *Green*, 399 U.S. at 157.

¹⁴⁹ 108 S. Ct. at 2804-05 (O'Connor, J., concurring).

¹⁵⁰ In *Mattox v. United States*, 156 U.S. 237, 244 (1895), the Court stated that constitutional safeguards like the confrontation right "must occasionally give way to considerations of public policy and the necessities of the case." *Id.* at 243. In *Chambers v. Mississippi*, 410 U.S. 294 (1973), the Court stated that, "[o]f course, the right to confront . . . is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Id.* at 295.

known' ”¹⁵¹ and the prosecution sought admission of hearsay consisting of a transcript of the witness' testimony at a preliminary hearing.¹⁵² The Court held the transcript admissible as an exception to the confrontation right.¹⁵³

Another constitutionally permissible exception to the confrontation right involves prior inconsistent and out-of-court statements of a testifying witness. In *Green*, the witness was available and, in fact, testified at the trial.¹⁵⁴ After testifying at trial inconsistently with his testimony at a preliminary hearing, the witness' "memory was 'refreshed' by his preliminary hearing testimony," parts of which were read by the prosecutor.¹⁵⁵ The Court held that the admission of excerpts from the testifying witness' testimony at a preliminary hearing was not unconstitutional where the witness was subject to cross-examination at both proceedings.¹⁵⁶

A third example of exceptions to the confrontation right is the admissibility of a co-conspirator's statements. In *Dutton v. Evans*,¹⁵⁷ a witness testified as to statements made to him by a fellow prisoner, who was a co-conspirator of the defendant.¹⁵⁸ The statements incriminated the defendant.¹⁵⁹ The Court held the statements admissible¹⁶⁰ in accordance with a Georgia statute which provided that, "[a]fter the fact of conspiracy shall be proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all."¹⁶¹

The *Coy* majority stated that because the face-to-face confrontation right is the most literal element of the sixth amendment right it should not be subject to exceptions.¹⁶² The Court seemed to be

¹⁵¹ *Roberts*, 448 U.S. at 61 (quoting *State v. Roberts*, 55 Ohio St. 2d 191, 194, 378 N.E.2d 492, 495 (1978), *rev'd*, 448 U.S. 56 (1980)).

¹⁵² *Id.* at 58.

¹⁵³ *Id.* at 77. In a similar case, *Mancusi v. Stubbs*, 410 U.S. 204 (1971), the previous trial testimony of a witness who had moved to Sweden was held admissible as an exception to the confrontation right, because the Court found the witness unavailable. *Id.* at 209, 216.

¹⁵⁴ *Green*, 399 U.S. at 152.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 158.

¹⁵⁷ 400 U.S. 74 (1970).

¹⁵⁸ *Id.* at 77-78.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 77-78, 89-90.

¹⁶¹ GA. CODE ANN. § 38-306 (1954). The co-conspirator exception was also applied in *United States v. Inadi*, 475 U.S. 387 (1986) (admission of the out-of-court statements of a non-testifying co-conspirator upheld), and *Bourjaily v. United States*, 107 S. Ct. 2775 (1987) (admission of the out-of-court statements of a co-conspirator did not violate confrontation clause).

¹⁶² *Coy v. Iowa*, 108 S. Ct. 2798, 2803 (1988).

arranging the confrontation rights on a spectrum, ranging from least established to most established. However, while the face-to-face confrontation right may be the most literal element of the sixth amendment right, it has also been the least litigated and had not, until *Coy* been the subject of a ruling by the Court. If the Court's spectrum rationale is to be applicable in determining the susceptibility of the confrontation right to exceptions, the fact that the face-to-face confrontation right is the least substantiated element of the sixth amendment confrontation right leads to the conclusion that the right at issue in *Coy* is actually the most susceptible to exceptions.¹⁶³

C. PROTECTIVE MEASURES SERVE A STATE INTEREST JUSTIFYING
EXCEPTIONS TO THE CONFRONTATION RIGHT

An interpretation of the majority opinion as holding that, even if the right to face-to-face confrontation were subject to exceptions in the interest of public policy, the protection of child sexual assault victims is not such a policy would ignore a grave societal problem. In fact, the majority never actually stated that the protection of child witnesses is not a public policy sufficiently important to justify exceptions to the confrontation right. The opinion merely stated that

¹⁶³ The majority's view that the exceptions to the confrontation clause involving non-literal rights, such as the right to cross-examine or to exclude out-of-court statements, are distinguishable from the exception advocated by the state in *Coy* is flawed in another respect. The majority held that it is permissible to erode the right to cross-examine and the right to exclude out-of-court statements, but that the right to physically face the defendant, as a literal requirement of the clause, is less susceptible to exceptions. *Id.* at 2803. However, the same hearsay exceptions which infringe on the right to cross-examine and the right to exclude out-of-court statements also infringe on the literal element of the clause—the right to physically face the witness. Justice O'Connor made this observation in her concurrence in *Coy*, when she stated:

[i]ndeed, virtually all of our cases approving the use of hearsay evidence have implicated the literal right to "confront" that has always been recognized as forming "the core of the values furthered by the Confrontation Clause," and yet have fallen within an exception to the general requirement of face-to-face confrontation. *Id.* at 2804-2805 (O'Connor, J., concurring)(quoting *California v. Green*, 399 U.S. 149, 157 (1970)(citations omitted). For example, in *Dutton*, as well as the other cases involving the co-conspirator exception, the defendant was denied the opportunity to cross-examine and to exclude the out-of-court statements of a co-conspirator whose statements to a testifying witness were admitted at the defendant's trial. *Dutton*, 400 U.S. at 77-78. In this case, the defendant was also denied the opportunity to face the co-conspirator whose out-of-court statements were used against him. In *Roberts*, the defendant was denied the opportunity to cross-examine at trial the unavailable witness whose preliminary hearing testimony was being admitted. *Roberts*, 448 U.S. at 58-59. The defendant was also denied the opportunity to face the witness at trial. However, in both cases the Court allowed the exception. *Id.* at 77. These cases demonstrate that the Court has permitted the right to physically face the defendant, along with the non-literal elements of the confrontation clause, to be infringed.

because the prosecution did not demonstrate that the use of the screen in *Coy* was necessary, the existence of an essential state interest was not established.¹⁶⁴ Therefore, the majority left undecided the issue which the concurring and dissenting opinions decided affirmatively: that because the public policy served by protective devices such as the screen in *Coy* is an essential state interest, the defendant's right to physically face the witnesses can be violated in certain cases to protect child victims of sexual assault.¹⁶⁵

The Court has not developed a comprehensive scheme or set of factors to be used in formulating exceptions to the confrontation clause. In *Roberts*, the United States Supreme Court commented, "[t]he Court has not sought to 'map out a theory of the Confrontation Clause that would determine the validity of all' " hearsay exceptions.¹⁶⁶ However, an analysis of the public policies that the Court has determined justify exceptions to the confrontation clause rights supports a conclusion that the state's interest in protecting child witnesses is such a public policy. The application of constitutional criminal procedural safeguards must consider balancing the rights of the individual against the "rights of the public" in preventing "a manifest failure of justice."¹⁶⁷ The most prominent public policies which the Court has stated support the established exceptions to the confrontation right are the policies of "effective law enforcement"¹⁶⁸ and "accurate factfinding."¹⁶⁹ Additionally, the Court has referred to "other legitimate interests in the criminal trial process" which justify exceptions to the confrontation right.¹⁷⁰

The public policy of protecting child witnesses from the trauma of courtroom testimony justifies an exception to the confrontation right to permit the use of a protective device such as that used in *Coy*. By increasing the probability that a child victim will be willing to testify and will testify accurately against the sexual offender, devices such as the *Coy* screen increase the likelihood that a sexual abuser will be convicted. The screen in *Coy* and other procedural devices designed to shield the child witness therefore represent the policy of "effective law enforcement"¹⁷¹ and "accurate fact-finding."¹⁷² Moreover, the protection of the child witness from the

¹⁶⁴ *Coy*, 108 S. Ct. at 2803.

¹⁶⁵ *Id.* at 2803 (O'Connor, J., concurring); *Id.* at 2809 (Blackmun, J., dissenting).

¹⁶⁶ *Roberts*, 448 U.S. at 64-65 (quoting *California v. Green*, 399 U.S. 149, 162 (1970)).

¹⁶⁷ *Mattox v. United States*, 156 U.S. 237, 243, 244 (1895).

¹⁶⁸ *Roberts*, 448 U.S. at 64.

¹⁶⁹ *Bourjaily v. United States*, 107 S. Ct. 2775, 2782 (1987).

¹⁷⁰ *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973).

¹⁷¹ *Roberts*, 448 U.S. at 64.

¹⁷² *Bourjaily*, 107 S. Ct. at 2782.

trauma of facing the defendant can most certainly be considered as within the class of "other legitimate interests in the criminal trial process."¹⁷³ Therefore, the use of the screen serves a public policy which strongly justifies a marginal infringement of the defendant's confrontation right.

In *Globe Newspaper Co. v. Superior Court*,¹⁷⁴ the Court hinted at its willingness to permit infringements on constitutional rights for the purpose of protecting child witnesses.¹⁷⁵ The *Globe* Court held that a Massachusetts statute¹⁷⁶ which mandated the exclusion of the press and general public, under all circumstances, from the courtroom, during the testimony of a minor victim at a sex offense trial violated the first amendment.¹⁷⁷ The *Globe* Court stated that the interest of "safeguarding the physical and psychological well-being of a minor" victim testifying regarding a sexual assault was a compelling interest which would justify a violation of the first amendment right of the press and general public to access to trials under certain circumstances.¹⁷⁸ While striking the statute as unconstitutional, the Court nonetheless supported the exclusion of the press and general public if the trial court determines "on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim."¹⁷⁹ The Court's determination in *Globe* that the interest of protecting child sexual assault victims from the trauma of testifying was a "compelling one,"¹⁸⁰ justifying an infringement of the first amendment when necessary, strongly supports the conclusion that the same interest justifies an infringement of the sixth amendment confrontation right.

Procedural devices designed to ease the trauma to the child victim of sexual assault are necessary to secure both the testimony of the victim and the veracity of the testimony, thereby facilitating the conviction of sexual offenders of children, which furthers the goals

¹⁷³ *Chambers*, 410 U.S. at 295.

¹⁷⁴ 457 U.S. 596 (1982).

¹⁷⁵ *Id.* at 607-609.

¹⁷⁶ The statute provided:

At the trial of a complaint or indictment for rape, incest, carnal abuse or other crime involving sex, where a minor under eighteen years of age is the person upon, with or against whom the crime is alleged to have been committed . . . the presiding justice shall exclude the general public from the court room [sic], admitting only such persons as may have a direct interest in the case.

MASS. GEN. LAWS ANN. ch. 278, § 16A (West 1981).

¹⁷⁷ *Globe*, 457 U.S. at 610-11. The first amendment states in pertinent part: "[c]ongress shall make no law . . . abridging the freedom of speech, or of the press . . ."

U.S. CONST. amend. I.

¹⁷⁸ *Globe*, 457 U.S. at 607-08.

¹⁷⁹ *Id.* at 608.

¹⁸⁰ *Id.* at 607.

of "effective law enforcement"¹⁸¹ and "accurate fact-finding."¹⁸² These goals are particularly important because of the gravity of the problem of child sexual abuse. In 1985, there were an estimated 113,000 cases of officially reported child sexual abuse.¹⁸³ Moreover, there is evidence that the actual incidence of sexual abuse of children is much more extensive than the officially reported statistics indicate.¹⁸⁴ Studies demonstrate that two-thirds of all sexually abused children suffer identifiable emotional disturbance and fourteen percent of all victims become severely disturbed.¹⁸⁵ Child sexual abuse has been linked with depression, learning difficulties, sexual promiscuity, runaway behavior, hysterical seizures, and compulsive rituals,¹⁸⁶ although the effects vary from child to child.¹⁸⁷

¹⁸¹ *Roberts*, 448 U.S. at 64.

¹⁸² *Bourjaily*, 107 S. Ct. at 2782.

¹⁸³ This figure was compiled by the American Humane Association (AHA), based on reports from state child-protective agencies. Donnelly, *Child Sexual Abuse*, 1 CONG. QUARTERLY'S EDITORIAL RES. REP. 490, 492 (1987).

¹⁸⁴ *Id.* For example, 54% of 930 San Francisco women surveyed in a random sampling reported experiencing sexual abuse prior to the age of eighteen. A similar study of 521 Boston men and women revealed that 15% of women and 6% of men reported past sexual abuse. Additionally, 12% of women and 3% of men in a survey of 2000 Texans reported sexual abuse as children. *Id.*

¹⁸⁵ Weiss & Berg, *Child Victims of Sexual Assault: Impact of Court Procedures*, 21 J. AM. ACAD. CHILD PSYCHIATRY 513, 514 (1982).

¹⁸⁶ J. CONTE, A LOOK AT CHILD SEXUAL ABUSE 22 (1986). A recent study organized the impact of child sexual abuse into a model identifying four specific effects of the abuse: traumatic sexualization, betrayal, powerlessness and stigmatization. Finkelhor & Browne, *The Traumatic Impact of Child Sexual Abuse: A Conceptualization*, 55 AM. J. ORTHOPSYCHIATRY 531-37 (1985). Traumatic sexualization occurs when a child's sexual development is misdirected by the abuse in an "interpersonally dysfunctional fashion." *Id.* at 531. This phenomenon results in "inappropriate repertoires of sexual behavior, . . . misconceptions about [the child's] . . . sexual self-concepts, and . . . unusual emotional associations to sexual activities." *Id.* Betrayal refers not only to betrayal by offenders who are trusted family members or friends but also to betrayal by family members who are unwilling to believe or protect the victim. The disillusionment and hostility resulting from this betrayal can lead to acquiescence in other abusive relationships, aversions to all relationships, marital problems, antisocial behavior or delinquency. Powerlessness arises from the invasion of the child's body against the child's will. The condition is exacerbated by coercion and manipulation. Powerlessness, particularly for males, leads to an unusual need to control or dominate others. Stigmatization results from negative feelings of shame and guilt communicated to the child victim by the offender and society. Stigmatization may result in the victim's engaging in alcohol abuse, criminal behavior, or prostitution. *Id.* at 531-39.

¹⁸⁷ Victims of a single incident, such as the victims in *Coy*, generally experience acute anxiety, phobic reactions and depression. Weiss & Berg, *supra* note 185, at 514. Sexually abused adolescents can become suicide risks and younger children may exhibit regressive phenomena such as bed-wetting, separation concerns and clinging, infantile behavior. *See id.* at 514. *See also* D. WHITCOMB, E. SHAPIRO, L. STELLWAGEN, WHEN THE VICTIM IS A CHILD: ISSUES FOR JUDGES AND PROSECUTORS 15-16 (1985)(describing effects of abuse and factors contributing to variation in child responses). If the offender is never apprehended, the effects of the abuse are aggravated due to the child's fear of

The impact of sexual abuse can be long lasting. Many incest victims experience psychological disturbance even twenty years after the assault.¹⁸⁸ Some child abuse victims grow up to become offenders themselves.¹⁸⁹

Procedural reform in the prosecution of child sexual assault cases is needed because, despite the gravity of the problem of child sexual abuse, the offenders are often never convicted due to the societal, institutional, and procedural barriers which impede the reporting, investigating and prosecuting of these crimes.¹⁹⁰ As the Court pointed out in *Pennsylvania v. Ritchie*,¹⁹¹ "[c]hild abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim."¹⁹² Bringing the abuse to the attention of the authorities is the first obstacle to the successful prosecution of child sexual assault cases.¹⁹³ Once action is taken on a reported incident, difficulties arise in the investigation of the report. Multiple questionings of the child, often by untrained parties, place a great strain upon the child and are one of the most traumatic aspects of the process.¹⁹⁴ Questioning by investigators who treat children as they treat adults and employ leading questions often prompts children to alter their stories, rendering it difficult for authorities to ascertain the facts.¹⁹⁵ Because of these problems, and because child sexual assault cases are traditionally hard to win, prosecutors are generally reluctant to take on child sex-

repeated incidents or threats of reprisal by the offender. Weiss & Berg, *supra* note 185, at 514. Assaults by family members, which, according to some estimates, comprise three quarters of the cases, Donnelly, *supra* note 183, at 492, are additionally accompanied by deep feelings of guilt over the "'trouble'. . . [the child] 'caused' the family." Weiss & Berg, *supra* note 185, at 514.

¹⁸⁸ Goodman, *Child Witnesses: Conclusions and Future Directions for Legal Practice*, 40 J. Soc. Issues 157, 167 (1984).

¹⁸⁹ J. CONTE, *supra* note 186, at 23.

¹⁹⁰ Donnelly, *supra* note 183, at 493-96.

¹⁹¹ 480 U.S. 39 (1987).

¹⁹² *Id.* at 60.

¹⁹³ Many child victims are either too embarrassed to speak out or too afraid to speak out as a result of threats from the offender. D. WHITCOMB, E. SHAPIRO, L. STELLWAGEN, *supra* note 187, at 4. Victims of sexual abuse by family members often will not report the abuse because of loyalty to or fear of hostility and rejection from the offender and the family. Berliner & Barbieri, *The Testimony of the Child Victim of Sexual Assault*, 40 J. Soc. Issues 125, 128 (1984). Children who tell their stories to family members or other trusted figures are often not believed. *Id.* at 127. Even when children are believed, the children and their families may be hesitant to report the crime because of fear of the trauma to the victim which may be inflicted by the criminal justice system. *Id.* at 128. Moreover, when the crimes are reported, overburdened child protection agencies, which are often responsible for initial investigations, are sometimes forced to ignore many reports. Donnelly, *supra* note 183, at 494.

¹⁹⁴ D. WHITCOMB, E. SHAPIRO, L. STELLWAGEN, *supra* note 187, at 100.

¹⁹⁵ Donnelly, *supra* note 183, at 494-96.

ual abuse cases.¹⁹⁶ Recently, however, these attitudes have been changing.¹⁹⁷

Once a case is brought to trial, further problems arise. The credibility of child witnesses may be questioned because of misconceptions about the competency of child witnesses with regard to memory deficits, levels of suggestibility, or ability to distinguish between fact and fantasy.¹⁹⁸ However, several studies have disproved these misconceptions.¹⁹⁹ Nevertheless, even completely honest children can sometimes be ineffective witnesses.²⁰⁰ Children frequently have problems providing a coherent narrative of events, often in response to the stress of interrogation.²⁰¹ These problems are aggravated when, as often is the case, the crime "involves many separate acts, occurring over a long period of time" and reported only much later.²⁰² "An abused child's inability to provide investigators with basic details of time, place and physical description often results in the case being dropped."²⁰³

Cases may also be dropped when the adverse effects of police interrogation, court delays, and, in cases of incest, family pressures, cause the victim to recant.²⁰⁴ Because the victim is often the only witness, the victim's testimony is essential to successful prosecution of the offender.²⁰⁵ For instance, in one case where a twelve-year-old girl was gang raped by five teenagers, the charges were dropped against one of the offenders because the victim could not go through with a second trial.²⁰⁶ In another case in which an eleven-year-old boy was sodomized by two men, the boy's parents decided

¹⁹⁶ *Id.* at 497.

¹⁹⁷ *Id.*

¹⁹⁸ Bulkley, *Legal Proceedings, Reforms and Emerging Issues in Child Sexual Abuse Cases*, 6 BEHAVIORAL SCI. & L. 153, 155 (1988).

¹⁹⁹ See *id.* at 155. Studies reveal that there is little support for the assertion that child reports of abuse are unreliable. Berliner & Barbieri, *supra* note 193, at 127. Evidence shows that children do not tend to fantasize about things outside of their realm of normal experience. Landwirth, *Children as Witnesses in Child Sexual Abuse Trials*, 80 PEDIATRICS 585, 586 (1987). The evidence also indicates that children are more likely to underreport the amount and type of abuse, as opposed to exaggerating such abuse. Berliner & Barbieri, *supra* note 193, at 127. Moreover the validity of child reports is supported by the relatively high rates of confessions by offenders. *Id.* Another commentator states that "[f]alse allegations by either children or adults [of sexual assault] remain rare events," which can be avoided by "proper investigatory technique[s]." Quinn, *The Credibility of Children's Allegations of Sexual Abuse*, 6 BEHAVIORAL SCI. & L. 181, 195 (1988).

²⁰⁰ Donnelly, *supra* note 183, at 494.

²⁰¹ *Id.* at 494-495.

²⁰² Berliner & Barbieri, *supra* note 193, at 129.

²⁰³ Donnelly, *supra* note 183, at 495.

²⁰⁴ Weiss & Berg, *supra* note 185, at 516.

²⁰⁵ Bell, *Working with Child Witnesses*, PUB. WELFARE 5, 6 (Winter 1988).

²⁰⁶ Weiss & Berg, *supra* note 185, at 516. One of the offenders was tried separately,

not to prosecute because they were concerned about the traumatic effects of a court trial.²⁰⁷ The boy had shown signs of emotional disturbance following the incident and was beginning to recover when the parents made the decision not to prosecute.²⁰⁸ In *State v. Sheppard*,²⁰⁹ an attorney, who had reviewed between seventy-five and eighty cases of child abuse as a member of a "charge" committee in the prosecutor's office, testified that nearly ninety percent of the child abuse cases were dismissed because children could not cope with the prospect of facing the defendant, relatives and strangers in a courtroom.²¹⁰ The attorney told of one instance in which a case of sexual assault of a twelve-year-old girl was dropped because a psychiatrist advised that "the child could not testify without having a total emotional breakdown."²¹¹

Because the problems at the pre-trial stages of a sexual assault case result in so few incidents of sexual assault actually being prosecuted, it is especially important that once a case reaches trial, the child is afforded the protection that will allow him or her to testify accurately and without undergoing excessive trauma.²¹² The gravity of the child sexual abuse problem and its devastating effects on child victims necessitates the prosecution of these crimes to deter the offenders and vindicate the victims.²¹³ Because of the multitude of

because of his status as an adult. Therefore, the victim was required to be present at two trials. *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ 197 N.J. Super. 411, 484 A.2d 1330 (1984).

²¹⁰ *Id.* at 417, 484 A.2d at 1333.

²¹¹ *Id.* at 418, 484 A.2d at 1333. Another attorney with substantial experience in the prosecution of child abuse cases testified that out of the thirty or forty cases he had handled, he was able to complete a trial in only one. *Id.* at 417, 484 A.2d at 1333.

²¹² Donnelly, *supra* note 183, at 494-496, 497. The many problems involved in sexual assault cases which prevent offenders from being brought to justice comprise an underlying rationale for placing special emphasis on convicting sexual offenders against children. Sexual abusers of children are most likely undeterred by the criminal penalties of child sexual assault because of the problems in the prosecution of child sexual abuse cases. For example, potential offenders are aware that children often do not speak out, that children's reports of abuse are often not believed, and that children are often too traumatized by the assault and its aftermath to testify. Because the chances that a sexual offender against a child will be convicted are relatively small, the potential offender is not as deterred by the possibility of being caught as perpetrators of other crimes might be. One who rapes, kidnaps or assaults an adult does not know, as does one who sexually assaults children, that psychological, societal and institutional barriers will contribute to preventing him from being brought to justice.

²¹³ The existence of these problems in the criminal justice system seems to lend support to the arguments of some mental health professionals who advocate the diversion of child sexual abuse cases from the criminal justice system to juvenile or family court, or voluntary treatment programs. These experts believe that offenders have psychological disorders that call for treatment rather than punishment. Berliner & Barbieri, *supra*

problems which characterize the investigation and prosecution of these crimes, procedural reforms are needed.²¹⁴ Devices such as the mirror in *Coy* ease the trauma to the child of facing the defendant during testimony, thereby encouraging the child witness to testify. Facilitating the child's testimony is especially important because the

note 193, at 129. See also J. BULKLEY, *CHILD SEXUAL ABUSE: LEGAL ISSUES AND APPROACHES* i (1981). Additional controversy over whether child sexual abuse should be prosecuted where the abuser is a parent is generated by concern over the trauma to the family. Bulkley, *supra* note 198, at 154. Other professionals argue that the criminal justice system provides the "concrete symbol . . . [which] sanctions the total unacceptability of such behavior." J. BULKLEY, *supra* note 213, at i. "Most child sexual abusers know that they are breaking the law and can be held legally responsible." Berliner & Barbieri, *supra* note 193, at 128. In addition, sexual offenders rarely seek mental-health treatment voluntarily. *Id.* Often offenders that are in voluntary treatment drop out. J. BULKLEY, *supra* note 213, at ii. The criminal court has the coercive power that alternative methods of addressing the problems of child sexual assault do not have. Bulkley, *supra* note 198, at 157. Moreover, there still remains the problem of false accusations, which the criminal justice system, through its procedural safeguards, is designed to ferret out. *Id.* Therefore, the criminal justice system, with its specialized fact finding process and deterrent effect, remains the best corrective forum for the problem of child sexual abuse. Once an offender has been convicted, the law can then "be used effectively as a leverage, even when the goal of all concerned is treatment rather than punishment." Berliner & Barbieri, *supra* note 193, at 128.

²¹⁴ Other reforms of courtroom procedure implemented in some jurisdictions include provisions to: 1) liberalize the competency requirements of minor witnesses; 2) require speedy trials of sexual assault cases; 3) establish special hearsay exceptions for the child victim's out-of-court statement of abuse; 4) close the courtroom to the press or public during the child's testimony; and 5) permit greater use of expert testimony. Brief of Amicus Curiae The American Bar Association at 12, *Coy v. Iowa*, 108 S. Ct. 2798 (1988)(No. 86-6757). In addition, early docketing of cases involving child victims/witnesses addresses the problems of delays in prosecution of child sexual assault cases. Goodman, Jones, Pyle, Prado-Estrada, Port, England, Mason & Rudy, *The Emotional Effects of Criminal Court Testimony on Child Sexual Assault Victims: A Preliminary Report*, in *PROCEEDINGS FROM THE INTERNATIONAL CONFERENCE ON CHILD WITNESSES: DO THE COURTS ABUSE CHILDREN?* (in press) [hereinafter Goodman]. To address problems at the investigative stages, states have passed reporting laws, which "establish a comprehensive legislative scheme for child protection designed to encourage reports of abuse . . . , to designate one agency to handle reports, and to offer services to children and families." Bulkley, *supra* note 198, at 158. Some communities have established programs which address the problems arising in child sexual assault cases before and during the prosecution of the cases. See generally AMERICAN BAR ASSOCIATION NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY AND PROTECTION, *INNOVATIONS IN THE PROSECUTION OF CHILD SEXUAL ABUSE CASES* (1981)(providing descriptions of several county and municipal programs for handling child sexual abuse cases). For example, in Seattle, a program called the Sexual Assault Center contributed to the implementation of new approaches to handling child sexual abuse cases. A special children's interviewing room instead of the police station, and joint interviews to avoid multiple interrogations were introduced. In addition, sensitive questioning techniques designed to reduce trauma to the child and enhance information gathering represent another area of possible reform. J. BULKLEY, *supra* note 213, at 13. A guardian ad litem, or legal representative, can work with the prosecutor to represent the child's interests and ensure that the child is handled sensitively. *Id.* at 14.

child victim is often the only witness to the crime.²¹⁵ Against this background, it is clear that the public policy of prosecuting crimes of sexual assault on children justifies a marginal infringement upon the defendant's right of confrontation.

In addition to the public policy of bringing sexual offenders to justice, the *Coy* screen and other similar devices serve the interest of protecting the child victim from the further trauma of testifying under the stare of the defendant, which is certainly one of the other "legitimate interests in the criminal trial process."²¹⁶ The line separating the adverse effects upon the child resulting from the actual abuse and the adverse effects upon the child resulting from involvement in the legal process is difficult to demarcate. However, evidence suggests that involvement in court proceedings intensifies the trauma to child sexual assault victims.²¹⁷ A recent study of child sexual assault victims involved in criminal proceedings demonstrated that children who testified in court showed a larger increase in overall behavioral disturbance than those children who did not testify in court.²¹⁸ The fear of facing the defendant is only one of the factors that contributes to the traumatic effect of courtroom testimony,²¹⁹ heightening the "emotional fallout of the legal process."²²⁰ However, one study found that the most frequently mentioned fear of child victims of sexual assault was facing the defendant.²²¹ "[T]o a child who does not understand the reason for confrontation, the anticipation and experience of being in close proximity to the defendant can be overwhelming."²²² If a child is attempting to recover from the traumatic effects of sexual abuse, seeing the offender in the courtroom "may reactivate or intensify the clinical symptoms seen at onset or may produce new ones."²²³

²¹⁵ See *supra* note 205 and accompanying text.

²¹⁶ *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973).

²¹⁷ D. WHITCOMB, E. SHAPIRO, L. STELLWAGEN, *supra* note 187, at 17. One commentator stated: "[f]or a child, testifying in court may be the most traumatic experience of her involvement in the legal process." J. BULKLEY, *supra* note 213, at 13.

²¹⁸ Goodman, *supra* note 214. Empirical research regarding children's reactions to court involvement is in its early stages. *Id.*

²¹⁹ D. WHITCOMB, E. SHAPIRO, L. STELLWAGEN, *supra* note 187, at 17-18.

²²⁰ Melton, *Child Witnesses and the First Amendment: A Psychological Dilemma*, 40 J. Soc. ISSUES 109, 109 (1984).

²²¹ D. WHITCOMB, E. SHAPIRO, L. STELLWAGEN, *supra* note 187, at 17. A recent study focused on the effects of court testimony on child sexual assault victims. Although not all children expressed negative feelings about other aspects of courtroom testimony such as talking to the judge or talking to the defense attorney, a significantly larger number of children expressed negative feelings about seeing the accused in court. Goodman, *supra* note 214.

²²² D. WHITCOMB, E. SHAPIRO, L. STELLWAGEN, *supra* note 187, at 17-18.

²²³ Weiss & Berg, *supra* note 185, at 516.

Moreover, after going through the trauma of testifying, a child victim can be especially devastated by an acquittal for the defendant. Children often do not understand why the process has not resulted in a just outcome.²²⁴

The introduction of protective devices in cases of child sexual assault will not set a precedent for infringing on the defendant's sixth amendment confrontation right in cases involving adults. The particular need for using protective devices with child witnesses stems from the fact that child victims are inherently different from adult victims. A child does not understand why he or she must repeat his or her story to police, social workers, doctors, prosecutors, and the court and this further aggravates the child's feelings of helplessness.²²⁵ Children are particularly affected by cross-examination, which they also do not understand.²²⁶ Moreover, child victims who testify are overwhelmed by certain physical attributes of the courtroom or the figure of the judge.²²⁷ Some children also may experience anxiety when they are asked questions which cause them to fear they have done something wrong.²²⁸

In addition, the rationale underlying the need for face-to-face confrontation does not apply to children in the same way that it applies to adults. The majority contends that the "Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusions."²²⁹ This represents a choice for the child between looking at the defendant and experiencing the resulting trauma, and trying not to look at the defendant, thereby increasing the jury bias against the child's credibility. A truthful child who is terrified in the presence of the defendant will of course avoid looking at the defendant, thereby decreasing his or her chances of being believed. On the other hand, the use of protective procedures for child witnesses may enhance truth telling. In *State v. Shepard*,²³⁰ a forensic psychiatrist explained this while testifying for the

²²⁴ Berliner & Barbieri, *supra* note 193, at 135.

²²⁵ D. WHITCOMB, E. SHAPIRO, L. STELLWAGEN, *supra* note 187, at 18.

²²⁶ *Id.* Even an adult victim who thoroughly comprehends the importance of careful investigation and procedural safeguards in the criminal justice system would feel frustration, pain, and helplessness at the delays and complexities of the system. Children, on the other hand, do not understand why they have to be questioned so many times, why they have to reveal and relive the painful details of their experience to strangers, why the legal process takes so long, and, in some cases, why their attacker has not been punished. *Id.* at 17-18.

²²⁷ *Id.*

²²⁸ *Id.* at 19.

²²⁹ *Coy v. Iowa*, 108 S. Ct. 2798, 2802 (1988).

²³⁰ 197 N.J. Super. 411, 484 A.2d 1330 (1984).

state at a hearing in response to the state's application to employ closed-circuit television during the testimony of the child sexual assault victim. The psychiatrist stated that while an adult witness will be prompted by the traditional court setting to tell the truth, the "opposite is true of a child, particularly when the setting involves a relative."²³¹ In addition to the fear, anxiety and trauma caused by the courtroom, the child also has mixed feelings about his or her testimony. For the accused, he or she feels anger as well as care. The child feels guilt as well as satisfaction in response to the prospect of convicting the defendant.²³² "These mixed feelings . . . mitigate the truth, producing inaccurate testimony."²³³ On the other hand, the more relaxed atmosphere provided by devices such as the mirror may result in the child giving a clearer and more complete description of the abuse.²³⁴

Although there are other possible reforms which address the problems of child witnesses, many of these other procedural reforms pose the same type of constitutional questions raised by the screen in *Coy*. Videotaped testimony, closed-circuit television, and the admission of prior statements by the child concerning the abuse all attempt to protect the child. Iowa is, in fact, unusual in permitting the use of the one-way mirror.²³⁵ The screen used in *Coy* is actually the least intrusive of these methods. Closed-circuit television does not allow the defendant to be present with counsel during the child's testimony and cross-examination without forcing the witness to testify under the defendant's stare. It thus presents a choice between having the defendant in the same room as the witness or having only defendant's counsel present with the witness. However, placing the defendant in a separate room from the witness in this manner also separates the defendant from his counsel during cross-examination.²³⁶

Devices such as the one-way mirror in *Coy* serve the essential state interests of prosecuting sexual offenders of children and protecting the child victim of sexual assault from the trauma of viewing

²³¹ *Id.* at 416, 484 A.2d at 1332.

²³² *Id.*

²³³ *Id.*

²³⁴ Donnelly, *supra* note 183, at 499.

²³⁵ Twenty-five states permit a loosening of the hearsay ban when a child has disclosed sexual abuse to a trusted adult and the prosecutor wishes the adult to testify as to the hearsay. Thirty-four states permit videotaped testimony of a child in lieu of live testimony. In addition, twenty-five states allow closed-circuit television testimony. Donnelly, *supra* note 183, at 496; Wyo. STAT. § 7-11-408 (1987).

²³⁶ An additional advantage to the one-way mirror is that it is less costly and simpler to implement. AMERICAN BAR ASSOCIATION, GUIDELINES FOR THE FAIR TREATMENT OF CHILD WITNESSES IN CASES WHERE CHILD ABUSE IS ALLEGED 25 (Approved Draft, 1985).

the defendant during testimony. Because these interests justify infringing the defendant's right to face-to-face confrontation, the use of these devices constitutes a constitutionally permissible exception to the confrontation right.

D. A SHOWING OF NECESSITY AS A PREREQUISITE

While protective devices should be allowed as exceptions to the confrontation right, a showing of necessity should be required for their use. This view is in accord with the majority and concurring opinions,²³⁷ and with several state legislatures which have incorporated the requirement of necessity into their states' protective procedure statutes.²³⁸ In *Ohio v. Roberts*,²³⁹ the Court outlined an approach for permitting exceptions to the confrontation right.²⁴⁰ The Court stated that "in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity."²⁴¹ The *Roberts* Court explained that if the prosecution wishes to introduce hearsay, it must be demonstrated that the declarant is unavailable and that the statement is reliable.²⁴² Moreover, in *Chambers v. Mississippi*,²⁴³ the Court emphasized that the "denial" or "diminution" of the right to confront by competing interests "requires that the competing interest be closely examined."²⁴⁴ The *Chambers* rule suggests that if an exception to the

²³⁷ See *Coy v. Iowa*, 108 S. Ct. 2798, 2803 (1988); *id.* at 2805 (O'Connor, J., concurring).

²³⁸ For example, Florida provides for the use of closed-circuit television in sexual assault cases involving children under age sixteen "[u]pon motion and hearing in camera and upon a finding that there is a substantial likelihood that the child will suffer at least moderate emotional or mental harm if required to testify." FLA. STAT. § 92.54(1) (1987). Massachusetts requires that a court ordering the use of a protective procedure must find "by a preponderance of the evidence at the time of the order that the child witness is likely to suffer psychological or emotional trauma as a result of testifying." MASS GEN. L. ch. 278, § 16D(b)(1) (1986). New Jersey requires that there be a "substantial likelihood" of "severe emotional or mental distress" for the use of closed-circuit testimony to be permitted. N.J. STAT. ANN. § 2A:84A-32.4(b) (West Supp. 1988). California provides extensive guidelines for making a finding of necessity, delineating the factors to be considered. CAL. PENAL CODE § 1347(d)(1) (West Supp. 1988). States that do not require a finding of necessity before the use of protective devices include Connecticut, Kansas, Kentucky, and Louisiana. See, e.g., CONN. GEN. STAT. § 54-86g (Supp. 1987); KAN. STAT. ANN. § 38-1558 (1986); KY. REV. STAT. ANN. § 421-350(1)(3) (Baldwin 1986); LA. REV. STAT. ANN. § 15:283 (West Supp. 1987).

²³⁹ 448 U.S. 56 (1980).

²⁴⁰ *Id.* at 64-65.

²⁴¹ *Id.* at 65.

²⁴² *Id.*

²⁴³ 410 U.S. 284 (1973).

²⁴⁴ *Id.* at 295 (citing *Berger v. California*, 393 U.S. 314, 315 (1969)).

confrontation right is being invoked, a particularized showing justifying the exception must be made.

*Globe Newspaper Co. v. Superior Court*²⁴⁵ also supports the requirement of a showing of necessity in the context of protecting child witnesses.²⁴⁶ The *Globe* Court held the Massachusetts statute unconstitutional because the statute mandated exclusion in all cases.²⁴⁷ The Court stated that "as compelling as that interest [of protecting minor victims of sexual assault] is, it does not justify a *mandatory* closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest."²⁴⁸ The Court stated that a trial court should determine whether exclusion is necessary based on such factors as the victim's age, the victim's psychological maturity and understanding, the nature of the crime, the victim's wishes, and the interests of parents and relatives.²⁴⁹

The Court pointed out that the particular circumstances in *Globe* may have led to a finding that closure was unnecessary, had the trial court not been limited by the statute's provision of mandatory exclusion.²⁵⁰ The Court noted that the names of the victims in *Globe* were already publicly known, and that, according to the prosecuting attorney, the victims stated that they wouldn't object to the press being present during their testimony provided that the press would not interview them or publish their names, photographs or personal information.²⁵¹ The Court added that child victims "could be protected just as well by requiring the trial court to determine on a case-by-case basis whether the State's legitimate concern for the well-being of the minor victim necessitates closure" as by requiring mandatory closure in all cases.²⁵² The Court discussed the rationale for a finding of necessity by explaining that "[s]uch an approach ensures that the constitutional right of the press and public to gain access to criminal trials will not be restricted except where necessary to protect the State's interest."²⁵³

Similarly, in allowing an exception to the confrontation right for cases of child sexual assault, courts must be careful to ensure that case-specific inquiries are made into the necessity of a protec-

²⁴⁵ 457 U.S. 596 (1982).

²⁴⁶ *Id.* at 609.

²⁴⁷ *Id.* at 608, 610-611.

²⁴⁸ *Id.* at 607-608 (emphasis in original).

²⁴⁹ *Id.* at 608.

²⁵⁰ *Id.* at 609.

²⁵¹ *Id.* at 599 n.5.

²⁵² *Id.* at 609.

²⁵³ *Id.*

tive device.²⁵⁴ A case-specific finding is especially justified in the context of child protective exceptions because of variation among victims in reacting to both the sexual assault and the involvement in the judicial process. There is evidence that some children "appear unharmed by the criminal justice system."²⁵⁵ One study concluded that "the opportunity to testify in juvenile court may exert a protective effect on the child victim."²⁵⁶ This study suggested that testimony may be therapeutic for the child victim because it gives the child an opportunity to express his or her feelings and experiences and to counteract his or her sense of powerlessness.²⁵⁷ However the therapeutic effect of the testimony may vary from child to child,²⁵⁸ just as most studies have shown that some sexually abused children have far more serious reactions to the abuse than others.²⁵⁹ One commentator stated:

[p]sychiatric opinions and studies emphasize that each child victim reacts to an offense and its aftermath in his own individual way. . . . Thus, there can be no more justification for excusing all child victims from testifying than for imposing the duty on all of them. Each case merits its own individual decision.²⁶⁰

²⁵⁴ As the Court suggested in *Globe*, Courts can consider several factors in determining whether the use of a protective procedure is necessary. *Id.* at 608. The child's age, fear of the defendant, handicap or disability, reaction to previous interviews, past history of abuse, and relationship to the defendant are important factors. Brief of Amicus Curiae The American Bar Association at 16, *Coy v. Iowa*, 108 S. Ct. 2798 (1988)(No. 86-6757). However, care is warranted in ensuring that an inquiry into the necessity of a protective device does not subject the child to further trauma. For example, "it would be self-defeating to subject the child to a grueling *voir dire* examination or, after the child has been called to testify, to delay the proceedings while this issue is being resolved." *Id.* at 17 (emphasis in original). Even a psychiatric evaluation of the child to determine the need for protective procedures is unnecessary as this determination can be made by referring to parents and other relatives, a child-victim advocate, a social worker, or the child's therapist. *Id.* at 18.

²⁵⁵ D. WHITCOMB, E. SHAPIRO, L. STELLWAGEN, *supra* note 187, at 15-18.

²⁵⁶ Runyan, Everson, Edelsohn, Hunter, & Coulter, *Impact of Legal Intervention on Sexually Abused Children*, 113 J. PEDIATRICS 647, 652 (1988)(studying impact on child sexual abuse victims of foster care placement of victims, criminal prosecution of the offender, and testimony by the victims in either criminal or juvenile court). The authors cautioned against applying these results to criminal court testimony. *Id.*

²⁵⁷ *Id.* at 652. See also Berliner & Barbieri, *supra* note 193, at 135 ("the experience of testifying in court can have a therapeutic effect for the child victim").

²⁵⁸ Runyan, Everson, Edelsohn, Hunter, & Coulter, *supra* note 256, at 650.

²⁵⁹ J. CONTE, *supra* note 186, at 22-23. Some of the factors that affect the impact of the abuse on the child are: the age of the child; the age and gender of the offender; whether physical force was used; the frequency, severity and duration of the abuse; the relationship of the offender to the child; the number of the offenders; the number of problems exhibited by the child's family; and the relationship of the child to his or her siblings. *Id.*

²⁶⁰ Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977, 1009 (1969)(citations omitted). Careful attention to the underlying factors thought to aggravate the impact of child abuse is necessitated by the fact that psychological problems resulting from child sexual abuse often may not be immediately

Caution in permitting the use of these devices is further warranted by the fact that the danger of convicting innocent defendants of sexual abuse is not remote. There is evidence that children are sometimes manipulated by adults who encourage them to make false accusations of sexual assault.²⁶¹ For example, a mother involved in a custody dispute with the father may prompt the child to make false accusations of abuse.²⁶² Due to most children's level of suggestibility and desire to please adults, leading questions by interrogators may encourage a child to describe things that never happened.²⁶³ Critics of procedural devices aimed at protecting child witnesses express concerns that these devices set precedents which may further erode constitutional protections for the accused.²⁶⁴ The possibility of false accusations of sexual assault heightens the importance of procedural safeguards in cases of sexual assault. While the protection of child witnesses is an important goal, the rights of the accused must be protected as well. A rule of necessity which permits an infringement of a defendant's constitutional right only when necessary to protect the child witness, increases the protection of the accused's rights.

The *Coy* dissent, however, in light of its opinion that the confrontation right is not violated by protective devices, disagreed, and advocated that protective devices should be used even without a particularized showing of necessity.²⁶⁵ The dissent pointed to other exceptions to the confrontation clause which do not require a showing of necessity.²⁶⁶ For example, in *United States v. Inadi*,²⁶⁷ the

apparent. Problems may not show up until later in the victim's life. J. CONTE, *supra* note 186, at 23. Therefore, a finding of a lack of necessity based on the child's appearance at the time of trial may not be appropriate.

²⁶¹ Donnelly, *supra* note 183, at 496. One study found that forty-five percent of reports of sexual abuse are unsubstantiated, although that number may include truthful reports which were unprovable. A more detailed survey in Denver reached a finding of only 8% untruthful allegations. *Id.* at 494. In one case, a man in the process of getting a divorce was accused of sexually abusing his two young daughters. Although the man was acquitted, he was still being denied the opportunity to see his children two years later. *Id.* at 491. Another man was accused of molestation by a friend of his daughter. Although the jury decided that the incident as described by the girl was physically impossible and acquitted the defendant, the financial and personal costs to him were substantial. *Id.* at 494. A group of parents who claim to have been falsely accused of sexual and other abuse have joined in an organization called Victims of Child Abuse Laws, Inc. (VOCAL). *Id.* at 493.

²⁶² *Id.* at 496. One study found that child abuse charges are made in three percent of custody disputes. *Id.*

²⁶³ Donnelly, *supra* note 183, at 496.

²⁶⁴ *Id.* at 493.

²⁶⁵ *Coy v. Iowa*, 108 S. Ct. 2798, 2809 (Blackmun, J., dissenting).

²⁶⁶ *Id.* at 2809 (Blackmun, J., dissenting). The dissent pointed out that "statements of a co-conspirator, excited utterances, and business records are all generally admissible

Court held that a specific showing that the witness was unavailable was not required,²⁶⁸ and in *Bourjaily v. United States*,²⁶⁹ the Court held that an independent showing of the reliability of evidence violative of the sixth amendment was also not required.²⁷⁰ The *Bourjaily* Court's reasoning was based on the Court's statement in *Roberts* that in the case of a " 'firmly rooted hearsay exception,' " an independent inquiry into reliability is not necessary.²⁷¹ However, the *Roberts* decision also stated that "[i]n other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness."²⁷² Moreover, the requirement of a showing of unavailability was not rescinded by *Inadi*, rather, it was deemed applicable to prior testimony and not to co-conspirator statements.²⁷³ Therefore, *Inadi* and *Bourjaily* affirmed that a particularized showing of necessity is required, except in the case of a firmly rooted exception to the confrontation right. In those cases of exceptions not firmly rooted, "case-specific inquiry into the applicability of the rationale supporting the rule that allows"²⁷⁴ the exception is necessary.

The shocking nature of child sexual assault cases leads to emotional demands for reform. However, because of the complex nature of the problem and the danger of infringing on the rights of the innocent, care is required in the implementation of these reforms. The inclusion of a rule of necessity as an exception to the confrontation right in child sexual assault cases constitutes this type of care.

under the Federal Rules of Evidence without case-specific inquiry into the applicability of the rationale supporting the rule that allows their admission." *Id.* at 2809 n.6 (Blackmun, J., dissenting). However, these examples are much more clearly definable exceptions than the one at issue in *Coy*. For example, the business record exception, FED. R. EVID. 803(6), is a clearly-defined category to which the rationale underlying the exception would apply in every case fitting within the category. The category of child sexual assault victims who would be excessively traumatized by testifying in the presence of their attackers is a much more ambiguous category, since not all child sexual assault victims are excessively traumatized by testifying. See *supra* notes 255-257 and accompanying text. Therefore, the rationale underlying the exception would not apply to every child victim.

²⁶⁷ 475 U.S. 387 (1986).

²⁶⁸ *Id.* at 394.

²⁶⁹ 107 S. Ct. 2775 (1987).

²⁷⁰ *Id.* at 2782.

²⁷¹ *Id.* at 2782-2783 (quoting *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)).

²⁷² *Roberts*, 448 U.S. at 66.

²⁷³ *Inadi*, 475 U.S. at 394-95, 400.

²⁷⁴ *Coy*, 108 S. Ct. at 2809 n.5 (Blackmun, J., dissenting).

E. THERE WAS NO SHOWING OF NECESSITY IN COY

As the majority²⁷⁵ and concurrence²⁷⁶ stated, there was no showing of necessity in *Coy* to justify the use of the one-way mirror. The defendant pointed out that there was "no testimony or finding that the child witnesses were traumatized or would be harmed by testifying in . . . [the defendant's] presence."²⁷⁷ "Neither girl expressed a preference for the use of the screen during her testimony."²⁷⁸ The record was "silent as to any justification for infringement on appellant's right to confront adverse witnesses."²⁷⁹ The defendant further argued that:

[w]hile the trial judge allowed defense counsel to assert his constitutional objections to the screening barrier, the court provided no explanation for his ultimate ruling. He did not make specific findings of fact as to the need for a screening device at this trial, nor did he conduct an evidentiary hearing during which the child witnesses, their parents and relatives, or expert witnesses could provide some justification for the extraordinary courtroom structure.²⁸⁰

The defendant noted that neither witness identified him as the offender and that the testimony of both witnesses was clear and articulate.²⁸¹ Because there was no showing that the witnesses in *Coy* would have been traumatized by testifying while the defendant was within view, the use of the mirror was unnecessary.²⁸² The Court in *Coy* was correct in concluding that the defendant's right to confront the witnesses against him was violated.

CONCLUSION

Although the defendant's right to confront the witnesses against him face-to-face has never been the subject of a Supreme Court decision, the literal meaning of the confrontation clause and Supreme Court language in several cases establish that the right is, if not the most essential, at least an important element of the sixth amendment confrontation clause. Therefore, *Coy's* sixth amendment right was violated by the use of the one-way mirror. However, the right to a face-to-face encounter is, like the other confrontation rights, not absolute where substantial public policy interests justify exceptions. The twin goals of convicting sexual offenders against

²⁷⁵ See *id.* at 2803.

²⁷⁶ *Id.* at 2805 (O'Connor, J., concurring).

²⁷⁷ Brief for Appellant at 39, *Coy v. Iowa*, 108 S. Ct. 2798 (1988)(No. 86-6757).

²⁷⁸ *Id.* at 5.

²⁷⁹ *Id.* at 39-40.

²⁸⁰ *Id.* at 27.

²⁸¹ *Id.* at 28.

²⁸² *Coy*, 108 S. Ct. at 2803.

children and protecting child victims of sexual assault from excessive trauma are public policy interests which justify permitting the use of protective devices such as the screen in *Coy*. However, the use of such a device should only be permitted if a case-specific showing that the device is necessary is made. Because there was no such showing in *Coy*, the violation of the defendant *Coy*'s confrontation right was unconstitutional.

The majority opinion in *Coy* leaves two questions unanswered: first, whether, if there were a showing of necessity, the right to physically face the witness would be subject to an exception for the purpose of protecting child witnesses; second, whether, if a protective procedure passed the sixth amendment test, the Court would hold it violative of due process as a prejudicial device.

With regard to the first issue, the decisions in *Coy* suggest that Justice Blackmun and Chief Justice Rehnquist would join Justices O'Connor and White to affirm a conviction in which a protective device was used on a showing of necessity. In such a case the holding would be determined by Justice Kennedy's vote.²⁸³ As to the issue of prejudice, only Justice Blackmun addressed the issue. However, because Justices O'Connor and White stated that protective devices would be allowed on a showing of necessity, it appears that, according to this reasoning, the prejudicial question is not an obstacle to the constitutionality of protective devices. Therefore, the outcome of this issue hinges on the same factor as that determining the first issue.

In any case, *Coy* does not forbid the use of protective procedures in child sexual assault cases. In her concurring opinion, Justice O'Connor noted that "[w]hile I agree with the Court that the Confrontation Clause was violated in this case, I wish to make clear that nothing in today's decision necessarily dooms such efforts by state legislatures to protect child witnesses."²⁸⁴ A conservative approach toward allowing procedural reforms which implicate constitutional rights should result in reforms of the entire system, including trial procedure, to protect child victims and to make the successful prosecution, deterrence and rehabilitation of the offenders more likely.

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²⁸³ Justice Kennedy took no part in the decision in *Coy*.

²⁸⁴ *Coy*, 108 S. Ct. at 2804 (O'Connor, J., concurring).