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**COY V. IOWA: RECONCILING A DEFENDANT'S RIGHT
TO CONFRONTATION WITH A CHILD-
WITNESS' INTEREST IN AVOIDING
UNDUE PSYCHOLOGICAL
TRAUMA**

I. INTRODUCTION

A stranger sexually molested a twelve year-old child. The prosecutor did not learn of the incident until the child turned seventeen—when the child finally revealed the crime. The court dismissed the case on the basis of a psychiatric evaluation that the child could not testify without experiencing a total emotional breakdown. The child had dealt with the traumatic incident by trying to forget—to force her to remember the incident would have been devastating.

A friend of a seven year-old boy sexually abused him. When the boy spoke to the prosecuting attorney, the boy spoke freely and articulately. However, when testifying before the grand jury, the presence of many people made the boy hesitant, forgetful, and inconsistent in his testimony.

A father was charged with sexually abusing his daughter. The child found it difficult to talk about the molestation, and refused to discuss the facts with anyone except the prosecuting attorney. Consequently, the court dismissed the complaint because the necessary facts could not be presented to a grand jury.

A child told a psychiatrist of frequent incidents of sexual abuse by her stepfather beginning when she was only three years old. Although she told the psychiatrist she would be able to testify in open court and face her stepfather, she feared him because he had threatened to kill her if she revealed his activities. She was therefore hesitant about testifying in court.¹

Although children may fear testifying in court, the sixth amendment Confrontation Clause guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”² The Confrontation Clause grants all criminal defendants the right to challenge their accusers in open court and engage in meaningful cross-examination.³ Originally, the right of confrontation sought

1. In *State v. Sheppard*, 197 N.J. Super. 411, 413, 484 A.2d 1330, 1332-33 (1984), the court discussed these four case histories.

2. U.S. CONST. amend. VI.

3. *Barber v. Page*, 390 U.S. 719 (1968); Arenson, *The Confrontation Clause: Where Will the Supreme Court Take Us?*, 12 S.U.L. REV. 15, 18 (1985).

to prevent the practice of trying defendants on evidence that consisted solely of reading depositions, confessions of accomplices, or ex parte affidavits that effectively deprived defendants of the opportunity to challenge their accusers in a face-to-face encounter before a jury.⁴

As illustrated by the above excerpts, sending a child-victim complaining of sexual abuse through the rigors of testifying before an adult-oriented court system may well impede the discovery of truth and unnecessarily traumatize the child. Ironically, the very factors that encourage adults to testify truthfully may intimidate children—the courtroom atmosphere itself may frighten the child.⁵ Some children become so traumatized from intense questioning or from fears of having to face the defendant in the courtroom that they become distraught or physically ill.⁶ The defendant, aware that he may elicit such a reaction, may use his confrontation right solely to intimidate the witness.⁷ Thus, actual face-to-face confrontation could prove less reliable.⁸

Moreover, some defense attorneys use ethically and professionally questionable methods to cross-examine a child that they would not use to question an adult.⁹ The state cannot press charges when the children refuse to testify in court.¹⁰ The defendant often goes free because the evidence proves insufficient to convict without the child's testimony.¹¹ Therefore, the system's attempt to prosecute a child-abuser further abuses the child.

Sexual abuse of children is a major problem in our society,¹² and its elimination demands modification of the technical requirements of confrontation at trial to accommodate child-victims.¹³ Accordingly, many

4. *Mattox v. United States*, 156 U.S. 237, 242-43 (1895).

5. Wixom, *Videotaping the Testimony of an Abused Child: Necessary Protection for the Child or Unwarranted Compromise of the Defendant's Constitutional Rights?*, 3 UTAH L. REV. 461, 464 (1986).

6. MacFarlane, *Diagnostic Evaluations and the Use of Videotapes in Child Sexual Abuse Cases*, 40 U. MIAMI L. REV. 135, 149 (1985).

7. Mahady-Smith, *The Young Victim as Witness for the Prosecution: Another Form of Abuse?*, 89 DICK. L. REV. 721, 742 (1985); Melton, *Children's Competency to Testify*, 5 LAW & HUM. BEHAV. 73 (1981).

8. Mahady-Smith, *supra* note 7, at 742; Melton, *supra* note 7, at 76.

9. Bowes, *Libai's Child Courtroom: Is it Constitutional?*, 7 J. JUV. L. 31, 34 (1983). For example, the attorney may instruct the child to step down in front of the jury and show the position she had to take while being molested. *Id.* See also Berliner, *The Child Witness: The Progress and Emerging Limitations*, 40 U. MIAMI L. REV. 167, 174 (1985).

10. Mahady-Smith, *supra* note 7, at 731.

11. Libai, *The Protection of the Child-Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977, 1009 (1969); Mahady-Smith, *supra* note 7, at 731; Wixom, *supra* note 5, at 465.

12. Mahady-Smith, *supra* note 7, at 728.

13. *Id.* at 732; Wixom, *supra* note 5, at 465-66. In *Commonwealth v. Knight*, 469 Pa. 57,

states have enacted special trial procedures to solve this problem.¹⁴ Employing these special procedures eases the testifying process for the child, yet allows recognition of the defendant's confrontation right. The court permits the child to testify in another room via one-way or two-way closed circuit television, or by videotaping the child's testimony.¹⁵ Numerous experts and scholars have concluded that the use of such protective courtroom procedures enhances the reliability of the child's testimony.¹⁶ However, to avoid violating the defendant's sixth amendment right, any special trial procedure designed to protect child-witnesses must not substantially interfere with the defendant's opportunity to cross-examine the witnesses.

This Note examines the constitutional issues arising from the conflict between a defendant's right to confront his adverse witnesses, and a child's interest in testifying against the defendant without experiencing emotional distress. Specifically, this Note addresses the United States Supreme Court decision of *Coy v. Iowa*¹⁷ and discusses why limits on a defendant's confrontation right may be constitutional. As the above excerpts illustrate, the friction between a child-victim's interest in testifying in court free from mental and physical harm and a defendant's constitutional right to confront the witnesses against him poses a threat to successful prosecution of child molesters.¹⁸ While perfect resolution of these competing interests is impossible, this Note will argue that providing a defendant with a slightly modified confrontation right will still guarantee the defendant a fair trial, while minimizing unnecessary emotional trauma to the child.

II. HISTORICAL BACKGROUND OF THE CONFRONTATION CLAUSE

The origins of the sixth amendment Confrontation Clause can be

364 A.2d 902 (1976), the court excluded spectators from the defendant's trial because the court feared that the presence of spectators would further traumatize the child. *Id.* at 63, 364 A.2d at 907. The court held the exclusion did not violate the defendant's right to a public trial. *Id.* at 64, 364 A.2d at 908.

14. See, e.g., CAL. PENAL CODE § 1347 (West Supp. 1989); COLO. REV. STAT. § 13-25-129 (1987); IND. CODE ANN. § 35-37-4-6 (Burns 1985); KAN. STAT. ANN. § 60-460 (Supp. 1988); ME. REV. STAT. ANN. tit.15, § 1205 (Supp. 1988); MINN. STAT. § 595.02(3) (1988); S. D. CODIFIED LAWS ANN. § 19-16-38 (1987); UTAH CODE ANN. § 76-5-411 (Supp. 1988); WASH. REV. CODE ANN. § 9A.44.120 (1988).

15. See, e.g., CAL. PENAL CODE § 1347 (West Supp. 1989). ¶

16. See Note, *Proving Parent-Child Incest: Proof at Trial Without Testimony in Court by the Victim*, 15 U. MICH. J.L. REF., 131, 137 (1981).

17. 108 S. Ct. 2798 (1988).

18. See Avery, *The Child Abuse Witness; Potential for Secondary Victimization*, 7 CRIM. JUST. J. 1, 3-5 (1983); Mahady-Smith, *supra* note 7, at 728-32, 742-43; Wixom, *supra* note 5, at 461-62.

traced to the trial of Sir Walter Raleigh in 1603.¹⁹ Raleigh was accused of high treason.²⁰ The principal evidence to support Raleigh's conviction consisted of an alleged co-conspirator's testimony that Raleigh plotted to seize the throne.²¹ However, the witness later retracted the statement, and Raleigh believed that the witness would testify in his favor.²² Nevertheless, the government refused to allow Raleigh to call the witness, and consequently used the witness' written statement to convict Raleigh.²³ The public outrage resulting from Raleigh's *ex parte* trial, combined with evolving concerns for individual liberty, led the English to make demands for individual rights.²⁴

Carrying this concern to the New World, the colonists drafted constitutions guaranteeing citizens individual rights, including protection for criminal defendants like Raleigh.²⁵ The United States Constitution codified limitations on federal governmental power in the Bill of Rights.²⁶ The sixth amendment aspires to ensure protection of individual dignity during criminal prosecutions, thereby protecting defendants from *ex parte* trials like Raleigh's.²⁷

Over the years, courts and commentators have come to find certain corollary rights flowing from the right to confrontation.²⁸ For instance,

19. See *Dutton v. Evans*, 400 U.S. 74, 86 n.16 (1970) (plurality opinion) ("It has been suggested that the constitutional provision is based on a common-law principle that originated in a reaction to abuses at the trial of Sir Walter Raleigh.") (citing F. HELLER, *THE SIXTH AMENDMENT* 104 (1951)).

However, one commentator believes that Raleigh's trial did not inspire the sixth amendment. See Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99 (1972). Graham states that the custom of referring to Raleigh's trial as the origin of the sixth amendment right "represents . . . a convenient but highly romantic myth." *Id.* at 100 n.4. By contrast, Graham believes that the creation of the sixth amendment resulted from the form of trials in the vice-admiralty courts, rather than Raleigh's trial or the abuses committed by the Star Chamber. *Id.* at 104 n.23.

20. See Graham, *supra* note 19, at 99-100.

21. *Id.* at 100.

22. *Id.*

23. *Id.* at 100-01.

24. See E. BARRETT & W. COHEN, *CONSTITUTIONAL LAW, CASES AND MATERIALS* 17 (1985).

25. *Id.*

26. *Id.* at 17-19.

27. The sixth amendment of the Federal Constitution reads:

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

U.S. CONST. amend. VI.

28. See Graham, *supra* note 19, at 102.

the right to confrontation requires the prosecution to produce the complaining witness in open court for the defendant to cross-examine.²⁹ Confrontation allows the judge and jury to assess the truth and veracity of a witness' statement.³⁰ This function works best when the witness testifies under oath, subject to cross-examination, and appears in front of a jury who can observe the witness' demeanor during testimony.³¹

III. STATEMENT OF THE CASE

The defendant in *Coy v. Iowa*³² was accused of sexually accosting two thirteen year-old girls while they were sleeping in their backyard tent next door to Coy.³³ The only witnesses against the defendant were these children.³⁴ At the defendant's jury trial, the court placed a screen between the defendant and the two young witnesses pursuant to an Iowa statute.³⁵ The Iowa statute authorized the witnesses to testify either via closed-circuit television or behind a screen in the courtroom:

The court may require a party to be confined 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.³⁶

To enhance the screen's performance, the court dimmed the normal courtroom lights and focused a panel of bright lights directly at the screen, which created a "sort of a dramatic emphasis and a potentially 'eerie' effect."³⁷ Although the judge and jury could freely observe the demeanor of the witnesses and the defendant, the screen blocked the defendant completely from the witnesses' line of vision.³⁸ The defendant

29. "A primary interest secured by [the Confrontation Clause] is the right of cross-examination." *Douglas v. Alabama*, 380 U.S. 415, 418 (1965); Graham, *Indicia of Reliability and Face-to-face Confrontation: Emerging Issues in Child Sexual Abuse Prosecution*, 40 U. MIAMI L. REV. 19, 65 (1985); Graham, *supra* note 19, at 100-01.

30. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 578 (1988).

31. *California v. Green*, 399 U.S. 149, 158 (1970).

32. 108 S. Ct. 2798 (1988).

33. *Id.* at 2799.

34. *Id.* at 2805 (Blackmun, J., dissenting).

35. IOWA CODE § 910A.14 (1987).

36. *Id.*

37. *Coy*, 108 S. Ct. at 2810 (Blackmun, J., dissenting).

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

vigorously objected to the use of the screening device, arguing that since the witnesses could not see him, the procedure violated his right to "face-to-face" confrontation expressly granted by the sixth amendment of the Constitution.³⁹

The trial court rejected the defendant's constitutional claims.⁴⁰ Affirming the defendant's conviction, the Iowa Supreme Court held that since the screen did not impair the defendant's ability to cross-examine the witnesses, no sixth amendment violation existed.⁴¹ The United States Supreme Court, in a plurality opinion, reversed the conviction, holding that use of a protective screen in court violated the defendant's sixth amendment right to face-to-face confrontation.⁴²

IV. REASONING OF THE COURT

A. *The Plurality Opinion*

Justice Scalia, writing for a plurality of the Court in *Coy v. Iowa*,⁴³ relied on several public policy and legal doctrines to invalidate the Iowa statute⁴⁴ and to hold that the Confrontation Clause strictly guaranteed a defendant's right to a face-to-face meeting with witnesses at trial.⁴⁵ However, since only a plurality of the Supreme Court joined Justice Scalia's absolutist view of the Confrontation Clause, *Coy's* precedential value is limited.

Justice Scalia distinguished the sixth amendment right to confront

39. *Id.* The defendant also argued that the procedure was inherently prejudicial and violated his fourteenth amendment right to due process. *Id.* He believed that the procedure would make him appear guilty and therefore eroded the presumption of innocence. *Id.* at 2809-10. The Supreme Court found it unnecessary to address this issue because it found that the defendant's constitutional right to confrontation was violated. *Id.* at 2803.

40. *Id.* at 2799-800. However, the trial court explained to the jury that the screen was a device used in procedures involving children. *State v. Coy*, 397 N.W.2d 730, 735 (1986).

41. *State v. Coy*, 397 N.W.2d 730, 734 (1986).

42. 108 S. Ct. 2798, 2803 (1988). However, the Supreme Court remanded the case because the Iowa Supreme Court did not address whether, under *Chapman v. California*, 386 U.S. 18 (1967), the Confrontation Clause error was harmless beyond a reasonable doubt. *Coy*, 108 S. Ct. at 2803.

43. Three other members of the Supreme Court—Justices Brennan, Marshall, and Stevens—joined Justice Scalia's opinion to reverse the defendant's conviction and remand the case. *Id.* at 2799. Justice Brennan joined in the judgment only, and wrote a brief separate opinion in which he stressed that the screen did not prejudice the defendant's trial. *Id.* at 2810 (Brennan, J., concurring in the judgment). Justices O'Connor and White wrote an opinion concurring in the judgment to reverse and remand the case only. *Id.* at 2803 (O'Connor & White, J.J., concurring). Justices Blackmun and Rehnquist dissented. *Id.* at 2805 (Blackmun, J., & Rehnquist, C.J., dissenting). Justice Kennedy did not take part in the decision. *Id.* at 2799.

44. IOWA CODE § 910A.14 (1987).

45. *Coy*, 108 S. Ct. at 2800.

one's accusers from other sixth amendment guarantees.⁴⁶ He explored the roots of the confrontation right, finding them to be deeply embedded in human nature and the American criminal justice system.⁴⁷ Justice Scalia found that the essence of the Confrontation Clause's protection was the guarantee of a face-to-face meeting at trial, based on the plain meaning of the sixth amendment.⁴⁸

Determining that the right to a face-to-face meeting lies at the core⁴⁹ of the Confrontation Clause, Justice Scalia held that the right was absolute.⁵⁰ The Constitution guaranteed a defendant this core right even if face-to-face confrontation caused a child-victim to suffer undue emotional trauma.⁵¹ Justice Scalia did not determine whether any exceptions to face-to-face confrontation existed, and held the Iowa statutory procedure unconstitutional because the statute denied the defendant the opportunity of a face-to-face encounter with the witnesses.⁵² As an interpretivist,⁵³ Justice Scalia relied on the Framers' original intent and the Constitution's text to discern the Confrontation Clause's meaning. As an advocate of judicial restraint, he decided no more of the constitutional question than proved necessary to rule on the case at hand.

46. *Id.* at 2800-02.

47. *Id.* at 2801. To illustrate how deeply ingrained the right to confrontation is in American culture, Justice Scalia cited specific examples from history. He referred to Roman law, which required accusers to meet a defendant face-to-face to allow the defendant the opportunity to defend himself against charges. *Id.* at 2800. Justice Scalia further noted that England recognized a form of the right to confrontation even before the right to a jury trial. *Id.* (citing Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381, 384-87 (1959)). Also, Shakespeare defined confrontation through his character Richard II: "Then all them to our presence—face-to-face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak." W. SHAKESPEARE, RICHARD II, act 1, sc.1 (circa 1600). Additionally, President Eisenhower stated that if someone accused another of a crime, "he must come up on front, he cannot hide behind the shadow." *Coy*, 108 S. Ct. at 2801 (quoting President Dwight D. Eisenhower, press release of remarks given to the Anti-Defamation League of B'nai B'rith, November 23, 1953, quoted in Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381 (1959)).

48. *Coy*, 108 S. Ct. at 2800.

49. *Id.* at 2801 (citing *California v. Green*, 399 U.S. 149, 157 (1970)).

50. *Id.* at 2802-03.

51. *Id.* at 2802.

52. *Id.* at 2803.

53. An interpretivist limits judicial review to matters expressly covered by the Constitution or that can be logically deduced from an express constitutional restriction. Karlin, *Back to the Future: From Nollan to Lochner*, 17 SW. U.L. REV. 627, 631-32 (1988). Interpretivists search for the meaning of concepts in terms of the Framers' intent. *Id.* Alternatively, a non-interpretivist does not confine himself to the text of the Constitution, but rather looks to sources such as American tradition and history, philosophy and contemporary moral theory to apply the Constitution as a neutral body of law to satisfy modern needs. *Id.* at 634-35. Non-interpretivists think in terms of a "living Constitution." *Id.* at 634.

1. The difference between the core confrontation right and the right to cross-examine witnesses

Justice Scalia distinguished the defendant's core sixth amendment confrontation right at issue in *Coy v. Iowa*⁵⁴ from the defendant's other sixth amendment guarantees, specifically the defendant's right to cross-examine witnesses and to exclude out-of-court statements.⁵⁵ He argued that satisfaction of one did not necessarily satisfy the other.⁵⁶ The right to a face-to-face encounter at trial, Justice Scalia explained, formed the core right or essence of the Confrontation Clause, while the rights to cross-examine witnesses and to exclude out-of-court statements were rights merely implicit in the Confrontation Clause.⁵⁷ The defendant's confrontation right was not secured simply by allowing the defendant the opportunity to cross-examine witnesses, and by complying with the evidence rules.⁵⁸ Although the right to cross examine one's accuser may serve the same purpose as the right to face-to-face confrontation,⁵⁹ Supreme Court decisions that have interpreted the Confrontation Clause using hearsay exceptions⁶⁰ or restrictions on the scope of cross-examination⁶¹ have not adequately defined the core confrontation right.⁶²

According to Justice Scalia, the clause's "plain meaning" shaped the core confrontation rights.⁶³ As the Latin root of confrontation means

54. 108 S. Ct. 2798 (1988).

55. *Id.* at 2800.

56. *Id.* at 2801 n.2.

57. *Id.*

58. *Id.*

59. *Id.* at 2802.

60. *See, e.g.,* Ohio v. Roberts, 448 U.S. 56 (1980).

61. *See, e.g.,* Delaware v. Van Arsdall, 475 U.S. 673 (1986); Davis v. Alaska, 415 U.S. 308 (1974).

62. *Coy*, 108 S. Ct. at 2800. Justice Scalia stated that most Supreme Court cases focus on issues not explicit in the Clause such as hearsay and cross-examination because the extent to which the Clause includes those elements is uncertain since they are not explicitly set forth in the Clause. *Id.* Cases which involved debate over whether to imply new rights from the Confrontation Clause include: Delaware v. Van Arsdall, 475 U.S. 673 (1986) (restrictions on scope of cross-examination); Ohio v. Roberts, 448 U.S. 56 (1980) (admissibility of out-of-court statements); Davis v. Alaska, 415 U.S. 308 (1974) (restrictions on the scope of cross-examination); Dutton v. Evans, 400 U.S. 74 (1970) (admissibility of out-of-court statements). Justice Scalia believed that the controversy over whether the Confrontation Clause included these elements created litigation concerning the scope of the Clause. *Coy*, 108 S. Ct. at 2800. However, Justice Scalia stated that the Confrontation Clause explicitly guaranteed the right to a face-to-face meeting at trial. *Id.* (citing California v. Green, 399 U.S. 149, 175 (1970)). Justice Scalia asserted that the Supreme Court had never doubted a defendant's core right to a face-to-face encounter at trial. *Id.* Thus, reasoned Scalia, unlike cases involving rights that are implicit in the Confrontation Clause, the Supreme Court has not needed to decide issues involving the core confrontation right since that right is explicit. *Id.*

63. *Id.* at 2801.

“face-to-face,”⁶⁴ Justice Scalia concluded that the clause’s definition explicitly granted the defendant the right to face an accuser at trial.⁶⁵ This “‘literal right to confront the witness at the time of trial’ . . . form[s] ‘the core of the values furthered by the Confrontation Clause.’ ”⁶⁶

2. The refusal to balance an absolute constitutional guarantee

Since the Constitution explicitly guaranteed the right to a face-to-face encounter at trial, Justice Scalia stated that the right was absolute, and therefore may not be balanced.⁶⁷ Justice Scalia distinguished contrary Supreme Court precedent that balanced the confrontation right against other important interests.⁶⁸ He reasoned that the confrontation rights balanced in those cases did not involve the clause’s explicit core right,⁶⁹ but rather, involved only those confrontation rights merely implicit in the Confrontation Clause.⁷⁰ Justice Scalia found a significant difference between claiming that reasonable implications to the confrontation right must be balanced against other essential interests, and identifying exceptions to the Confrontation Clause’s core meaning.⁷¹

To demonstrate the importance of the absolute guarantee of a face-to-face encounter at trial, Justice Scalia’s opinion included many references to, and quotations from, history to indicate that the public had always regarded face-to-face confrontation as “‘essential to a fair trial in criminal prosecution[s].’ ”⁷² While tracing the right back to the begin-

64. WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 276 (9th ed. 1988).

65. *Coy*, 108 S. Ct. at 2800.

66. *Id.* at 2801 (quoting *California v. Green*, 399 U.S. 149 (1970)).

67. *Coy v. Iowa*, 108 S. Ct. 2798, 2802-03 (1988). However, Scalia did state: “We leave for another day . . . the question whether any exceptions [to the Confrontation Clause] exist.” *Id.* at 2803.

68. *Id.* at 2802 (citing *Kentucky v. Stincer*, 107 S. Ct. 2658, 2665 (1987) (defendant’s asserted right to face-to-face confrontation at some point in proceedings other than trial itself not violated by defendant’s exclusion from child-witness’ competency hearing because during hearing, judge asked only simple background questions like age, name, and whether child knew what telling truth meant, and all questions could have been easily repeated during trial in defendant’s presence), *cert. denied*, 108 S. Ct. 1234 (1988); *Ohio v. Roberts*, 448 U.S. 56, 63-65 (1980) (out-of-court statements admissible if necessity demonstrated by unavailability of witness and reliability of statements); *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (right to exclude out-of-court statements)).

69. *Id.*

70. *Id.* Specifically, Justice Scalia stated that those implicit rights included: (1) the right to cross-examination, *id.* at 2802-03 (citing *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973)); (2) the right to exclude out-of-court statements, *id.* (citing *Ohio v. Roberts*, 448 U.S. 56, 63-65 (1980)); and (3) the right to face-to-face confrontation at some point in the proceedings other than the trial itself, *id.* at 2802-03 (citing *Kentucky v. Stincer*, 107 S. Ct. 2658 (1987), *cert. denied*, 108 S. Ct. 1234 (1988)).

71. *Id.* at 2803.

72. *Id.* at 2801 (quoting *Pointer v. Texas*, 380 U.S. 400, 404 (1965)).

nings of Western legal culture,⁷³ Justice Scalia cited examples of “folk justice, gut fairness [and] adversary sportsmanship involved in the confrontation notion,”⁷⁴ which supported the general perception that telling a lie about a person to his face was more difficult than telling a lie about a person behind his back.⁷⁵ Consequently, face-to-face confrontation necessarily enhanced the validity of the fact-finding process.⁷⁶ Society perceived face-to-face confrontation as essential to a fair trial and the best method to achieve true testimony.⁷⁷

In holding that the right to face-to-face confrontation was absolute, Justice Scalia stated that a witness’ trauma resulting from face-to-face confrontation could not displace an essential constitutional right of the accused.⁷⁸ He recognized that trauma may result from reliving the past and telling the truth—the two may be intricately bound.⁷⁹ However, even though face-to-face confrontation may upset the abused child-witness, it may also confound the false accuser, or reveal the child coached by a malevolent adult. Stated Scalia, “It is a truism that constitutional protections have costs.”⁸⁰

Although Justice Scalia held that the defendant’s confrontation right was absolute, he stated that he would not decide whether exceptions existed to the literal right to confrontation because the trial court made no special finding of necessity that a face-to-face meeting at trial would have adversely affected the child-witnesses.⁸¹ Justice Scalia stated that a legislatively imposed presumption of trauma, as created by the Iowa statute, did not suffice to establish necessity.⁸² Exceptions to a face-to-face encounter at trial must be based on more than a general statutory

73. *Id.* at 2800.

74. *Id.*

75. *Id.* at 2802. Justice Scalia observed that a witness “‘may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or misstating the facts. He can now understand what sort of human being that man is.’” *Id.* (quoting Z. CHAFEE, *THE BLESSINGS OF LIBERTY* 35 (1956)). Additionally, Justice Scalia pointed out that when a lie is told to a person’s face, it will often be told less convincingly. *Id.* Justice Scalia noted that the Confrontation Clause does not compel a witness to fix his eyes on the defendant; however, the jury remains free to draw its own conclusions about the truthfulness of the testimony. *Id.*

76. *Id.* (quoting *Kentucky v. Stincer*, 107 S. Ct. 2658, 2662 (1987), *cert. denied*, 108 S. Ct. 1234 (1988)).

77. *Id.*

78. *Id.*

79. *Id.* Indeed, Justice Scalia asked the prosecutor in *Coy* to concede that face-to-face confrontation at trial profoundly affected the witness. *Id.*

80. *Id.*

81. *Id.* at 2803.

82. *Id.* Alternatively, the dissent argued that since the Iowa statute presumed necessity, no individual finding of necessity was required. *Id.* at 2809 (Blackmun, J., dissenting).

declaration of necessity.⁸³ If any exceptions to the right to a face-to-face encounter at trial do exist, Justice Scalia would only allow them when necessary to further an important public policy,⁸⁴ or when the exception was “firmly . . . rooted in our jurisprudence.”⁸⁵ A 1985 statute, Justice Scalia noted, was not firmly rooted.⁸⁶

As an advocate of judicial restraint,⁸⁷ Justice Scalia refused to decide a constitutional question not squarely presented by *Coy*. The trial court failed to make a particular finding of necessity, and the state’s statutory presumption of trauma could not displace the most literal application of the Confrontation Clause. Therefore, Justice Scalia would not determine whether the trial procedure used in *Coy* qualified as a public policy exception to face-to-face confrontation that passed constitutional muster.

Applying these principles to the facts in *Coy*, Justice Scalia concluded that the Iowa statute violated the defendant’s constitutional right to confrontation.⁸⁸ The screen allowed the witnesses to avoid viewing the defendant while testifying, wholly preventing a face-to-face encounter, and thereby literally violating the Confrontation Clause.⁸⁹

B. Justice O’Connor’s Concurring Opinion

Justice O’Connor agreed with the plurality opinion in *Coy v. Iowa* that the defendant’s confrontation rights were violated.⁹⁰ However, Justice O’Connor’s concurrence⁹¹ clearly showed that a majority of the Court did not support Justice Scalia’s strict Confrontation Clause interpretation. In contrast to Justice Scalia’s absolutist view of the Confrontation Clause, Justice O’Connor would balance important competing interests against the defendant’s confrontation right. Therefore, she be-

83. *Id.* at 2803. Even with exceptions to cross-examination and hearsay, the law requires something more than the type of generalized finding underlying such a statute when the exception is not “firmly . . . rooted in our jurisprudence.” *Id.* (quoting *Bourjaily v. United States*, 483 U.S. 171, 183 (1987)).

84. *Id.*

85. *Id.* (quoting *Bourjaily v. United States*, 483 U.S. 171, 183 (1987)). However, recently, one state supreme court has interpreted Justice Scalia’s statement to mean that Justice Scalia would recognize exceptions. *Craig v. Maryland*, 316 Md. 551, 560 A.2d 1160 (1989).

86. *Coy*, 108 S. Ct. at 2803.

87. See Karlin, *supra* note 53, at 631-32.

88. *Coy*, 108 S. Ct. at 2803.

89. *Id.* at 2802. Justice Scalia did not address the State’s argument that any Confrontation Clause error would be harmless beyond a reasonable doubt. *Id.* at 2803. Finding no sixth amendment violation, the Iowa Supreme Court did not reach the harmless error issue.

90. *Coy v. Iowa*, 108 S. Ct. 2798, 2803 (1988) (O’Connor, J., concurring).

91. Justice O’Connor wrote a concurring opinion in which Justice White joined. Both concurred in the judgment only. *Id.*

lieved that prosecuting certain criminals such as alleged child molesters may warrant an exception to a defendant's right to a face-to-face meeting at trial.⁹²

Justice O'Connor believed that the plurality opinion only dictated that more than a generalized legislative finding of necessity was required before the Iowa statutory procedure⁹³ would apply.⁹⁴ Noting that the trial judge in *Coy* made no such case-specific finding, Justice O'Connor agreed with the plurality that use of the protective screen at the defendant's trial violated his confrontation rights.⁹⁵ However, if the court made a specific finding that facing the defendant in court would unduly traumatize the child, Justice O'Connor believed that the court should permit special procedures to protect the child from psychological trauma while testifying.⁹⁶

Unlike Justice Scalia, Justice O'Connor was willing to reach beyond the case at hand to decide this issue. Justice O'Connor's concern with the importance of prosecuting child-abuse cases accorded more deference to special courtroom protections in child-abuse cases.⁹⁷ She believed that without such protections for child-witnesses, child molesters would escape prosecution.⁹⁸ Therefore, under certain circumstances, and within certain procedural frameworks, Justice O'Connor concluded that the core right to confrontation may yield to the compelling state interest of protecting sexually abused child-witnesses.⁹⁹

Significantly, Justice O'Connor recognized the necessity of protective trial procedures to facilitate the prosecution of child-abuse cases.¹⁰⁰ She cited many studies that have determined that a child will suffer severe psychological trauma from exposure to the harsh courtroom atmosphere.¹⁰¹ Protective measures shield the child, prevent trauma, and help ease the testifying process.¹⁰²

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

93. IOWA CODE § 910A.14 (1987).

94. *Coy*, 108 S. Ct. at 2805 (O'Connor, J., concurring).

95. *Id.* (O'Connor, J., concurring).

96. *Id.* at 2804 (O'Connor, J., concurring). See *infra* note 102 for a list of relevant state statutes.

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

98. *Id.* (O'Connor, J., concurring).

99. *Id.* (O'Connor, J., concurring) (citing *Ohio v. Roberts*, 448 U.S. 56 (1980); *Chambers v. Mississippi*, 410 U.S. 284 (1973)).

100. *Id.* (O'Connor, J., concurring). Justice O'Connor noted that child abuse cases are very difficult to prosecute because the child is often the only witness to the crime. *Id.* (O'Connor, J., concurring) (citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987)).

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

102. *Id.* (O'Connor, J., concurring). Justice O'Connor noted that half of the states use one- or two-way closed-circuit television to facilitate the child's testimony. *Id.* (O'Connor, J., con-

While Justice Scalia refused to address exceptions to the defendant's right to a face-to-face encounter at trial,¹⁰³ Justice O'Connor believed in balancing the defendant's rights against the witnesses', as she explored possible exceptions to the Confrontation Clause.¹⁰⁴ Justice O'Connor rejected the plurality's view that the right to face-to-face confrontation is absolute "even if located at the 'core' of the Confrontation Clause."¹⁰⁵ Rather, Supreme Court precedent recognizes a general "preference" that the witness face the defendant while testifying, and that the Court may override this preference in certain circumstances if necessary.¹⁰⁶ Justice O'Connor reasoned that such a literal interpretation of the Confrontation Clause would bar all hearsay evidence that the Court admits as an exception to the general requirement of a face-to-face meeting at trial.¹⁰⁷ The sixth amendment does not intend such an extreme approach.¹⁰⁸

Although Justice Scalia refused to discuss the possibility of allowing special trial procedures to protect children testifying in court,¹⁰⁹ Justice O'Connor stated that she would allow a particular trial method that prevented face-to-face confrontation if that procedure were necessary to further an important public policy.¹¹⁰ Justice O'Connor believed that shielding a child-victim of sexual abuse from the trauma of courtroom

curing). States authorizing testimony by one-way television include: ALA. CODE § 15-25-3 (Supp. 1987); GA. CODE § 17-8-55 (Supp. 1987). Two-way systems permit the child to see the courtroom and the defendant over a video monitor. *See, e.g.*, CAL. PENAL CODE § 1347 (West Supp. 1988) (two-way closed circuit television); N.Y. CRIM. PROC. LAW §§ 65.00-65.30 (McKinney Supp. 1988) (two-way closed circuit television). Thirty-three states allow the use of videotaped testimony, usually taken in the defendant's presence and then broadcast in the courtroom for the jury. *Coy*, 108 S. Ct. at 2804 (O'Connor, J., concurring) (citing ALA. CODE § 15-25-3 (Supp. 1987) (one-way closed circuit television; requires defendant to be in same room as witness); GA. CODE ANN. § 17-8-55 (Supp. 1987) (one-way closed circuit television; requires defendant to be in same room as witness)). Other states' statutes require a case-specific finding of necessity before allowing the prosecution to resort to protective trial procedures. *See, e.g.*, CAL. PENAL CODE § 1347(d)(1) (West Supp. 1989); FLA. STAT. § 92.54(4) (1987); MASS. GEN. L. § 278:16D(b)(1) (1986); N.J. STAT. ANN. §§ 2A:84A-32.4(b) (West Supp. 1988).

103. *Coy*, 108 S. Ct. at 2803.

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

105. *Id.* (O'Connor, J., concurring) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) ("Of course, the right to confront . . . is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.")).

106. *Id.* (O'Connor, J., concurring) (citing *Ohio v. Roberts*, 448 U.S. 56, 63-64 (1980); *Chambers v. Mississippi*, 410 U.S. 284 (1973)).

107. *Id.* at 2805 (O'Connor, J., concurring) (citing *Bourjaily v. United States*, 483 U.S. 171, 182 (1987)).

108. *Id.* (O'Connor, J., concurring) (citing *Bourjaily v. United States*, 483 U.S. 171, 182 (1987); *Ohio v. Roberts*, 448 U.S. 56, 63 (1980)).

109. *Id.* at 2803.

110. *Id.* (O'Connor, J., concurring) (citing *Ohio v. Roberts*, 448 U.S. 56, 63-64 (1980)).

testimony qualified as a critical competing interest.¹¹¹ Indeed, a trial procedure such as the Iowa statute that affected the literal right to a face-to-face encounter at trial would not alter this conclusion.¹¹² Justice O'Connor reasoned that many legislative procedures designed to protect child-witnesses may pose no Confrontation Clause issue since they involve testimony in the presence of the accused and call for a case-specific finding of necessity.¹¹³ Even if the state procedure violated the Confrontation Clause's general requirements, Justice O'Connor explained that the procedure may qualify as an exception to the Clause's general preference for face-to-face confrontation.¹¹⁴ However, to apply a trial procedure that called for something other than face-to-face confrontation, the court must first determine that the procedure was necessary to protect the child-witness from psychological trauma.¹¹⁵

C. Justice Blackmun's Dissenting Opinion

In contrast, Justice Blackmun stated that the procedure used at defendant's trial did not violate the purposes of the Confrontation Clause.¹¹⁶ Justice Blackmun believed that the essence of Confrontation Clause protection was the right to be shown that the accuser is real and the right to cross-examine the accuser in front of the jury,¹¹⁷ not the witness' ability to see the defendant while testifying.¹¹⁸ Furthermore, he stated that a compelling state interest existed to protect child-victims of sexual abuse¹¹⁹ and to facilitate child-abuse prosecutions, which justified

111. *Id.* (O'Connor, J., concurring).

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

113. *Id.* at 2804 (O'Connor, J., concurring). Justice O'Connor cited the following state codes that require the witness to testify in the same room as the defendant: ALA. CODE § 15-25-3 (Supp. 1987); GA. CODE ANN. § 17-8-55 (Supp. 1987) (one-way closed circuit television; defendant must be in the same room as witness). Justice O'Connor noted that the following state statutes require the court to make a case-specific finding of necessity: CAL. PENAL CODE § 1347 (d)(1) (West Supp. 1989); FLA. STAT. § 92.54(4) (1987); MASS. GEN. L. § 278:16D(b)(1) (1989); N.J. STAT. ANN. § 2A:84A-32.4(b) (Supp. 1988). *Coy*, 108 S. Ct. at 2805 (O'Connor, J., concurring).

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

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

116. *Coy v. Iowa*, 108 S. Ct. 2798, 2806 (1988) (Blackmun, J., dissenting). Chief Justice Rehnquist joined Justice Blackmun in the dissent. *Id.*

117. *Id.* at 2805 (Blackmun, J., dissenting) (citing *Mattox v. United States*, 156 U.S. 237, 242-43 (1895)).

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

119. *Id.* at 2808 (Blackmun, J., dissenting). Justice Blackmun observed that the number of child abuse incidents continues to rise. *Id.* (Blackmun, J., dissenting) (citing THE AMERICAN ASSOCIATION FOR PROTECTION OF CHILDREN, HIGHLIGHTS OF OFFICIAL CHILD NEGLECT AND ABUSE REPORTING, 1985 3, 18 (1987)).

minimal infringements on a defendant's right to confrontation.¹²⁰ The necessity of protecting child-witnesses qualified as an important public interest,¹²¹ and a legislatively created presumption of trauma sufficed to limit the confrontation right.¹²² Therefore, Justice Blackmun found judicial review of the protective trial method unnecessary. Ultimately, Justice Blackmun presumed the Iowa trial procedure¹²³ constitutional although it infringed on a constitutional right.¹²⁴

Justice Blackmun explained that a witness' ability to see the defendant while testifying never constituted an essential Confrontation Clause protection since only one Supreme Court case has supported the requirement of a face-to-face encounter during witness testimony.¹²⁵ However, he stated, even that case held that the purposes of the Confrontation Clause were to prevent " 'ex parte affidavits, to provide the opportunity for cross-examination, and to compel the defendant to stand face-to-face with the jury.' " ¹²⁶ Justice Blackmun further reasoned that exceptions to the rule against hearsay, and the fact that blind witnesses cannot see the defendant, also demonstrate that the ability of a witness to see the defendant while testifying is not essential to the Confrontation Clause.¹²⁷

Justice Blackmun believed the plurality's literal interpretation of the Confrontation Clause to be an outdated sixth amendment interpreta-

120. *Id.* at 2806 (Blackmun, J., dissenting). Justice Blackmun stated that requiring a witness to view a defendant during testimony would impede states' attempts to facilitate the testimony of child-victims of sex abuse and would lead states to sacrifice other, more central confrontation interests, such as the right to cross-examination or the right to have the jury observe the testifying witness. *Id.* (Blackmun, J., dissenting). Justice Blackmun also believed that the defendant's due process rights were not violated. *Id.* at 2809-10 (Blackmun, J., dissenting).

121. Furthermore, Justice Blackmun agreed with Justice O'Connor that protective procedures such as the Iowa trial procedure enhanced the reliability of child-witnesses' testimony. *Id.* at 2809 (Blackmun, J., dissenting). Justice Blackmun was concerned that fear and trauma associated with a child's testimony in a defendant's presence may psychologically injure the child, prevent effective testimony, and undermine a trial's truth-finding function. *Id.* at 2808 (Blackmun, J., dissenting).

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

123. IOWA CODE § 910A.14 (1987).

124. Interestingly, Justice Blackmun's opinion in *Coy* deferred entirely to the state's power to regulate in the face of an explicit constitutional right. Justice Blackmun, writing for the majority in an earlier case, denied states power to infringe upon a woman's right to choose abortion, a right implied only from the fourteenth amendment right to liberty. *Roe v. Wade*, 410 U.S. 113 (1973) (Blackmun, J.).

125. *Coy*, 108 S. Ct. at 2806-07 (Blackmun, J., dissenting) (referring to *California v. Green*, 399 U.S. 149 (1970)).

126. *Id.* at 2807 (Blackmun, J., dissenting) (quoting *California v. Green*, 399 U.S. 149, 158 (1970)).

127. *Id.* (Blackmun, J., dissenting). See also *Dutton v. Evans*, 400 U.S. 74 (1970).

tion.¹²⁸ By the time the Framers ratified the Bill of Rights, the purposes of the Confrontation Clause had merged with the principle of cross-examination.¹²⁹ Justice Blackmun noted that the Supreme Court has recently held that cross-examination, testifying under oath, the right to counsel, and the witness' presence before the jury satisfied the confrontation right.¹³⁰ Since the Iowa trial procedure did not interfere with these constitutional protections, Justice Blackmun would hold that the defendant's confrontation rights were satisfied.¹³¹

Like Justice O'Connor, Justice Blackmun would construe the Confrontation Clause to secure only a preference for a face-to-face encounter¹³² which in certain situations, must yield to compelling public interests.¹³³ However, he saw no reason for the Court to make a specific finding of necessity to justify a trial procedure that limited the right to a face-to-face encounter, since legislative exceptions to the Confrontation Clause were common.¹³⁴ He would not impose a different standard by requiring the state to make a predicate showing in every case.¹³⁵ Justice Blackmun disagreed with the plurality that, to be constitutional, the trial procedure must be "firmly . . . rooted in our jurisprudence,"¹³⁶ stating that that requirement applied only to hearsay issues concerning the reliability of out-of-court statements.¹³⁷ Justice Blackmun believed that in *Coy*, the testimony was clearly reliable because the two witnesses testified under oath, in full view of the jury, and were subjected to cross-

128. *Coy*, 108 S. Ct. at 2807 n.3 (Blackmun, J., dissenting).

129. *Id.* (Blackmun, J., dissenting) (citing 5 J. WIGMORE, EVIDENCE § 1395 at 153 n.2) (J. Chadbourn rev. ed. 1974)).

130. *Id.* at 2807 (Blackmun, J., dissenting) (citing *California v. Green*, 399 U.S. 149, 158 (1970)).

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

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

133. *Id.* (Blackmun, J., dissenting) (citing *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973); *Mattox v. United States*, 156 U.S. 237, 243 (1895)).

134. *Id.* at 2809 n.6. Justice Blackmun noted that under the Federal Rules of Evidence and Supreme Court precedent, exceptions requiring no case-specific finding include excited utterances, business records, and statements of a co-conspirator. *Id.* (Blackmun, J., dissenting). See *Bourjaily v. United States*, 483 U.S. 171 (1987); *United States v. Inadi*, 475 U.S. 387 (1986); FED. R. EVID. 801(d)(2), 803(2), 803(6).

135. *Coy*, 108 S. Ct. at 2809 (Blackmun, J., dissenting).

136. *Id.* (Blackmun, J., dissenting) (quoting *Bourjaily v. United States*, 483 U.S. 171, 183 (1987)).

137. *Id.* (Blackmun, J., dissenting). The requirement that an exception to the Confrontation Clause be firmly rooted in our jurisprudence is imposed only when the prosecution tries to introduce an out-of-court statement, and a question exists as to the statement's reliability. *Id.* (Blackmun, J., dissenting). In the event that the statement offered falls within a firmly rooted hearsay exception, reliability can be inferred. *Id.* (Blackmun, J., dissenting) (citing *Ohio v. Roberts*, 448 U.S., 56, 66 (1980)).

examination.¹³⁸

Justice Blackmun concluded that the trial procedure did not violate the defendant's confrontation right.¹³⁹ The compelling state interest of protecting children justified a limited departure from the typical defendant-witness confrontation at a criminal trial.¹⁴⁰

V. ANALYSIS

The Constitution guarantees all criminal defendants the right to confront their accusers at trial.¹⁴¹ However, when the principal witness testifying against a defendant is a child, the defendant's confrontation right should be limited. In the past, states have frequently found compelling reasons to grant children special rights.¹⁴² The rights of confrontation, "however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case."¹⁴³ However, perfect reconciliation of these two competing interests is impossible. Nevertheless, neither Justice Scalia's nor Justice Blackmun's approach in *Coy v. Iowa*¹⁴⁴ best addressed the problem.

Justice Scalia's "bright line" absolutist approach ignored the importance of the state's interest in protecting a child-victim of sexual abuse in the courtroom in favor of granting the defendant an unrestricted confrontation right. Alternatively, Justice Blackmun appeared to defer blindly to the legislature even though the Iowa trial procedure¹⁴⁵ limited a constitutional right. Rather than adopting a bright-line rule and requiring a choice between the defendant's right to confrontation or the child-victim's right to avoid psychological trauma while testifying, the Supreme Court should accommodate these competing interests by invoking a strict scrutiny test.¹⁴⁶

The Supreme Court has never overruled earlier decisions balancing

138. *Id.* (Blackmun, J., dissenting).

139. *Id.* (Blackmun, J., dissenting).

140. *Id.* (Blackmun, J., dissenting).

141. U.S. CONST. amend. VI.

142. See *infra* notes 264-66 and accompanying text.

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

144. 108 S. Ct. 2798 (1988).

145. IOWA CODE § 910A.14 (1987).

146. See Galloway, *Means-End Scrutiny in American Constitutional Law*, 21 LOY. L.A.L. REV. 449, 453-54 (1988). Means-end scrutiny involves a three-part analysis: (1) a court first examines state interests served by the challenged government action; (2) the court reviews the effectiveness of the means chosen to implement the government interests; and (3) the court studies alternatives to determine whether less restrictive methods are available to further the government interests. *Id.* Under a strict scrutiny analysis, the Court may only restrict a de-

confrontation rights.¹⁴⁷ However, the Court has yet to decide the weight to afford to either side of the scale in child sexual abuse cases. By issuing a plurality opinion in *Coy*, the Court left the issue open for final determination.

A. *Justice Scalia's Reasoning in Coy v. Iowa*

An analysis of the plurality's reasoning necessarily begins with the fact that prior to *Coy v. Iowa*, the Supreme Court never addressed the issue of the precise scope of the Confrontation Clause.¹⁴⁸ Moreover, "[t]he exact intent of the framers of the Constitution in providing [the Confrontation Clause] is probably undiscoverable."¹⁴⁹ Little research has been done concerning the right to confrontation.¹⁵⁰ One commentator believes that the Confrontation Clause may be interpreted by using three methods: the historical, the functional, or the conceptual method.¹⁵¹ The historical approach applies the Framers' intent to the case at hand.¹⁵² The functional approach looks at the purposes the confrontation right serves and then sets forth rules to carry out that purpose in criminal trials.¹⁵³ The conceptual, or definitional approach seeks to interpret the clause by analyzing case law.¹⁵⁴

Justice Scalia, an interpretivist, used the historical approach in *Coy* to define the Confrontation Clause. He looked solely to the Framers' original intent and the plain meaning of the constitutional text. Justice Scalia refused to limit or expand this plain meaning absent historical or explicit textual guidelines. "Confront" means "face-to-face,"¹⁵⁵ thus, literal satisfaction of the constitutional provision could occur in no other way.¹⁵⁶ Viewing it in this light, Justice Scalia had no choice but to hold that the screening device violated the defendant's confrontation rights

defendant's right to confrontation, if the state shows a compelling interest and uses the least-burdensome means available. *Id.* at 449-55.

147. *See, e.g.,* *Mattox v. United States*, 156 U.S. 237 (1895).

148. U.S. CONST. amend. VI. In *Coy v. Iowa*, Justice Scalia stated that "most of this Court's encounters with the Confrontation Clause have involved either the admissibility of out-of-court statements, or restrictions on the scope of cross-examination." 108 S. Ct. 2798, 2800 (1988).

149. Read, *The New Confrontation-Hearsay Dilemma*, 45 S. CAL. L. REV. 1, 6 (1972).

150. Graham, *supra* note 19, at 104.

151. *Id.* at 103.

152. *Id.*

153. *Id.* at 104.

154. *Id.* at 103.

155. *See supra* note 64 and accompanying text.

156. *Coy*, 108 S. Ct. at 2800 (citing *Kentucky v. Stincer*, 107 S. Ct. 2658, 2668 (1987) (Marshall, J., dissenting), *cert. denied*, 108 S. Ct. 1234 (1988)). *See also* *Kirby v. United States*, 174 U.S. 47, 55 (1899).

because the screen prevented a face-to-face meeting during the witnesses' testimony.

Justice Scalia's holding that the Confrontation Clause grants defendants the right to a face-to-face encounter at trial is neither linguistically nor precedentially controversial.¹⁵⁷ Commentators also agree that physical confrontation is an element of the sixth amendment guarantee.¹⁵⁸ While some recent cases use different language, none deny the preference for a face-to-face meeting.¹⁵⁹ Further, *Webster's Dictionary* defines confrontation as: "the bringing face-to-face of an accused person and his accusing witnesses . . . used especially in the phrase right of confrontation."¹⁶⁰ *Black's Law Dictionary* states: "In criminal law, the act of setting a witness face-to-face with the prisoner, in order that the latter may make any objection he has to the witness, or that the witness may identify the accused."¹⁶¹ Also, the Confrontation Clause's language combined with the defendant's sixth amendment implicit guarantee of the right to be present at every stage of the trial,¹⁶² implies a face-to-face encounter at trial.¹⁶³ As recently as 1987, the Supreme Court has held

157. *Coy*, 108 S. Ct. at 2800. Justice Scalia quoted several Supreme Court opinions that recognized that the Confrontation Clause included a right to face-to-face confrontation. *Id.* at 2800-01 (quoting *Kentucky v. Stincer*, 107 S. Ct. 2658, 2669 (1987) (Marshall, J., dissenting) (the Confrontation Clause "plainly envisions that witnesses against the accused shall . . . testify in his presence"), *cert. denied*, 108 S. Ct. 1234 (1988); *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987) ("The Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination."); *Ohio v. Roberts*, 448 U.S. 56, 63 n.5 (1980) (Face-to-face confrontation "forms the core of the values furnished by the Confrontation Clause"); *California v. Green*, 399 U.S. 149, 157 (1970) ("The literal right to 'confront' the witness at the time of trial 'forms' the core of the values furthered by the Confrontation Clause."); *Dowdell v. United States*, 221 U.S. 325, 329 (1910) ("[T]he plaintiffs in error were not given the opportunity to meet the witnesses face-to-face, or be confronted with the witnesses."); *Kirby v. United States*, 174 U.S. 47, 55 (1899) ("[A] fact which can be primarily established only by witnesses cannot be proved against an accused . . . except by witnesses who confront him at the trial, upon whom he can look while being tried . . ."); *Mattox v. United States*, 156 U.S. 237, 242-43 (1895) ("The primary object of the constitutional provision . . . was to prevent *ex parte* affidavits . . . [test] the recollection . . . of the witness, [and] to [compel] him to stand face-to-face with the jury.")).

158. See *Graham*, *supra* note 29, at 73; *Wixom*, *supra* note 5, at 466-67.

159. *Coy*, 108 S. Ct. at 2804 (O'Connor, J., concurring). See also *Ohio v. Roberts*, 448 U.S. 56, 65 (1980).

160. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 447 (1966).

161. BLACK'S LAW DICTIONARY 272 (5th ed. 1979).

162. *Illinois v. Allen*, 397 U.S. 337, 340 (1970) ("One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of the trial."). See also *Kentucky v. Stincer*, 107 S. Ct. 2658, 2667 (1987), *cert. denied*, 108 S. Ct. 1234 (1988).

163. See Note, *Does the Child Witness Videotape Statute Violate the Confrontation Clause?: Article 38.071, Texas Code of Criminal Procedure* 17 TEX. TECH L. REV. 1669, 1676 (1986). See generally C. WHITEBREAD & C. SLOBOGIN, CRIMINAL PROCEDURE 667 (2d ed. 1986).

that the Confrontation Clause provides two kinds of protection for a defendant: the right to physically face the witnesses testifying against him, and the right to cross-examination.¹⁶⁴

Justice Scalia's interpretation also responds to the Confrontation Clause's symbolic function. The idea that one who accuses another of a crime should do so in a forum where he assumes the consequences of his accusations carries much weight.¹⁶⁵ Through the sixth amendment, the Framers sought to prevent trials like Sir Walter Raleigh's, and convictions based on evidence that the defendant has no opportunity to test.

Although the historical approach protects Justice Scalia from charges of rewriting the Constitution, it neglects the dynamic potential of the ideals embodied in the Confrontation Clause. The sixth amendment describes a vision of justice, not merely a set of rules.¹⁶⁶ In applying values sought to be promoted by the sixth amendment to current cases, room for principled judicial rule-making exists. In the largest sense, the sixth amendment promotes individual dignity by protecting the defendant from arbitrary state action. Even if issues of child abuse did concern the Framers, the Framers could not have considered how to handle an abused child's videotaped testimony or other legislative safeguards to protect child-abuse victims from psychological trauma while testifying.¹⁶⁷ If contemporary psychological insights offer better awareness of the dangerous effects of courtroom testimony on child-victims, and if technological developments make it possible to respect the defendant's right to a public trial in the presence of his accusers, then no reason exists to hold the sixth amendment to a literal requirement of face-to-face confrontation.

The Framers knew well that those accused by the State needed protection of their individual rights and dignity.¹⁶⁸ However, this understanding should not preclude the legislature from seeking to promote the general welfare. The State's interest in prosecuting child abusers is clear and compelling. A Confrontation Clause interpretation that wholly ignores the complaining witness' dignitary interests should not be accepted unless a balancing approach is unworkable. The Supreme Court *has* in fact held that sixth amendment interests may be balanced against overriding compelling state interests.¹⁶⁹

164. *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987) (citing *Delaware v. Fensterer*, 474 U.S. 15 (1985)).

165. See C. WHITEBREAD & C. SLOBOGIN, *CRIMINAL PROCEDURE* 667 (2d ed. 1986).

166. See Graham *supra* note 19, at 103.

167. See *id.*

168. E. BARRETT & W. COHEN, *supra* note 24, at 17.

169. See *Ohio v. Roberts*, 448 U.S. 56, 64 (1980) ("competing interests, if 'closely ex-

*B. The Confrontation Clause Guarantee of a Constitutional Right
Distinct From the Rule Against Hearsay*

One well-recognized exception to the right to face-to-face confrontation is hearsay. However, the scope of the Confrontation Clause cannot be determined using hearsay rules. Hearsay exceptions permit a testifying witness to state what a non-testifying witness said out of court. Hearsay is an evidentiary exclusion rule based on a preference for reliable evidence.¹⁷⁰ Yet, hearsay deprives the defendant of the opportunity to cross-examine the non-testifying witness and is only admitted when the out-of-court context serves as an adequate indication of the statement's truth and reliability.¹⁷¹ To ensure truthfulness, various reliability requirements constrain the rule.¹⁷² Nevertheless, hearsay exceptions deprive the defendant of the opportunity to confront face-to-face his accusers who do not appear in court and who are heard only through the testifying witness' words.

Many courts and commentators, including Justice Blackmun in his dissent in *Coy v. Iowa*,¹⁷³ view the Confrontation Clause as merely an evidentiary presumption against the admissibility of hearsay.¹⁷⁴ This interpretation derives from Dean Wigmore, who eloquently and forcefully defined the Confrontation Clause according to evidence law.¹⁷⁵ One commentator believes that Wigmore's lack of sympathy to the individual's claims against the state led him to reduce the Confrontation Clause

amined,' may warrant dispensing with confrontation at trial"); *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) ("[T]he right . . . to cross-examine [witnesses] is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests.").

170. *Arenson*, *supra* note 3, at 19.

171. *See California v. Green*, 399 U.S. 149, 158-59 (1970); Note, *Confrontation and the Hearsay Rule*, 75 *YALE L.J.* 1434, 1436 (1965).

172. The Supreme Court has limited admissibility of hearsay statements to those that demonstrate a high degree of reliability. *Chambers v. Mississippi*, 410 U.S. 284, 298-99 (1973). *See also Ohio v. Roberts*, 448 U.S. 56, 66 (1980) ("Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.").

173. 108 S. Ct. 2798, 2801 n.2 (1988).

174. *Dutton v. Evans*, 400 U.S. 71, 86 (1970). *See also Pointer v. Texas*, 380 U.S. 400, 406-07 (1965); *Dowdell v. United States*, 221 U.S. 325, 330 (1911); *Kirby v. United States*, 174 U.S. 47, 55-56 (1899); *Mattox v. United States*, 156 U.S. 237, 242-43 (1895). *See generally* 5 *J. WIGMORE, EVIDENCE* 131 (3d ed. 1940).

175. *Graham*, *supra* note 19, at 104; Gutman, *Academic Determinism: The Division of the Bill of Rights*, 54 *S. CAL. L. REV.* 295, 340-41 (1981). However, Professor Graham believes that reliance on Wigmore's thesis to interpret the Confrontation Clause is misplaced. *Graham*, *supra* note 19, at 104. Professor Graham stated that Wigmore's fanatical interest in hearsay reform, and opposition to the doctrine of criminal evidence, led him to shun the various constitutional limitations on the use of evidence in criminal trials. *Id.* at 104 n.24.

to a right to cross-examine the witnesses produced by the prosecutor at trial.¹⁷⁶ Interestingly, in *Coy*, Justice Blackmun strongly deferred to state legislation and cited Wigmore to support his Confrontation Clause analysis.¹⁷⁷ Indeed, the Supreme Court has affirmed Wigmore's evidence thesis that the goals of confrontation are to generate reliability and to accommodate necessity—the same goals sought by rules against hearsay.¹⁷⁸

In one recent case, *Perez v. State*,¹⁷⁹ the Florida Supreme Court seemed to ignore the precise distinction between confrontation and hearsay that Justice Scalia emphasized in *Coy*. In *Perez*, the court admitted into evidence a three year-old child's hearsay statements made to his mother and two investigating officers regarding an alleged sexual assault.¹⁸⁰ After an evidentiary hearing, the trial court found the child's hearsay statements sufficiently reliable, and determined that the child was unavailable as a witness due to a substantial likelihood of severe emotional distress if required to participate in the trial.¹⁸¹ The defendant appealed, arguing that the trial court unconstitutionally denied him the opportunity to confront the witnesses against him.¹⁸² The Florida Supreme Court dismissed the defendant's argument, noting that the United States Supreme Court rejected the view that the Confrontation Clause bars the use of any out-of-court statements, and held that the defendant's confrontation right was satisfied since the witness' statement bore adequate indicia of reliability.¹⁸³ Thus, the court used an unavailability rule based on hearsay admissibility to determine whether the defendant's confrontation rights were violated, offering the defendant no additional constitutional protection beyond that provided by evidence law.

In *Coy*, Justice Scalia distinguished the Confrontation Clause from evidence law.¹⁸⁴ Specifically, he criticized the dissent's reliance on Dean Wigmore to interpret the Confrontation Clause,¹⁸⁵ arguing that Wigmore

176. Graham, *supra* note 19, at 104 n.24 (citing 5 J. WIGMORE, EVIDENCE 131 (3d ed. 1940)).

177. *Coy*, 108 S. Ct. at 2807 (Blackmun, J., dissenting) (citing 5 J. WIGMORE, EVIDENCE 131 (3d ed. 1940)).

178. See *Tennessee v. Street*, 471 U.S. 409, 414 (1985); *Roberts*, 448 U.S. at 66; see also Gutman, *supra* note 175, at 337.

179. 536 So. 2d 206 (Fla. 1988).

180. *Id.* at 207-08.

181. *Id.* at 208.

182. *Id.* at 209.

183. *Id.* at 209-10 (citing *Ohio v. Roberts*, 448 U.S. 56, 65 (1980)).

184. *Coy*, 108 S. Ct. at 2801 n.2.

185. *Id.*

presented merely an evidence theorist's thesis that the confrontation right only protects the right to cross-examine the witness.¹⁸⁶ Justice Scalia captured the basic flaw in the Wigmore theory. To say that the right to cross-examine exhausts the defendant's Confrontation Clause rights, because the purpose of the Confrontation Clause can be effectuated by hearsay protection, ignores the fact that the Clause itself requires "confrontation."¹⁸⁷ Under Wigmore's logic, Justice Scalia stated that one could dispense with the Constitution's specific jury trial requirement by showing that the accused was justly convicted and publicly known to be justly convicted.¹⁸⁸

Justice Scalia correctly criticized the dissent. The Supreme Court has stated that although the Confrontation Clause and the evidentiary hearsay rule stem from the same roots, they do not protect identical rights.¹⁸⁹ Confrontation is a fundamental trial right.¹⁹⁰ Hearsay is an evidentiary rule involving statements made out of court. Commentators recognize that confrontation encompasses a greater right than an evidentiary rule of exclusion.¹⁹¹ Satisfaction of one does not entail compliance with the other,¹⁹² since evidence admissible as an exception to hearsay may still violate the Confrontation Clause and confrontation rights may be satisfied although the hearsay rule is violated.¹⁹³

Courts and commentators have used evidence law to illuminate

186. *Id.*

187. *Id.* (citing 5 J. WIGMORE, EVIDENCE § 1397, 158 (J. Chadbourn rev. ed. 1974)).

188. *Id.* Furthermore, Justice Scalia believed that Wigmore contradicted himself by stating that a secondary purpose of confrontation is to produce a " 'certain subjective moral effect . . . upon the witness' " designed to bring out the truth during testimony before the jury. *Id.* (quoting 5 J. WIGMORE, EVIDENCE § 1395, 153 (J. Chadbourn rev. ed. 1974)). Justice Scalia believed that Wigmore's theory, that the truth-enhancing effect resulted from a witness' presence before a tribunal, and not a witness' presence before the defendant, had no support. *Id.*; see 5 J. WIGMORE, EVIDENCE § 1395, 154 (J. Chadbourn rev. ed. 1974). Justice Scalia further criticized Wigmore's thesis as implausible since the phrase " 'be confronted with the witnesses against him' " was, to Justice Scalia, a "strange way to express a guarantee of nothing more than cross-examination." *Coy*, 108 S. Ct. at 2802 n.2 (criticizing 5 J. WIGMORE, EVIDENCE § 1395, 154 (J. Chadbourn rev. ed. 1974)).

189. *Dutton*, 400 U.S. at 86; *Green*, 399 U.S. at 155-56.

190. *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987); *Pointer v. Texas*, 380 U.S. 400, 405 (1965).

191. Seidelson, *Hearsay Exceptions and the Sixth Amendment*, 40 GEO. WASH. L. REV. 76, 82 (1971). Due process under the fifth or fourteenth amendments, not the Confrontation Clause, is the appropriate standard by which to test federal or state rules of evidence in criminal trials. *Id.* at 91. See Jonakait, *supra* note 30, at 575.

192. *Green*, 399 U.S. at 155-56; Arenson, *supra* note 3, at 16; Note, *supra* note 171, at 1436.

193. See *Roberts*, 448 U.S. at 66; *Green*, 399 U.S. at 155-56; *Barber v. Page*, 390 U.S. 710, 722 (1968).

Confrontation Clause issues.¹⁹⁴ Face-to-face confrontation rarely poses an issue at trial, thus, little research has been done in the Confrontation Clause field as compared to the evidence field.¹⁹⁵ Dean Wigmore, Professor McCormick, and Judge Weinstein are only a few of the many scholars who have written about evidence law. Unlike most other constitutional doctrines, there is no contemporaneous construction.¹⁹⁶ The United States Supreme Court decided its first Confrontation Clause case one hundred years after the Framers adopted the sixth amendment.¹⁹⁷

The Confrontation Clause embodies notions of individual rights far broader than the technical hearsay rules. The confrontation right¹⁹⁸ provides the criminal defendant with the opportunity to defend himself through our adversary system by prohibiting *ex parte* trials,¹⁹⁹ granting the defendant an opportunity to test the evidence in front of the jury,²⁰⁰ and guaranteeing the right to face-to-face confrontation.²⁰¹ By using hearsay to determine the scope of confrontation, the Confrontation Clause would cease to be a guarantee of individual liberty, secured through the simultaneous functioning of its components interpreted like other fundamental rights, to become a "mere vestigial appendix of the hearsay doctrine."²⁰² This would deprive the Confrontation Clause of any force beyond that which the hearsay rule already provides, thus rendering the Confrontation Clause useless.²⁰³

C. *The Precedent for Limiting the Defendant's Right to Confrontation in Light of the Compelling State Interest to Protect Child-Witnesses*

1. The Supreme Court's limitation of other fundamental rights

The Supreme Court has limited fundamental constitutional protec-

194. See generally *Roberts*, 448 U.S. at 56; *Dutton*, 400 U.S. at 74; *Green*, 399 U.S. at 149; 5 J. WIGMORE, EVIDENCE 131 (3d ed. 1940).

195. *Jonakait*, *supra* note 30, at 578.

196. *Graham*, *supra* note 19, at 104.

197. *Id.* The first Supreme Court decision to interpret the Confrontation Clause was *Mattox v. United States*, 156 U.S. 237 (1895).

198. The confrontation right is only one of several rights contained in the sixth amendment. The sixth amendment also guarantees the right to a speedy and public jury trial, the right to counsel, the right to present evidence on one's own behalf, and the right to confront one's adverse witnesses. U.S. CONST. amend. VI.

199. *Mattox*, 156 U.S. at 242-43.

200. *Kirby*, 174 U.S. at 55.

201. *Coy*, 108 S. Ct. at 2801.

202. *Jonakait*, *supra* note 30, at 575.

203. *Id.* at 577.

tions when costs of preserving them simply prove too high. For example, political speech, a core first amendment right, enables our system of representative government to operate by permitting political and social change to come about peacefully through public discussion rather than through violence.²⁰⁴ The first amendment prohibits the government from suppressing ideas on the theory that one can only determine the truth of any idea in the "marketplace" of competing thoughts.²⁰⁵ Restriction of political speech subverts the democratic process.²⁰⁶

However, although the first amendment protects freedom of speech in absolute terms,²⁰⁷ the Supreme Court has never treated first amendment guarantees as absolute.²⁰⁸ In certain situations, the Court will balance an individual's right to free expression against other societal interests.²⁰⁹

The first amendment will not necessarily protect all political speech that "directs to inciting or producing imminent lawless action," and which is also "likely to incite or produce such action."²¹⁰ However, the legislature refuses to stifle legitimate dissent, since the Supreme Court has distinguished general political dissent and advocacy of abstract theories, which cannot be punished, from incitement of particular illegal acts,

204. In *On Liberty*, John Stuart Mill recognized the public good which resulted from the free exchange of ideas.

First, if any opinion is compelled to silence, that opinion may, for aught we can certainly know, be true. To deny this is to assume our own infallibility. Secondly, though the silenced opinion be an error, it may and very commonly does, contain a portion of truth, and since the general or prevailing opinion on any subject is rarely or never the whole truth, it is only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied. Thirdly, even if the received opinion be not only true, but the whole truth; unless it is suffered to be, and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of a prejudice, with little comprehension or feeling of its rational grounds. And not only this, but, fourth, the meaning of the doctrine itself will be in danger of being lost or enfeebled, and deprived of its vital effect on the character and conduct . . .

J.S. MILL, *ON LIBERTY*, ch. II (1859). See also *Mills v. Alabama*, 384 U.S. 214, 218 (1966); *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, J., dissenting).

205. *Abrams*, 250 U.S. at 630 (Marshall, J., dissenting).

206. J. NOWAK, R. ROTUNDA & N. YOUNG, *CONSTITUTIONAL LAW* 837 (3d ed. 1986).

207. The first amendment reads in part: "Congress shall make no law . . . abridging the freedom of speech. . . ." U.S. CONST. amend. I (emphasis added).

208. See, e.g., *Globe Newspaper Co. v. County of Norfolk*, 457 U.S. 596, 606 (1982); J. NOWAK, R. ROTUNDA & N. YOUNG, *supra* note 206, at 853.

209. See, e.g., *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 (1976) (restrictions on commercial speech not allowed); *Miller v. California*, 413 U.S. 15, 23-24 (1973) (restrictions on obscenity allowed).

210. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). The *Brandenburg* Court prohibited speech advocating unlawful conduct. J. NOWAK, R. ROTUNDA & N. YOUNG, *supra* note 206, at 864.

which are punishable.²¹¹

Although the Court will balance first amendment rights against competing interests, the first amendment's importance has not been lessened.²¹² Indeed, the value of free speech is enhanced by protecting the very governmental framework that ensures the right. Thus, the Constitution places the burden of reconciling the conflicting interests of the individual and society on the Court.²¹³ To be sure, the Supreme Court will only restrict first amendment political speech rights when the costs produced by certain types of speech prove too high for the benefits political speech may have.²¹⁴

In *Globe Newspaper Co. v. Superior Court*,²¹⁵ the Supreme Court held that the first amendment right of access to criminal trials²¹⁶ is not absolute, and may be balanced against other competing state interests.²¹⁷ The Court stated that "safeguarding the physical and psychological well-being of a minor" was a compelling state interest which warranted limiting the defendant child molester's first amendment rights.²¹⁸ Interestingly, the arguments made for limiting the defendant's first amendment right in *Globe Newspaper* parallel those made by Justice O'Connor in her concurrence in *Coy v. Iowa*, differing only in the constitutional right protected.²¹⁹

211. J. NOWAK, R. ROTUNDA & N. YOUNG, *supra* note 206, at 853.

212. *Id.* (citing Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 905 (1963)). For a contrary view, see generally Frank, *Hugo L. Black: Free Speech and the Declaration of Independence*, in SIX JUSTICES ON CIVIL RIGHTS 11, 31-37 (R. Rotunda, ed. 1983).

213. J. NOWAK, R. ROTUNDA & N. YOUNG, *supra* note 206, at 853 (citing *Dennis v. United States*, 341 U.S. 494, 517 (1951); Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 905 (1963)). In *Marbury v. Madison*, Justice Marshall stated that when the Supreme Court identifies a conflict between a constitutional provision and a congressional statute, the Court has the authority and the duty to declare the statute unconstitutional and to refuse to enforce it. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The Court, not the legislature, determines whether an Act of Congress conflicts with the Constitution. *Id.*

214. See *Brandenburg*, 395 U.S. 444, 447 (per curiam) (state may not "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

215. 457 U.S. 596 (1982).

216. In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), the Supreme Court held that the press and public have a first amendment right of access to criminal trials. *Id.* at 576. The text of the first amendment reads in part: "Congress shall make no law . . . abridging the freedom . . . of the press." U.S. CONST. amend. I.

217. *Globe Newspaper*, 457 U.S. at 606-11.

218. *Id.* at 607.

219. See *id.* at 606-11 (O'Connor, J., concurring). In *Globe Newspaper*, Justice Brennan emphasized that the majority's holding did not apply outside of criminal trials. *Id.* at 611 n.27. In *Coy*, Justice Brennan joined Justice Scalia's plurality opinion but emphasized that the

The Globe Newspaper Company desired access to a rape trial of three minor-victims.²²⁰ The newspaper contested a state statute²²¹ requiring the trial judge to exclude the press and general public from the courtroom during the testimony of minor-victims in cases involving sexual offenses.²²² Although the Court held that the mandatory exclusion rule violated Globe Newspaper's first amendment right of access to criminal trials,²²³ the Court recognized that compelling circumstances exist where courts may exclude the press and general public during the testimony of minor-victims of sexual abuse.²²⁴ The Court held that a state may deny the right of access only when the trial court demonstrated that a compelling governmental interest necessitated denial of access and that the exclusion was narrowly tailored to serve that interest.²²⁵

In *Globe Newspaper*, the statute served the purpose of encouraging young victims of sexual offenses to testify truthfully in court, while shielding them against undue psychological harm and embarrassment while testifying.²²⁶ The Court agreed that guarding the physical and psychological well-being of a minor served a compelling state interest; however, the Court held that the state may not have a mandatory closure rule unless the circumstances of the particular case determined that closure

screen in no way prejudiced the defendant's trial. *Coy*, 108 S. Ct. at 2810 (Brennan, J., concurring). In *Globe Newspaper*, Justice Rehnquist stated that the minimal impact of the Massachusetts law, excluding the press and public from the courtroom during the child rape-victim's testimony, on first amendment rights, and the overriding weight of the state's interest in protecting child rape victims, justified the constitutionality of the state law. *Globe Newspaper*, 457 U.S. at 616 (Rehnquist, J., dissenting). In both *Coy* and *Globe Newspaper*, Justice Rehnquist believed that the state statute need not be narrowly tailored, and remarked that legislative exceptions to constitutional rights were common. *Coy*, 108 S. Ct. at 2809 n.6 (Blackmun, J., & Rehnquist, C.J., dissenting); *Globe Newspaper*, 457 U.S. at 616 (Rehnquist, J., dissenting). In *Globe Newspaper*, Justice Rehnquist suggested that the Court need look only at whether the restrictions imposed on the first amendment were reasonable, and whether the state's interests overrode the limited effects of the law on the first amendment rights. *Globe Newspaper*, 457 U.S. at 616 (citing *Richmond Newspapers*, 448 U.S. 555, 580-81 (1980); *Pell v. Procunier*, 417 U.S. 817 (1974); *Sarbe v. Washington Post Co.*, 417 U.S. 843 (1974)). In his dissenting opinion in *Coy*, Justice Blackmun, joined by Chief Justice Rehnquist, cited cases in which the Supreme Court allowed admission of evidence absent a case-specific inquiry of necessity. 108 S. Ct. at 2809 n.6 (Blackmun, J., dissenting) (citing *Bourjaily v. United States*, 483 U.S. 171 (1987); *United States v. Inadi*, 475 U.S. 387 (1986)).

220. *Globe Newspaper*, 457 U.S. at 598.

221. MASS. GEN. L., ch. 278, § 16A (West 1981).

222. *Globe Newspaper*, 457 U.S. at 598.

223. *Id.* at 610-11.

224. *Id.* at 606-07 (citing *Brown v. Hartlage*, 456 U.S. 45, 53-54 (1982); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 101-03 (1979); *NAACP v. Button*, 371 U.S. 415, 438 (1963)). See also, J. NOWAK, R. ROTUNDA & N. YOUNG, *supra* note 206, at 1021.

225. *Globe Newspaper*, 457 U.S. at 607.

226. *Id.* at 600, 607.

was necessary to protect the minor-victim's welfare.²²⁷ Factors that the trial court should weigh, the Supreme Court held, include the minor-victim's age, psychological maturity and understanding, the nature of the crime, and the victim's desires.²²⁸

In *Globe Newspaper*, these factors were not satisfied: The state did not move for closure, the minor-victims' names were already public knowledge, and the victims may have been willing to testify despite the presence of the press and public.²²⁹ Therefore, the Court held that the state statute was not narrowly tailored to the state's interest of protecting testifying minor-victims of sexual abuse.²³⁰ This interest could have been served by requiring the trial court to determine on a case-by-case basis whether the state's legitimate concern for the minor-victim's psychological well being necessitated closure.²³¹ This approach would help ensure that the state will not restrict the public's and press' first amendment right to access of criminal trials except where necessary to further a compelling state interest.²³²

As is clear from the Court's *majority* opinion in *Globe Newspaper*, the Court will balance a defendant's constitutional right against the compelling state interest of protecting children. In *Globe Newspaper*, the Supreme Court found it necessary to qualify the defendant's first amendment right to a public trial in order to protect child-witnesses. Likewise, in certain cases, the well-being of a child justifies limiting a defendant's sixth amendment right to confrontation.

Although the sixth amendment, like the first amendment, is stated in absolute terms, courts should also balance this right against compelling state interests when the costs of requiring a face-to-face encounter at trial for child-witnesses prove much higher than the perceived benefits. In conformance with the Framers' preference for face-to-face confrontation, the sixth amendment establishes a presumptive rule of necessity.²³³ Therefore, in certain circumstances, when advantages from actual confrontation between the child and the defendant in the courtroom are only

227. *Id.* at 608. In Justice O'Connor's concurrence in *Coy*, she stated that "if a court makes a case-specific finding of necessity" she "would permit use of a particular trial procedure that called for something other than face-to-face confrontation." 108 S. Ct. at 2805 (O'Connor, J., concurring). In *Globe Newspaper*, the Court held that "a trial court can determine on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim." *Globe Newspaper*, 457 U.S. at 608.

228. *Globe Newspaper*, 457 U.S. at 608.

229. *Id.* at 608-09.

230. *Id.* at 609.

231. *Id.*

232. *Id.*

233. *Ohio v. Roberts*, 448 U.S. 56, 65 (1980); *Perez v. State*, 536 So. 2d 206 (Fla. 1988).

incidental compared to the trauma the child may suffer while testifying, courts should limit the defendant's confrontation right.

In order to limit a fundamental right like the confrontation right, the courts should invoke a strict scrutiny test as used with other fundamental constitutional rights.²³⁴ Under this test, the state must first show that an essential interest is at stake and that no less intrusive means are available to serve the state's interest equally well.²³⁵ In other words, the government may only restrict that right where necessary to accomplish some compelling state interest, and only to the extent necessary to satisfy that need.²³⁶ The government may not pursue a legitimate legislative purpose using means that broadly stifle fundamental personal liberties when the state can achieve the ends more narrowly.²³⁷

In *Coy*, the state did not demonstrate that the screen was necessary to protect the children from potential psychological trauma.²³⁸ The state failed to support its application for a one-way screen, by affidavit or otherwise, and neglected to establish that a barrier was necessary in this particular case. Without a finding that the children needed the special protections provided by the Iowa statute,²³⁹ no reason justified restricting the defendant's right to confrontation.²⁴⁰ Thus, the Court could not uphold the statutory procedure.²⁴¹

To find that the children warranted special protection, "[t]he basis for such a premise must be established both in fact as well as in logic, and its dimensions must be spelled out in terms of its nature, degree and po-

234. For example, the Court invokes a strict scrutiny analysis in cases involving racial classifications, freedom of speech, and freedom of religion. Galloway, *supra* note 146, at 453 n.16.

235. See, e.g., *Palmore v. Sidoti*, 466 U.S. 429, 432-33 (1984) ("Such classifications are subject to the most exacting scrutiny; to pass constitutional muster, they must be justified by a compelling governmental interest and must be 'necessary to the accomplishment' of their legitimate purpose."); *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981) ("the least restrictive means of achieving some compelling state interest" should be used); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) ("necessary to promote a compelling state interest").

236. Galloway, *supra* note 146, at 453.

237. *Id.* at 451-52.

238. *Coy*, 108 S. Ct. at 2805, 2809.

239. IOWA CODE § 910A.14 (1987).

240. *Coy*, 108 S. Ct. at 2803; *Roberts*, 448 U.S. at 65. The *Roberts* Court stated that with the Framers' preference for face-to-face confrontation, the Confrontation Clause established a rule of necessity to restrict the range of admissible hearsay. *Roberts*, 448 U.S. at 65. The prosecution had to demonstrate a declarant's unavailability if it wished to use the declarant's statement against the defendant. *Id.* Once a witness was shown to be unavailable, the *Roberts* Court held the Confrontation Clause allowed only hearsay that was trustworthy. *Id.* See also *Mancusi v. Stubbs*, 408 U.S. 204 (1972); *Barber v. Page*, 390 U.S. 710 (1968).

241. A court cannot limit a defendant's confrontation rights without a finding of necessity. *Roberts*, 448 U.S. at 65.

tential duration."²⁴² Psychiatric evidence shows that each child-victim reacts to an offense and its aftermath in his or her own way.²⁴³ Thus, one cannot justify excusing all child-victims from testifying, nor can one impose the duty on all of them to testify. Each child's case deserves its own individual consideration.²⁴⁴

2. Protection of children testifying in the courtroom

*"The State, of course, has a duty of the highest order to protect the interests of minor children, particularly those of tender years."*²⁴⁵

Face-to-face confrontation before an arbiter in a public forum remains the hallmark of Anglo-American criminal trials,²⁴⁶ allowing for the adversarial testing of evidence.²⁴⁷ Yet, if facing the defendant in court will unduly traumatize the child, trial procedures should prevent this situation. However, changing a system that the Constitution requires and that society has accepted as an adequate method for prosecuting criminals and protecting the innocent must be done with care.²⁴⁸

Although age is not a suspect classification warranting equal protection scrutiny,²⁴⁹ in certain circumstances, our legal system provides different rules depending on whether the person is a child, an adult, or an elderly person because of the difference in capabilities each has according

242. *Hocheiser v. Superior Court*, 161 Cal. App. 3d 777, 793, 208 Cal. Rptr. 273, 289 (1984).

243. *Libai*, *supra* note 11, at 1009.

244. Several state statutes require a case-specific finding of necessity before allowing the trial court to use a trial procedure which limits a defendant's confrontation right. *See, e.g.*, CAL. PENAL CODE § 1347(d)(1) (West Supp. 1989); FLA. STAT. § 92.54(4) (1987); MASS. GEN. L. ch. 278, § 16D(b)(1) (1986); N.J. STAT. ANN. § 2A:84A-324(b) (West Supp. 1989).

245. *Palmore v. Sidoti*, 466 U.S. 429 (1984).

246. *Mlyniec & Dally, See No Evil? Can Insulation of Child Sexual Abuse Victims Be Accomplished Without Endangering the Defendant's Constitutional Rights?*, 40 U. MIAMI L. REV. 115, 117 (1985).

247. *Jonakait*, *supra* note 30, at 586.

248. *Mlyniec & Dally*, *supra* note 246, at 117.

249. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 311-13 (1976). In *Murgia*, the Supreme Court held that age is not a suspect classification entitled to strict scrutiny. *Id.* at 312. The Court held that a Massachusetts statute calling for mandatory retirement at age 50 did not deny a police officer equal protection. *Id.* The Court concluded that the class of uniformed state police officers over 50 was not a suspect class for purposes of equal protection analysis. *Id.* at 313. The Court's rationale was that the elderly, unlike those who have been discriminated against on the basis of race or national origin, have not experienced a "history of purposeful unequal treatment" or been subjected to unique disabilities on the basis of "stereotyped characteristics not truly indicative of their abilities." *Id.* "Even if the statute could be said to impose a penalty upon a class defined as the aged," the Court held "it would not impose a distinction sufficiently akin to those classifications that [it] ha[s] found suspect to call for strict judicial scrutiny." *Id.*

to his age. John Locke, one of the primary philosophers who influenced our Constitution, believed that children differ from adults:

Adam was created a perfect man, his body and mind in full possession of their strength and reason, and so was capable from the first instant of his being to provide for his own support and preservation and govern his actions according to the dictates of the law of reason which God had implanted on him. From him the world is peopled with his descendants *who are all born infants, weak and helpless*, without knowledge or understanding; but to supply the defects of this imperfect state till the improvements of growth and age has removed them, Adam and Eve, and after them all parents, were, by the law of nature, under an obligation to preserve, nourish and educate the children they had begotten.²⁵⁰

Lockean thought provided many ideas for the American Revolution of 1776.²⁵¹ In fact, one commentator noted that the Declaration of Independence proved so close to Locke in form, phraseology and content, that someone accused Jefferson of copying Locke's *Second Treatise*.²⁵² Thus, even under Justice Scalia's narrow interpretivist approach, a "children's exception" to strict Confrontation Clause requirements seems reasonable.

Psychological studies demonstrate that a child's cognitive level differs from an adult's.²⁵³ To the extent that children lack certain basic skills their minds differ qualitatively from adults'.²⁵⁴ Children develop from being able to perceive only concrete symbols, to being able to conceive of the world in symbolic and abstract terms.²⁵⁵ Accordingly, legal principles designed for adult psyches may often prove incomprehensible and even traumatic when applied to children.²⁵⁶

250. J. LOCKE, *THE SECOND TREATISE OF GOVERNMENT* 32 (T. Peardon rev. ed. 1952) (1st ed. 1690) (emphasis in original).

251. *Id.* at vii.

252. *Id.* at xx.

253. Cognition refers to the human mental processes involved in: (1) perception—the detection, organization and interpretation of information from both the outside world and the internal environment; (2) memory—the storage and retrieval of the perceived information; (3) reasoning—the use of knowledge to make inferences and draw conclusions; (4) reflection—the evaluation of the quality of ideas and solutions; and (5) insight—the recognition of new relationships between two or more segments of knowledge. P. MUSSEN, J. CONGER & J. KAGAN, *CHILD DEVELOPMENT AND PERSONALITY* 234 (5th ed. 1979).

254. H. GLEITMAN, *BASIC PSYCHOLOGY* 209 (1983).

255. See J. PIAGET, *LOGIC AND PSYCHOLOGY* (1953); J. PIAGET, *THE PSYCHOLOGY OF INTELLIGENCE* (1950). See also P. MUSSEN, J. CONGER & J. KAGAN, *supra* note 253, at 281.

256. Libai, *supra* note 11, at 999; Wixom, *supra* note 5, at 464.

Jean Piaget composed a theory to explain the normal course of cognitive development that all children pass through to become adults.²⁵⁷ Piaget believed that children grow to adulthood through a series of continuous stages, followed in the same order, although at varying speeds.²⁵⁸ During any one stage, children are capable of different patterns of behavior;²⁵⁹ however, underlying each stage is a common structure explaining the stage, and giving the stage its unity.²⁶⁰ Transition to a new stage involves fundamental reorganization in the child's mind, with each stage building on the one before it until the child reaches adulthood, and the mind reaches maturity.²⁶¹

Children generally do not understand abstract concepts such as duty or truth,²⁶² and therefore, children may not comprehend the Constitution's goal of protecting the defendant's rights in the adversarial sense. Children may not realize that the incomprehensible trial experience is designed to elicit the truth, not merely to embarrass and scare the child in front of all those adults. The judge, wearing an impressive black robe, can be a frightening figure, and the intimidation is only exacerbated when the twelve jurors, all adults, stare intently at the child throughout the trial. Such a situation is not likely to aid the child in testifying accurately and truthfully; rather, anxiety breeds confusion in children and leads to lies or to silence.²⁶³

In light of the well-recognized differences between children and adults, many areas of Anglo-American law have found compelling reasons to treat children differently. Under contract law, a minor lacks the capacity to contract.²⁶⁴ For the tort of negligence, courts distinguish

257. See J. PIAGET, *BIOLOGY AND KNOWLEDGE* (1971); J. PIAGET, *LOGIC AND PSYCHOLOGY* (1953); J. PIAGET, *THE PSYCHOLOGY OF INTELLIGENCE* (1950); J. PIAGET, *JUDGMENT AND REASONING IN THE CHILD* (1929).

258. J. PIAGET, *The Child in Reality*, in *THE ESSENTIAL PIAGET* 814-19 (1977).

259. *Id.*

260. *Id.*

261. *Id.*

262. See D. BJORKLUND, *CHILDREN'S THINKING, DEVELOPMENTAL FUNCTION AND INDIVIDUAL DIFFERENCES* 112-13 (1989); R. CASE, *INTELLECTUAL DEVELOPMENT, BIRTH TO ADULTHOOD* 108-17 (1985).

263. See Mahady-Smith, *supra* note 7, at 743. See also *State v. Sheppard*, 197 N.J. Super. 411, 413, 484 A.2d 1333 (1984). In *Sheppard*, the court recognized problems involved when frightened children testify before the court: "Children who did testify . . . frequently 'forgot' details, changed stories, or presented inconsistent facts. Ultimately, many broke down, cried, ignored questions and eventually refused to answer." *Id.*

264. The Restatement (Second) of Contracts states: "Unless a statute provides otherwise, a natural person has capacity to incur only voidable contractual duties until the beginning of the day before the person's eighteenth birthday." *RESTATEMENT (SECOND) OF CONTRACTS* § 14 (1985); see also 1 CORBIN, *CONTRACTS* § 6 (1963 & Supp. 1980); 2 WILLISTON, *CONTRACTS* §§ 222-48 (3d ed. 1959).

children from adults by holding children to a subjective rather than an objective standard of care.²⁶⁵ Constitutional law holds child pornography to a different standard from adult pornography.²⁶⁶

Similarly, in criminal law, testifying child witnesses of sex abuse should receive special courtroom protections not afforded adults. The guilty defendant may hope to capitalize on the inherent weaknesses of childhood and use the system and his presence at trial to intimidate the child-witness into silence or anxiety-produced confusion.²⁶⁷ If the child accuses an innocent adult of sexual assault, an intimidated child may distort the truth, tell more lies, and feel unable to recant the accusations already made. A less intimidating atmosphere would encourage the child to reveal the truth.²⁶⁸ Public policy warrants modifying the trial proceeding for children to prevent undue psychological trauma while testifying, and to encourage truthful testimony.

Psychologists have found that children may suffer from continued fear, guilt, and anxiety if forced to testify in court.²⁶⁹ Possible long-term effects include: nightmares; depression; eating, sleeping, and school problems; behavioral difficulties; and promiscuity.²⁷⁰ The psychiatric goal in sexual-abuse cases should be to provide appropriate treatment of the offender and strong support for the child. The prospect of reaching this goal, in certain circumstances, may be severely inhibited by face-to-face testimony.

As in *Globe Newspaper*, the Supreme Court in *Pennsylvania v. Ritchie*²⁷¹ recognized the need to accommodate children in the courtroom. The Court determined that the defendant's sixth amendment right to discover favorable evidence must yield to the state's interest in maintaining the confidentiality of its investigative files concerning child-abuse cases.²⁷² In *Ritchie*, the defendant served the Children and Youth

265. See, e.g., *Roth v. Union Depot Co.*, 13 Wash. 525, 43 P. 641 (1896). The *Roth* court held that a child should not be held to the same degree of care in avoiding danger as a person of mature years and accumulated experience. *Id.* at 531, 43 P. at 647. Rather, the court held children to the degree of discretion reasonably expected of children of that age. *Id.*

266. In *New York v. Ferber*, 458 U.S. 747 (1982), the Supreme Court held that child pornography is a category of material outside first amendment protection. *Id.* at 752. The Court held that the legislature could prohibit advertising and selling of child pornography in order to advance the state's interest in preventing sexual exploitation of children. *Id.*

267. Mahady-Smith, *supra* note 7, at 743.

268. See Wolfe, Sas & Wilson, *Some Issues in Preparing Sexually Abused Children for Courtroom Testimony*, 10 BEHAV. THERAPIST 107, 110 (1987).

269. *Id.* at 109-10.

270. *Id.* at 109.

271. 480 U.S. 39 (1987).

272. *Id.* at 43.

Services Agency²⁷³ with a subpoena seeking access to records to defend a sexual molestation accusation.²⁷⁴ The agency refused, claiming that the records were confidential under a Pennsylvania statute protecting the work completed in child-abuse investigations.²⁷⁵ The Court held that an in camera review by the trial court would protect the defendant's right to discover favorable information contained in investigative files²⁷⁶ and would serve the defendant's interest in a fair trial.²⁷⁷

Ritchie held that the Confrontation Clause does not require pretrial disclosure of any information that might be useful to contradict unfavorable testimony.²⁷⁸ Under *Ritchie*, a defendant has no constitutional right to an unsupervised search through the state's files to determine the materiality of information; rather, the state can regulate the manner of disclosure to protect the child-witness' privacy rights.²⁷⁹ The defendant may request specific information in the file he believes is material, and the state must release information that becomes material during the proceedings.²⁸⁰ However, the Court found that allowing full disclosure to the defendant would unnecessarily sacrifice the state's compelling interest in protecting its child-abuse information, and adversely affect the state's efforts to discover and treat child abuse.²⁸¹

Similarly, trial courts should be allowed to apply protective procedures to serve the compelling public interest of protecting child-victims of sexual abuse from undue psychological trauma while testifying. Legislatures in many states have enacted statutes designed to reduce the danger of emotional trauma to child-witnesses caused by testifying in court.²⁸² Indeed, California has enacted various provisions to lessen the potentially traumatizing effect of a child's trial court experience.²⁸³ Such

273. The Children and Youth Services discussed in *Ritchie* was a protective service agency that investigated alleged child abuse. *Id.*

274. *Id.*

275. *Id.* (citing PA. STAT. ANN. tit. 11, § 2214 (Purdon Supp. 1986)).

276. *Id.* at 49.

277. *Id.* at 50.

278. *Id.* at 47. The Court held that the Confrontation Clause does not protect pretrial discovery by a defendant in a criminal case; the Confrontation Clause only protects a defendant's trial rights. *Id.* at 47 n.9.

279. *Id.* at 49.

280. *Id.*

281. *Id.*

282. See, e.g., statutes cited *supra* note 14.

283. California Penal Code section 1347(b) reads in part:

[T]he court in any criminal proceeding may order that the testimony of a minor 10 years of age or younger . . . be taken by contemporaneous examination and cross-examination in another place and out of the presence of the judge, jury, defendant, and attorneys, and communicated to the courtroom

CAL. PENAL CODE § 1347(b) (West Supp. 1989).

trial methods include screening devices, one-way or two-way closed circuit television broadcast into the courtroom from another location, and videotaped testimony.²⁸⁴ These statutes let the child-victim testify in a way intended to minimize the risk of trauma. Although the statutes permit a deviation from normal trial procedure, the departure is minimal, at most restricting, but not eliminating face-to-face confrontation.²⁸⁵ The limitation on the defendant's constitutional right to confrontation is minimal because most state statutes require that other procedural and confrontational trial safeguards, including cross-examination and the jury's unobstructed view of the witness, remain unimpaired.²⁸⁶

VI. PROPOSAL: COURTS SHOULD LIMIT A DEFENDANT'S RIGHT TO CONFRONTATION IF NECESSARY TO PROTECT A CHILD-WITNESS FROM PSYCHOLOGICAL HARM

As the United States Supreme Court has found reasons to limit even the most fundamental constitutional rights,²⁸⁷ so must the Court limit the defendant's sixth amendment right when overriding competing interests so warrant. The Court should balance the defendant's right to face-to-face confrontation when necessary to serve the vital state interests of protecting the mental health of testifying child-sexual assault victims and of convicting child molesters. Indeed, without such balancing, the child may refuse to testify, or testify inaccurately, thus frustrating the state's interest in prosecuting child molestation cases. However, before the trial court elects to limit the defendant's confrontation right, the court should make a particularized finding of necessity to protect the child. A child

284. See, e.g., CAL. PENAL CODE § 1347 (West Supp.1989) (two-way closed circuit television); COLO. REV. STAT. § 13-25-129 (1987) (hearsay exception for child's out of court statement); IND. CODE ANN. § 35-37-4-6 (Burns Supp. 1988) (videotaped statement); ME. REV. STAT. ANN. tit. 15, § 1205 (1988) (hearsay exception); MINN. STAT. § 595.02(3) (1988) (hearsay exception); S.D. CODIFIED LAWS ANN. § 19-16-38 (1987) (hearsay exception); WASH. REV. CODE ANN. § 9A.44.120 (1988) (hearsay exception).

285. Use of a two-way television monitor enables the child and defendant to see each other, though the child testifies from a different room in a less intimidating atmosphere surrounded by her parents or psychologist. See, e.g., CAL. PENAL CODE § 1347 (West Supp. 1989); N.Y. CRIM. PROC. LAW §§ 65.00-65.30 (McKinney Supp. 1989). In other jurisdictions, a court allows a videotaped deposition recorded in the presence of the defendant at an earlier time and have it broadcast into the courtroom. See, e.g., ARIZ. REV. STAT. ANN. §§ 13-4251-53 (Supp. 1988); CAL. PENAL CODE § 1346 (West Supp. 1989); UTAH CODE ANN. § 77-35-15.5(1) (Supp. 1988). Other state statutes call for one-way closed circuit television with the defendant in the same room as the witness. See, e.g., ALA. CODE § 15-25-3 (Supp. 1987); GA. CODE ANN. § 17-8-55 (Harrison Supp. 1987).

286. See *supra* notes 14, 102, 113, 284 and 285 for a list of relevant state statutes.

287. The Court, for example, will limit an individual's first amendment right when a compelling state interest exists. *Globe Newspaper Co. v. County of Norfolk*, 457 U.S. 596 (1982). See also *supra* notes 204-14 and accompanying text.

who testifies against the defendant has an interest in preserving his personal dignity, and in testifying without suffering undue severe psychological harm.

Recently, a state supreme court held that in light of its interpretation of *Coy v. Iowa*, and the "virtual unanimity of other courts" in upholding the constitutionality of protective trial procedures, a valid exception to the Confrontation Clause does exist: specifically, measures necessary to protect a testifying child-victim from psychological harm.²⁸⁸ The court held that Justice Scalia did not preclude exceptions to the Confrontation Clause in his plurality opinion in *Coy*.²⁸⁹ The court further stated, that invocation of any exceptions require a finding of necessity. Therefore, once the trial court finds that the child cannot testify free from emotional distress, the trial court may invoke the trial procedure; however, "appropriate protective measures must then be tailored to limit the confrontation right as little as feasible."²⁹⁰

By slightly limiting the defendant's sixth amendment rights, both the child's and the defendant's interests can be served. The Court would restrict face-to-face confrontation between the defendant and the child in favor of the goal of promoting truthful and accurate testimony by the child.²⁹¹ The defendant would still be entitled to all other sixth amendment guarantees.²⁹² In light of the compelling public interest in protecting child-witnesses from undue psychological trauma and of prosecuting child sexual abuse cases, slightly modifying the defendant's confrontation right best serves the purposes of the sixth amendment—a fair trial for all involved.

Finally, improving techniques used to investigate child-abuse cases so that children are less traumatized during the early stages of the case, may reduce the need to tamper with the defendant's confrontation right at all. With early psychological counseling, the child should be able to face the defendant at trial. Multiple interviews by insensitive and untrained police do at least as much damage to the children as a court

288. *Craig v. Maryland*, 316 Md. 551, 560 A.2d 1120 (1989).

289. *Id.*

290. *Id.*

291. See *supra* note 263 and accompanying text for discussion of how psychological stress leads child-witnesses to either testify inaccurately, or refuse to testify at all.

292. Such guarantees include: the right to be represented by counsel, *Gideon v. Wainwright*, 372 U.S. 335 (1963); the right to cross-examine adverse witnesses, *Ohio v. Roberts*, 448 U.S. 56 (1980); and the right to a public trial, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). Protective procedures used by many states do not affect these rights. For example, the screen used in *Coy* blocked the defendant from the witnesses' line of vision, but, the procedure did not limit these other sixth amendment guarantees.

appearance.²⁹³ Rather than improve the process at the expense of the Constitution, legislators should first improve pre-trial procedures and investigative practices.²⁹⁴

VII. CONCLUSION

In *Coy v. Iowa*, as in most modern trials, many of the evils existing at the time of Sir Walter Raleigh's trial no longer exist. No longer are defendants convicted on evidence that the defendant has no opportunity to test. Defendants are entitled to a public jury trial, the right to counsel, and the right to cross-examine their accusers, effectively remedying the courtroom practices that during Raleigh's times denied face-to-face confrontation. In light of these trial safeguards, restricting the defendant's confrontation right to accommodate competing state interests does not infringe the defendant's right to a fair trial.

The Supreme Court correctly decided *Coy*. No testimony or evidence was presented that testifying in the defendant's presence would traumatize or harm the children.²⁹⁵ Thus, the record remained silent of any justification for infringement of the defendant's right to confront his adverse witnesses. A legislative procedure should not be able to limit a defendant's constitutional confrontation right without a specific finding of necessity. Without specific evidence that the children would suffer psychological injury if forced to face the defendant in court, the screen used at defendant's trial violated his confrontation right by denying him the opportunity to confront the witnesses against him at trial.

In light of the fact that the lower court failed to make a finding of necessity, *Coy* proved to be a simple case for the Supreme Court, and in reality, answered no new questions. Justice Scalia's job proved easy—*Coy* did not present the difficult issue of exactly how to balance the interests of testifying child-victims of sexual abuse against a defendant's sixth amendment right. Justice Scalia refused to consider the issue of balancing since the trial court made no finding of necessity. However, Justice O'Connor correctly reached beyond the case at hand to determine how to strike that balance. Indeed, Justice O'Connor noted that if the trial court did make a specific finding of necessity, the Supreme Court has already held that a defendant's confrontation rights may be balanced

293. See Berliner, *supra* note 9, at 170; MacFarlane, *supra* note 6, at 137; Libai, *supra* note 11, at 984.

294. See Berliner, *supra* note 9, at 172; Mlyniec & Dally, *supra* note 246, at 134; Wolfe, Sas & Wilson, *supra* note 268, at 109.

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

against other competing state interests.²⁹⁶ Justice O'Connor would permit a trial procedure that prevented face-to-face confrontation if "necessary to further an important public policy."²⁹⁷

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296. *Id.* at 2804 (O'Connor, J., concurring) (citing *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973)). In *Coy*, the plurality did not overrule *Chambers* on this point. Justice O'Connor expressly rejected any suggestion by the plurality that the core confrontation right may not be limited by competing interests in certain situations. *Id.* (O'Connor, J., concurring).

297. *Coy*, 108 S. Ct. at 2805 (O'Connor, J., concurring).

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