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Coy v. Iowa: A Constitutional Right of Intimidation

I. INTRODUCTION

Peter was six years old when a babysitter ordered him and his 3- and 4-year-old brothers to their basement. The sitter threatened them with a knife, forced them to disrobe, and sexually assaulted Peter's little brothers. Police recovered the knife, with fingerprints of the suspect.

At the trial, despite sensitive questioning and careful use of anatomical dolls, Peter's brothers were unable to describe the assault. Peter was called to testify. Peter had seemed bright and articulate when, an hour earlier, he had visited the courtroom for orientation by the district attorney. Now, before the jury, he said nothing. He seemed confused and frightened, his eyes darting around the courtroom, his small body lost on what must have seemed an enormous chair. Peter nodded quickly when the judge said, 'I'll bet you'd feel much better if you were sitting on your Dad's lap.' When his father sat in the witness chair and put Peter on his lap with his arm around Peter's tummy, Peter answered all questions about the sexual assaults.¹

Prosecutors and legislatures have been responding to the public's demand for action against the rising number of child sexual abuse cases.² Prosecutors continue to file more charges and lawmakers ur-

1. Brief of Amicus Curiae Judge Charles B. Schudson for appellee at 4a-5a, *Coy v. Iowa*, 108 S. Ct. 2798 (1988) (No. 86-6757) [hereinafter Schudson]. Judge Schudson is a member of the National Council of Juvenile and Family Court Judges. He presides over Branch I of the Wisconsin Circuit Court for Milwaukee County and has traveled extensively throughout the United States lecturing about the laws and techniques emerging in the area of child witness testimony. *Id.* at 1-2. Judge Schudson has authored several works on this subject. *Id.* at 2 n.2. For seven years, prior to assuming his present role on the bench, Judge Schudson worked as both a federal and state prosecutor. *Id.* at 2. His specialty concerned cases of battered women, patients of nursing homes, and victims experiencing difficulty appearing or communicating in court. *Id.*

2. See *State v. Myatt*, 237 Kan. 17, 22, 697 P.2d 836, 841 (1985). Statistics indicate a 200% increase in the number of child sexual abuse cases reported between 1976 and 1983. Approximately 25,000 cases were reported annually by 1980. Estimates of the number of cases that never get reported are speculated to be as high as 500,000 annually. *Id.* See generally Bulkley, *Evidentiary and Procedural Trends in State Legislation and Other Emerging Legal Issues in Child Sexual Abuse Cases*, 89 DICK. L. REV. 645 (1985) (discussing increasing legislative reform and other measures taken to more competently deal with child sexual abuse cases because of the greater awareness of this abuse and higher number of reported cases); Parker, *The Rights of Child Witnesses: Is the Court a Protector or Perpetrator?*, 17 NEW ENG. L. REV. 643 (1982) (discussing the problems inherent within the legal system of prosecuting child sexual abuse cases, providing legislative guidelines and precedential authority developed to alleviate the problem, and assessing the contemplated constitutional questions that will be raised by such legislation); Comment, *Children's Testimony in Sexual Abuse Cases: Ohio's Proposed Legislation*, 19 AKRON L. REV. 441 (1986) (discussing the prevalent

gently draft legislation³ aimed at reducing the trauma suffered by the child victim.⁴ However, a looming disruption to these efforts is the

need for additional legislation, its relationship to the confrontation clause, and the constitutionality of the proposed legislation).

3. Prosecutors are filing "fatter" indictments and informations against accused sexual offenders in response to the public's cry for relief. Graham, *Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions*, 40 U. MIAMI L. REV. 19, 20 (1985). Legislatures have responded by creating more hearsay exceptions and passing laws designed to make prosecution of child sexual abuse cases more effective and less stressful for the child victim. *Id.* at 20-21.

State statutes and case law have attempted to make the victim's testimonial experience in court less traumatic, without compromising the accused's constitutional guarantees under the sixth amendment. One-way closed-circuit television, one-way screen and one-way mirror statutes: ALA. CODE § 15-25-3 (Supp. 1988); ARIZ. REV. STAT. ANN. § 13-4253 (Supp. 1988); CONN. GEN. STAT. ANN. § 54-86g (West Supp. 1988); FLA. STAT. ANN. § 92.54 (West Supp. 1988); GA. CODE ANN. § 17-8-55 (Supp. 1988); IND. CODE ANN. § 35-37-4-8 (Burns Supp. 1988); IOWA CODE ANN. § 910A.14 (West Supp. 1988) (formerly § 910A.3); KAN. STAT. ANN. § 38-1558 (1986); KY. REV. STAT. ANN. § 421.350(1)-(3) (Michie/Bobbs-Merrill Supp. 1988); LA. REV. STAT. ANN. § 15:283 (West Supp. 1988); MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (Supp. 1988); MASS. GEN. LAWS ANN. ch. 278, § 16D (West Supp. 1988); MINN. STAT. ANN. § 595.02(4) (West 1988); MISS. CODE ANN. § 13-1-405 (Supp. 1988); N.J. STAT. ANN. § 2A:84A-32.4 (West Supp. 1988); N.Y. CRIM. PROC. LAW § 65.10 (McKinney Supp. 1989); OKLA. STAT. ANN. tit. 22, § 753 (West Supp. 1989); PA. STAT. ANN. tit. 42, §§ 5982-5985 (Purdon Supp. 1988); R.I. GEN. LAWS § 11-37-13.2 (Supp. 1988); TEX. CODE CRIM. PROC. ANN. art. 38.071, § 3 (Vernon Supp. 1989); UTAH CODE ANN. § 77-35-15.5 (Supp. 1988); VT. R. EVID. 807 (1983).

Two-way closed circuit television statutes: CAL. PENAL CODE § 1347 (West Supp. 1989); N.Y. CRIM. PROC. LAW §§ 65.00 to 65.30 (McKinney Supp. 1989); OHIO REV. CODE ANN. § 2907.41(C), (D), & (E) (Anderson 1987); HAW. R. EVID. 616 (codified at HAWAII REV. STAT. § 626-1 (1985)); VT. R. EVID. 807 (1983).

Videotape deposition and testimony given before trial: *State v. Sheppard*, 197 N.J. Super. 411, 484 A.2d 1330 (Law Div. 1984); ALA. CODE § 15-25-3 (Supp. 1988); ALASKA STAT. § 12.45.047 (1984); ARIZ. REV. STAT. ANN. §§ 13-4251, 13-4253(B)-(C) (Supp. 1988); ARK. STAT. ANN. § 16-44-203 (1987); CAL. PENAL CODE § 1346 (West Supp. 1989); COLO. REV. STAT. §§ 18-3-413, 18-6-401.3 (1986); CONN. GEN. STAT. ANN. § 54-86g (West Supp. 1988); DEL. CODE ANN. tit. 11, § 3511 (1987); FLA. STAT. ANN. § 92.53 (West Supp. 1988); IND. CODE ANN. § 35-37-4-8 (Burns 1988); IOWA CODE ANN. § 910A.14 (Supp. 1988); KAN. STAT. ANN. §§ 22-3433 to -3434 (Supp. 1987); KY. REV. STAT. ANN. § 421.350(4) (Michie/Bobbs-Merrill Supp. 1988); LA. REV. STAT. ANN. §§ 15:440.3-440.5 (West Supp. 1988); ME. REV. STAT. ANN. tit. 15, § 1205 (West Supp. 1988); MASS. GEN. LAWS ANN. ch. 278, § 16D(b)(2) (West Supp. 1988); MINN. STAT. ANN. § 595.02(4) (West 1988); MISS. CODE ANN. § 13-1-407 (Supp. 1988); MO. ANN. STAT. §§ 491.675-690 (Vernon Supp. 1989); MONT. CODE ANN. §§ 46-15-401 to -403 (1987); NEV. REV. STAT. § 174.227 (1987); N.H. REV. STAT. ANN. § 517:13-a (Supp. 1988); N.M. STAT. ANN. § 30-9-17 (Supp. 1988); OHIO REV. CODE ANN. § 2907.41 (A), (B), (D), & (E) (Anderson 1987); OKLA. STAT. ANN. tit. 22, § 753(C) (West Supp. 1986); PA. STAT. ANN. tit. 42, §§ 5982, 5984 (Purdon Supp. 1988); R.I. GEN. LAWS § 11-37-13.2 (Supp. 1988); S.C. CODE ANN. § 16-3-1530(G) (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 23A-12-9 (1988); TENN. CODE ANN. § 24-116 (Supp. 1988); TEX. CODE CRIM. PROC. ANN. art. 38.071, § 3 (Vernon Supp. 1989); UTAH CODE ANN. § 77-35-15.5(3), (4) (Supp. 1988); WIS. STAT. ANN. § 967.04(7)-(10) (West Supp. 1988); WYO. STAT. § 7-11-408 (1987); VT. R. EVID. 807 (1983).

4. See Generally Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977 (1969) (defining the magnitude and scope of the harm suffered by the victim chiefly attributable to repeated court appearances and examining the difficulties in effectuating adequate pretrial interrogation of the child); Vartabedian, *Striking a Delicate Balance*, 24 JUDGES' J. 16 (Fall 1985) (discussing the issues associated with the clash between the needs of the sexually

confrontation clause as enunciated in the sixth amendment.⁵

While legislative reform⁶ has been warmly received by the public, courts remain ever wary of the defendant's constitutional guarantees.⁷ A recent decision by the Supreme Court⁸ may frustrate the operation of scores of state statutes designed to ease the trauma suffered by child victims of sexual abuse when they testify against their alleged assailant;⁹ such statutes were also enacted to aid the prosecutors in bringing these sexual abusers to justice.¹⁰

abused child witness and the criminal defendant's sixth amendment right to confront his accuser).

5. The sixth amendment guarantees to each defendant that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI.

6. Specifically, the definition of sexual abuse of a child has been expanded, statutes of limitation have been lengthened, procedural and evidentiary rules have been amended, and closed-circuit television statutes have been created. *See, e.g.*, CAL. EVID. CODE § 767(b) (West Supp. 1989) (allows leading questions to be asked of sexually abused children under ten years of age); CAL. PENAL CODE § 1347 (West Supp. 1989) (authorizing contemporaneous examination and cross-examination outside of the courtroom by the use of two-way, closed-circuit television transmission); WASH. REV. CODE ANN. §§ 9A.64.020, 9A.04.080 (West 1988) (1982 amendments expanding the definition of incest, and extending the statute of limitations); WIS. STAT. ANN. §§ 950.055(2), 971.105 (West Supp. 1988) (providing for the trial to be conducted in language that the abused child can comprehend and further requiring the court and the district attorney exercise appropriate measures to ensure a speedy trial for the purpose of reducing the trauma suffered by the child witness).

7. "Political passion often obscures the reality that as the offensiveness of the crime increases, so too do prosecutorial zeal, the ignominy of conviction, and the need to guard against wrongful prosecution." Note, *The Testimony of Child Victims in Sex Abuse Prosecution: Two Legislative Innovations*, 98 HARV. L. REV. 806, 808 (1985).

8. *Coy v. Iowa*, 108 S. Ct. 2798 (1988). Shortly before the Supreme Court heard *Coy*, the legal community worried that "if the Iowa procedure is struck down, the [C]ourt's action will have negative ramifications for more widely used alternative procedures, such as testimony by closed-circuit [television]." Coyle, *Application of Confrontation Clause, a Difficult Issue in Child Abuse Cases*, Nat'l L.J., Nov. 2, 1987, at 1, col. 2.

9. Note, *The Constitutionality of the Use of Two-Way Closed Circuit Television to Take Testimony of Child Victims of Sex Crimes*, 53 FORDHAM L. REV. 995, 997 (1985); Comment, "Face-to Television Screen- to Face": *Testimony by Closed-Circuit Television in Cases of Alleged Child Abuse and the Confrontation Right*, 76 KY. L.J. 273, 275-76 (1987); Comment, *Child Witnesses in Sexual Abuse Criminal Proceedings: Their Capabilities, Special Problems, and Proposals for Reform*, 13 PEPPERDINE L. REV. 157 (1985).

10. [A] system, designed to bring the abuser to justice, in reality further abuses the victim. Additionally, the abuser often goes free because, without the child's testimony, the evidence is insufficient to convict him. . . . Clearly, a system that traumatizes child victims and does not convict their abusers infringes on the public interest. The . . . procedures enacted in Utah and other states are designed to address these problems.

Comment, *Videotaping the Testimony of an Abused Child: Necessary Protection for the Child or Unwarranted Compromise of the Defendant's Constitutional Rights?*, 1986

Although the existence of the right of confrontation is not disputed,¹¹ the scope of this right is the source of numerous arguments.¹² Defendants vigorously contend that intrinsic to the right is the element of face-to-face confrontation.¹³ Indeed, lower courts have found violations of the sixth amendment when the defendant was precluded from actually viewing the testimony of an opposing child witness because of unorthodox seating arrangements¹⁴ or an overcrowded courtroom.¹⁵ However, in cases with highly similar fact situations, courts have also found no injury to the defendant's right of confrontation.¹⁶

The scope argument also arises when the alleged violation to the confrontation clause stems from conditions emanating from outside the courtroom. Specifically, in cases concerning prosecution for sexual abuse of a minor, introduction of the minor's testimony by electronic means did not deny the defendant his right of confrontation.¹⁷

UTAH L. REV. 461, 465-66; see also Note, *The Revision of Article 38.071 After Long v. State: The Troubles of a Child Shield Law in Texas*, 40 BAYLOR L. REV. 267, 268 (1988).

11. In federal court, the right stems from the sixth amendment. The same right exists in state court because the right of confrontation has been made applicable to the states as a fundamental right through the fourteenth amendment. *Pointer v. Texas*, 380 U.S. 400, 403-05 (1965).

12. Annotation, *Conditions Interfering With Accused's View of Witness as Violation of Right of Confrontation*, 19 A.L.R. 4TH 1286, 1287 (1983).

13. *Id.*

14. A California appellate court held that altering the seating arrangement in the courtroom to prevent the witness and the defendant from seeing each other denied the defendant his right to confront witnesses against him. *Herbert v. Superior Court*, 117 Cal. App. 3d 661, 668, 172 Cal. Rptr. 850, 853 (1981).

15. The Utah judiciary found that a defendant's right to confront witnesses against him included the right of face-to-face confrontation. This right was consequently violated when a defendant was forced to sit in the back of the courtroom while a six-year-old girl testified to the corpus delicti of the alleged crime. *State v. Mannion*, 19 Utah 505, 511-13, 57 P. 542, 543-44 (1899).

16. The California Supreme Court held that the defendant's right to confront witnesses was not abridged even though the desk of the clerk of the court partially blocked the defendant's view of each testifying witness. *People v. Garcia*, 2 Cal. 2d 673, 682, 42 P.2d 1013, 1017 (1935). Defendant's request to move the court's furniture was denied and no prejudice resulted because defendant was present at all times and no complaint was ever raised evidencing the defendant's inability to hear the testimony of each witness. *Id.*; accord *Palmer v. State*, 134 Tex. Crim. 390, 392, 115 S.W.2d 641, 642 (1938) (holding that the defendant was afforded sufficient opportunity to confront witnesses against him, despite the fact that the witness stand was constructed in such a way as to prevent the defendant from seeing the entire body of each witness during their occupation of the witness stand).

17. The New Jersey judiciary allowed a child victim to testify via contemporaneous videotape transmission into the courtroom from a nearby room. *State v. Sheppard*, 484 A.2d 1330 (N.J. Super. Law Div. 1984). The court expressly held that the videotape procedure would not inhibit the defendant's right of confrontation, even though the defendant was only afforded "electronic" confrontation as opposed to "physical" confrontation. *Id.* at 1348-49; accord *People v. Algarin*, 129 Misc. 2d 1016, 1019, 498 N.Y.S.2d 977, 979 (1986) (permitting the child victim's testimony to be introduced via two-way closed-circuit television effectuated an appropriate balance between the interests of the child victim and the defendant).

Yet, in another case dealing with the same type of offense, the electronically transmitted testimony of the child victim from another part of the courthouse, although contemporaneous with the trial itself, was held to be violative of the defendant's right of confrontation.¹⁸

This note will briefly examine the history and development of the confrontation clause as embodied in the sixth amendment to the United States Constitution. Additionally, a summary and analysis of the majority, concurring, and dissenting opinions written in *Coy v. Iowa*¹⁹ will be offered. Finally, this note proposes that the decision of the majority represents a gross departure from sound legal reasoning, frustrates the lawful, legislative efforts of a vast majority of states and ignores the pleas from the public to help bring the sexual abusers of our nation's children to justice. In effect, the Supreme Court has created a constitutional right of intimidation.

II. HISTORICAL BACKGROUND

The right to confrontation results from experience over the centuries that there is no better way to ascertain the truth when factual issues are disputed. . . . [Further], this . . . [right] is not peculiar to the mid-twentieth century. The . . . [right] existed over 2,000 years ago when the Roman Emperor Trajan advised his Governor that "anonymous accusations must not be admitted in evidence" against "a new sect known as Christians."²⁰

Some argue that by the time our nation's Constitution was adopted, the right to confront one's accusers, face-to-face, was already considered essential to determine the veracity of the accusations levied.²¹ However, the sixth amendment is devoid of any explicit language granting an accused the right of face-to-face confrontation.²² In *Mattox v. United States*,²³ the Supreme Court held that a defendant's

18. *State v. Warford*, 223 Neb. 368, 376-77, 389 N.W.2d 575, 581-82 (1986). The defendant had no way of communicating with his attorney during the cross-examination of the child witness nor did he have a full view of the child or his attorney throughout the cross-examination.

19. 108 S. Ct. 2798 (1988).

20. Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381, 413 (1959) (citing O'BRIAN, NATIONAL SECURITY AND INDIVIDUAL FREEDOM 62 (1955)).

21. Comment, *Preserving the Child Sexual Abuse Victim's Testimony: Videotaping is Not the Answer*, 1987 DET. C. L. REV. 469, 495.

22. See *supra* note 5. In fact, the confrontation clause was submitted without debate in either house of Congress. *California v. Green*, 399 U.S. 149, 176 (1970). Therefore, the determination of the legislature's intent in drafting the clause can only be achieved through a review of case law.

23. 156 U.S. 237 (1895).

sixth amendment right to confrontation is not absolute and therefore "must occasionally give way to considerations of public policy and the necessities of the case."²⁴ Further, the Court stated that the primary function of the confrontation clause was to prohibit the use of ex parte affidavits in place of live witness testimony and cross-examination.²⁵ The Court clearly stated that while the right of face-to-face confrontation exists, the defendant is not a party to the confrontation.²⁶ Rather, the defendant is merely afforded the right to compel adverse witnesses to testify while standing face-to-face with the jury so that the witness's credibility and veracity may be determined.²⁷

In *Kirby v. United States*,²⁸ decided four years after *Mattox*, the Supreme Court expressly granted criminal defendants the right to look at testifying, opposing witnesses.²⁹ However, *Mattox* was still applicable and the sixth amendment right of confrontation had not become absolute.³⁰ *Mattox* remains controlling today and is still cited for the proposition that confrontation rights may be abridged in certain instances.³¹ Similarly, in *Dowdell v. United States*,³² the Supreme Court found that a provision in the Philippine Bill of Rights, patterned after the sixth amendment to the United States Constitution, specifically included the right of face-to-face confrontation.³³

In 1931, the Supreme Court decided that the right of cross-exami-

24. *Id.* at 243. For a brief discussion of the recognized exceptions to the confrontation clause, see *infra* notes 58-67 and accompanying text.

25. "The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, [from] being used against the prisoner in lieu of personal examination and cross-examination . . ." *Id.* at 242.

26. [T]he accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of *compelling him to stand face to face with the jury* in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Id. at 242-43 (emphasis added).

27. *Id.*

28. 174 U.S. 47 (1899).

29. *Id.* at 55. Specifically, the Court stated that a defendant may be convicted only upon evidence established through "witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach . . ." *Id.* (emphasis added).

30. See *supra* note 24 and accompanying text. Additionally, while the *Kirby* court clearly gives the defendant the right to look at his accusers, this right was not violated in *Coy*. The defendant was able to see the two sexually molested girls while they testified. These witnesses were the only two that had their vision obstructed by the screen authorized under section 910A.14 of the Iowa Code. The extent of the obstruction was minimal. The girls could see everyone in the courtroom except the defendant.

31. See *supra* note 24; see *infra* note 169.

32. 221 U.S. 325 (1911).

33. *Id.* at 329-30. The court stated: "This provision of the statute intends to secure the accused in the right to be tried, so far as facts provable by witnesses are concerned, by only such witnesses as meet him face to face at the trial." *Id.* at 330.

nation, embodied in the sixth amendment, was so fundamental to our jurisprudence as to be "one of the safeguards essential to a fair trial [in federal court]."³⁴ By this time, the Court had articulated two purposes of the confrontation clause of the sixth amendment: (1) the defendant's right to see his accusers in court, face-to-face, and (2) the defendant's right to cross-examine all witnesses against him.³⁵ The Court further anticipated that the two functions of the confrontation clause, as written in the federal Constitution, would soon become applicable to the states via the fourteenth amendment.³⁶ This hypothesis was affirmed in 1965 when the Court held that the confrontation clause of the sixth amendment "reflects the belief of the Framers . . . that confrontation was a fundamental right essential to a fair trial in a criminal prosecution."³⁷ Therefore, the sixth amendment was made applicable to the states through the fourteenth amendment.³⁸

Until the mid-1960's, the confrontation clause cases decided by the Supreme Court stressed two important concepts: the criminal defendant's right to cross-examine all witnesses against him was paramount,³⁹ but his right to be present at any adverse criminal proceeding was merely derivative.⁴⁰ In 1968, the Supreme Court in *Barber v. Page*⁴¹ reaffirmed its earlier holding: confrontation means both the right to cross-examine witnesses and the opportunity to compel each adverse witness to testify while standing face-to-face with the jury.⁴²

Two years later, in 1970, the Supreme Court listed three vital purposes served by the confrontation clause.⁴³ These purposes included: (1) ensuring that testimony of a witness would be given only while under oath; (2) ensuring that any testifying witness would be subject to cross-examination; and (3) ensuring that the jury may view any witness, while testifying, to analyze that witness's demeanor for the

34. *Alford v. United States*, 282 U.S. 687, 692 (1931).

35. *Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934), *overruled on other grounds by Malloy v. Hogan*, 378 U.S. 1 (1964).

36. *Id.*

37. *Pointer v. Texas*, 380 U.S. 400, 404 (1965).

38. *Id.* at 406.

39. *Douglas v. Alabama*, 380 U.S. 415, 418 (1965).

40. Note, *supra* note 9, at 1006-07 (citing *Douglas*, 380 U.S. at 418; *Pointer*, 380 U.S. at 406-07). Wigmore concurs that the primary function of the confrontation clause is for the purpose of cross-examination, "not for the idle purpose of gazing upon the witness or of being gazed upon by him." 5 J. WIGMORE, EVIDENCE § 1395 (J. Chadbourn rev. ed. 1979).

41. 390 U.S. 719 (1968).

42. *Id.* at 725; *see also supra* notes 34-37 and accompanying text.

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

purpose of ascertaining credibility and veracity.⁴⁴ The Court further noted "that it is *this literal right to 'confront'* the witness at the time of trial that forms the core of the values furthered by the confrontation clause."⁴⁵

In *Chambers v. Mississippi*⁴⁶ and *Ohio v. Roberts*,⁴⁷ the Court reaffirmed the *Mattox* rule that the sixth amendment right to confrontation is not absolute.⁴⁸ Whereas the clause states a preference for face-to-face confrontation, this preference can be abridged in order to advance an important public policy.⁴⁹ The *Chambers* Court noted that the defendant's right to cross-examine adverse witnesses, preferably face-to-face, should be eliminated.⁵⁰ Moreover, the *Roberts* Court condoned abridging the defendant's right to exclude out of court assertions⁵¹ when such abrogation becomes necessary to further important public policies. Similarly, the Court recently held that a defendant, accused of sexual abuse of a minor, could be denied face-to-face confrontation at a competency hearing of two child witnesses because he was not denied the opportunity to cross-examine the witnesses at trial.⁵²

A plurality of Justices again noted in 1987, in *Pennsylvania v. Ritchie*,⁵³ that inherent within the confrontation clause is the notion that the witness be required to face the defendant.⁵⁴ The defendant in *Ritchie* had been tried and convicted for a number of sexual

44. *Id.* If these three requirements formed the basis of the confrontation clause rights today, the state of Iowa would not have abridged Mr. Coy's rights in any way. Each of the sexually assaulted girls testified under oath, was subjected to cross-examination, and was in full view of the jury during the entire time in which she offered her testimony. See *State v. Coy*, 397 N.W.2d 730, 734 (Iowa 1986).

45. *Green*, 399 U.S. at 157 (emphasis added). As the dissent in *Coy* pointed out, the procedure used at Coy's trial, pursuant to the Iowa statute, did not violate any of the purposes of the confrontation clause as enumerated in *Green*. See *infra* notes 134-36 and accompanying text.

46. 410 U.S. 284 (1973).

47. 448 U.S. 56 (1980).

48. See *supra* notes 24-25 and accompanying text.

49. *Roberts*, 448 U.S. at 63-64; *Chambers*, 410 U.S. at 295. The dissent in *Coy* believed that the policy advanced by Iowa suffices as an interest capable of abridging the defendant's confrontation rights. *Coy v. Iowa*, 108 S. Ct. 2798, 2805, 2806 (Blackmun, J., dissenting).

50. *Chambers*, 410 U.S. at 295. "Whatever validity the 'voucher' rule may once have enjoyed, and apart from whatever usefulness it retains today in the civil trial process, it bears little present relationship to the realities of the criminal process." *Id.* at 296.

51. *Roberts*, 448 U.S. at 63-65. The Court held that the defendant could not exclude Anita's statements because "the prosecution carried its burden of demonstrating that Anita was Constitutionally unavailable for purposes of respondent's trial." *Id.* at 77.

52. *Kentucky v. Stincer*, 107 S. Ct. 2658, 2664 (1987).

53. 480 U.S. 39 (1987).

54. *Id.* at 51.

crimes against a child.⁵⁵ The Court decided that the right of confrontation allows a defendant the *opportunity for effective cross-examination* as opposed to cross-examination ultimately effective through any means the defendant may choose to employ.⁵⁶

The rights granted to the criminal defendant by the confrontation clause are accompanied by a host of exceptions denying that defendant full protection in a variety of situations.⁵⁷ Many of these exceptions to the judicially developed reading of the confrontation clause existed long before Congress adopted the sixth amendment in 1791. Moreover, in no way do these exceptions clash with the spirit of the clause.⁵⁸ In fact, in *Mattox*, the Court specifically stated that it must interpret the confrontation clause in the context of that law as it existed at the time of the adoption of the sixth amendment.⁵⁹ Other exceptions to the mandate of the confrontation clause have been delineated by the Supreme Court's interpretation of the clause when balanced against principles of justice.⁶⁰ A defendant can waive the right to confront adverse witnesses by failing to appear at trial,⁶¹ by disrupting the proceedings so drastically that the defendant's removal is required to continue the trial,⁶² by general misconduct,⁶³ by intimidating the witness,⁶⁴ or by pleading guilty.⁶⁵ Additionally, a vast assortment of hearsay evidence is admissible without violating the rights within the confrontation clause.⁶⁶ However, the Court's deci-

55. *Id.* at 43-44.

56. *Id.* at 53. The scope of the right of cross-examination is limited to the extent that the defendant has had an adequate occasion on which to cross-examine. Therefore, provided a defendant's reasonable questioning of an adverse witness commences and progresses unimpeded, the right of confrontation has not been abridged. The dissent in *Coy* noted that the recognized rights embodied in the confrontation clause were not violated. See *infra* notes 134-36 and accompanying text.

57. Most notable is the explanation in the *Mattox* opinion that the defendant's confrontation clause rights may be restricted if outweighed by a competing policy interest. *Mattox v. United States*, 156 U.S. 237, 243 (1895). See generally Griswold, *The Due Process Revolution and Confrontation*, 119 U. PA. L. REV. 711, 713-15 (1971) (tracing the development of judicial interpretation of the confrontation clause).

58. *Mattox*, 156 U.S. at 243.

59. *Id.*

60. Note, *supra* note 9, at 1009.

61. *Diaz v. United States*, 223 U.S. 442, 445 (1912).

62. *Illinois v. Allen*, 397 U.S. 337, 343, *reh'g denied*, 398 U.S. 915 (1970).

63. *Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934).

64. *United States v. Carlson*, 547 F.2d 1346, 1359-60 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977).

65. *McCarthy v. United States*, 394 U.S. 459, 466 (1969).

66. The numerous hearsay exceptions to the confrontation clause are outside the scope of this article. See generally, Kirkpatrick, *Confrontation and Hearsay: Exemptions from the Constitutional Unavailability Requirement*, 70 MINN. L. REV. 665

sion in *Cox v. Iowa* specifically excludes from these confrontation clause exceptions the operation of a shield statute. Thus, absent a sufficient showing of need to protect the child, a child witness must physically and visually confront the defendant while testifying.

III. STATEMENT OF THE CASE

A. Facts

On the afternoon of August 2, 1985, C.B.⁶⁷ began fashioning a home-made tent out of two toppled ping-pong tables.⁶⁸ The tent was built in the back yard, just a few feet from the back door of C.B.'s house.⁶⁹ Both C.B. and her father thought it odd that the next door neighbor, John Avery Coy,⁷⁰ had watched the young girl tailor her campsite.⁷¹

At about 9:00 p.m., C.B. and her friend, N.C., ventured into the backyard with sleeping bags, pillows, soda pop, two plastic cups, a battery-powered flashlight, and an electronic game. The girls drank some soda, played the game, and went to sleep.⁷² Some time later, the assailant entered the tent, grabbed the girls by the throats and told them not to scream or he would "knock [them] out."⁷³ The girls were directed to remove their clothes, at which time they were fondled repeatedly by their attacker.⁷⁴ The assailant removed his own clothes, lay down between the two girls and started kissing them. He then forced the girls to engage in oral sex with him and later di-

(1986); Myers, *Hearsay Statements by the Child Abuse Victim*, 38 BAYLOR L. REV. 775 (1986); Note, *Victimizing the Child Victim: Vermont Rule of Evidence 807 and Trauma in the Courtroom*, 11 VT. L. REV. 631 (1986).

67. Appellee's Brief at 3, *Coy v. Iowa*, 108 S. Ct. 2798 (1988) (No. 86-6757) [hereinafter *Brief*]; see also Trial Transcript at 73, *Coy* (No. 86-6757) [hereinafter *Transcript*]. In an attempt to preserve the anonymity of the girls, their names were redacted and replaced by initials. Consequently, the victims' names appear nowhere in the record. Additionally, the father of one of the abused girls is referred to only by initials as well.

68. *Brief*, *supra* note 67, at 3; see also *Transcript*, *supra* note 67 at 73. A blanket, draped over the top, completed the design. *Id.*

69. *State v. Coy*, 397 N.W.2d 730 (Iowa 1986). The backyard was encircled by trees, and the tent could not be seen from the street. *Brief*, *supra* note 67, at 3; see also *Transcript*, *supra* note 67, at 302, 314. The only other vantage point from where the makeshift fort could be seen was from next door, where the defendant lived. *Brief*, *supra* note 67, at 3.

70. John Avery Coy was the accused assailant, the defendant in the trial court, and the appellant in the Iowa State Supreme Court as well as the United States Supreme Court. See *Coy*, 108 S. Ct. at 2799-2800.

71. *State v. Coy*, 397 N.W.2d 730, 732 (Iowa 1986). Coy was rarely seen in his backyard, but on the afternoon of August 2, 1985, he sat in a chair and intently watched C.B. construct her tent. *Brief*, *supra* note 67, at 3; see also *Transcript*, *supra* note 67, at 314.

72. *Brief*, *supra* note 67, at 3; see also, *Transcript*, *supra* note 67, at 38-41, 80.

73. *Brief*, *supra* note 67, at 3. The attacker remarked that he had expected to find only one girl in the tent, not two. *Id.*; see also *Transcript*, *supra* note 67, at 41, 81.

74. *Brief*, *supra* note 67, at 3; see also *Transcript*, *supra* note 67, at 41-42, 81-82.

rected them to kiss each other "and act like they were enjoying it."⁷⁵ Shortly thereafter, while lying between the two girls, the assailant admonished them to tell nobody.⁷⁶ Next, the assailant began his search for a means of escape which would alert no one.⁷⁷

At 6:00 a.m., approximately fifteen minutes after the assailant had fled, the girls ran into the house and reported the incident to C.B.'s parents.⁷⁸ C.B.'s father told the police that he suspected Coy of the crime because Coy was the only other person who knew of the backyard campsite.⁷⁹ While the police questioned Coy, a background check revealed an outstanding arrest warrant had been issued for Coy's detention.⁸⁰ Coy was subsequently arrested and taken into custody; meanwhile, the investigation continued.⁸¹ Even though the girls could not identify Coy as their attacker,⁸² the evidence linking

75. *Brief, supra* note 67, at 3-4; *see also Transcript, supra* note 67, at 43, 84, 90. Next, the offender requested that the victims urinate on his face, but neither of the two could do so. Thereafter, the assailant urinated into one of the plastic cups that the girls had brought with them. *Brief, supra* note 67, at 4.

76. *Brief, supra* note 67, at 4; *see also Transcript, supra* note 67, at 45-46, 85. The attacker cautioned his victims that they would "go through a lot" if they told a soul. *Brief, supra* note 67, at 4. Fortunately, the warning did not deter the girls from reporting the crime immediately. *Id.* Their swift action played a vital part in Iowa's conviction of the defendant. However, the Supreme Court's holding frustrates the states' attempts to contain the ever-increasing crimes of child abuse. *See supra* note 2 and accompanying text.

77. *Brief, supra* note 67, at 4; *see also Transcript, supra* note 67, at 45, 85. The girls were ordered to lie on their backs and were then tied together with C.B.'s jogging pants. *Brief, supra* note 67, at 4. After having assaulted the girls for about ninety minutes, the assailant left the tent, but he warned the girls that he would return immediately. *Id.*

78. *State v. Coy*, 397 N.W.2d 730, 731-32 (Iowa 1986). The girls were taken to the hospital for a medical examination and the police were called immediately. *Id.* at 732.

79. *Id.* Armed with this information, the police soon found Coy leaving his home with a suitcase. Before Coy could leave, the police began asking him questions regarding the sexual assault of the two girls. *Id.*

80. *Id.* Although the warrant was based on a traffic violation, the officer fulfilled his duty by efficiently and properly arresting Coy and taking him into police custody. *Id.*

81. *Id.* C.B.'s father and a neighbor conducted their own cursory search of Coy's residence. *Id.* This search was completely independent of any police involvement. *Id.* The police neither asked the private citizens to conduct the search nor created any impermissible agency when the civilians took it upon themselves to conduct their own search for evidence. *Id.* Based on the fruits of the private search and other information linking Coy to the offense, the investigating officer obtained a search warrant for Coy's home. *Id.*

82. The girls' failure to identify Coy as the offender resulted from the following facts: (1) the tent in which the girls were assaulted was very dark; (2) the girls were strictly directed not to look at the assailant; (3) a flashlight was shined in their eyes whenever the girls tried to look at the molester; (4) the attacker wore a stocking over

Coy to the crime was overwhelming.⁸³

B. Iowa's Treatment

The Iowa trial court found Coy guilty of two counts of engaging in lascivious acts with children.⁸⁴ To secure the testimony of the two abused girls, the prosecution moved, pursuant to a newly enacted statute,⁸⁵ to have their testimony offered to the court via closed-circuit television or from behind a one-way screen.⁸⁶ The trial court approved the use of the screen; however, it would not allow the closed-circuit television procedure to be employed.⁸⁷ Coy strongly objected to the use of the screen on two grounds.⁸⁸ First, he claimed the screen violated his rights under the confrontation clause of the sixth amendment.⁸⁹ Second, he claimed that its presence alone denied him due process of law by turning a presumption of innocence into a presumption of guilt.⁹⁰ The trial court found against Coy on both claims and the Supreme Court of Iowa affirmed.⁹¹

his head during the assault. *Brief, supra* note 67, at 4-5; *see also Transcript, supra* note 67, at 46-49, 52, 59-60, 86-89, 96-97.

83. The following list includes some of the key items of evidence which connected Coy to the assault: (1) The girls' noticed that the attacker had worn his watch high on his forearm, almost to his elbow, with the face turned inward towards his body. When the police arrested Coy, he was wearing his watch in a similar fashion. (2) The flashlight initially brought into the tent by the girls, and used by the assailant to shine in the girls' eyes to prevent identification, was found in Coy's garage containing his fingerprints. (3) The batteries used by the girls in the flashlight and in the electronic game were also found in Coy's garage. (4) One of the plastic cups, brought to the tent by the girls and smelling of urine, was found in the trashcan inside the backdoor of Coy's house. (5) Pubic hairs not matching either girl were found in the bedding used in the tent. (6) A head hair, unlike that of either of the victims, and highly similar to Coy's, was found in the girls' shorts. *Brief, supra* note 67, at 5; *see also Transcript, supra* note 67, at 139, 141, 146, 149, 199-201.

84. *State v. Coy*, 397 N.W.2d 730 (1986). This crime is prohibited by Iowa Code section 709.8(1). IOWA CODE ANN. § 709.8(1) (1985).

85. Section 910A.14 of the Iowa Code provides, in part:

The court may require a party 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 testimony.

IOWA CODE ANN. § 910A.14 (West Supp. 1988).

86. *Coy v. Iowa*, 108 S. Ct. 2798, 2799 (1988).

87. The trial judge felt that the screen "seem[ed] the more moderate and least obtrusive approach." Joint Appendix of Trial Transcript at 6, *Coy v. Iowa*, 108 S. Ct. 2798 (1988) (No. 86-6757).

88. *Coy*, 108 S. Ct. at 2799.

89. *Id.*

90. *Id.*

91. *Id.* Although the trial court rejected Coy's due process argument, the judge did charge the jury that no inference was to be drawn from the presence of the screen during part of the trial proceedings. *Id.* at 2799-2800.

Notice of appeal to the Supreme Court of the United States was filed on March 5, 1987. Probable jurisdiction was noted on June 26, 1987. Jurisdiction was invoked

IV. ANALYSIS

A. *The Majority Opinion*

Justice Scalia,⁹² writing for the majority, held that the sixth amendment affords a criminal defendant the right to confront adverse witnesses face-to-face.⁹³ The Court also determined that the prosecution's screen, used during the trial to make testifying bearable for C.B. and N.C., violated Coy's right to confront witnesses face-to-face.⁹⁴ Finally, the Court reversed and remanded the case to the Iowa judiciary because the state's supreme court failed to address the issue of harmless error.⁹⁵

In an attempt to prove that an actual face-to-face meeting between the defendant and his accuser is required in all criminal trials,⁹⁶ and has always been required,⁹⁷ the majority referred to a panoply of historical derivations of the confrontation clause.⁹⁸ Justice Scalia asserted that the purpose of providing the references from the near and distant past was to communicate his feeling that face-to-face confrontation, as an essential means to a fair trial, is a concept of human

under 28 U.S.C. § 1257(2). On November 23, 1987, oral argument was set for January 13, 1988. On June 29, 1988, the Supreme Court decided the case.

92. Joining Justice Scalia were Justices Brennan, White, Marshall, Stevens, and O'Connor.

93. "[The Court has] never doubted . . . that the confrontation clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." *Coy*, 108 S. Ct. at 2798, 2800 (1988); see *Kentucky v. Stincer*, 107 S. Ct. 2658, 2668 (1987) (Marshall, J., dissenting).

94. *Coy*, 108 S. Ct. at 2802-03; see also *supra* notes 87-91 and accompanying text.

95. *Coy*, 108 S. Ct. at 2803. Justice Scalia complains that the Iowa Supreme Court failed to determine whether the violation to the confrontation clause was harmless beyond a reasonable doubt. See *Chapman v. California*, 386 U.S. 18, 24 (1967). The absence of this analysis from Iowa Supreme Court Chief Justice Reynoldson's opinion is easily explained by the fact that the state judicial system found no violation of the confrontation clause; therefore, such analysis was unnecessary.

96. The majority does recognize that the confrontation clause may be skirted away when the defendant's rights lose on balance with an important public policy. *Coy*, 108 S. Ct. at 2803.

97. See *supra* note 95.

98. "There are indications that a right of confrontation existed under Roman law." *Coy*, 108 S. Ct. at 2800. "It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges." *Id.* (quoting *Acts* 25:16). In addition, by addressing the Latin derivation of "confront," the Court found the right exists "[s]imply as a matter of Latin . . ." *Coy*, 108 S. Ct. at 2800. "Then call them to our presence—face-to-face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak . . ." *Id.* (quoting Shakespeare, *Richard II*, act 1, scene 1). "President Eisenhower once described face-to-face confrontation as a part of the code of his home town of Abilene, Kansas." *Id.* at 2801. The phrase still persists: "Look me in the eye when you say that." *Id.*

nature.⁹⁹ Based on this historical review and the colloquial phrase, “[i]t is always more difficult to tell a lie about a person ‘to his face’ than ‘behind his back,’ ”¹⁰⁰ Justice Scalia found that a criminal defendant must be afforded the right of face-to-face confrontation with all adverse witnesses.¹⁰¹

The Court qualified this holding slightly by remarking that a witness is not compelled to actually make eye-contact with the defendant.¹⁰² However, a witness’s failure to fix his eyes on the accused is subject to the constellation of inferences possibly drawn by a reasonable jury.¹⁰³ This reason, coupled with the element of cross-examination, is said to combine forces to guarantee the integrity of our American system of justice.¹⁰⁴ Apparently, the majority realized the adverse affect that this holding will have on “the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult.”¹⁰⁵

The Court’s holding that criminal defendants must have the oppor-

99. *Id.* at 2802.

100. *Id.*

101. *Id.* The majority believed and asserted that a lie told about a person to that person’s face will often be told less convincingly, as opposed to a lie told about a person behind that person’s back. *Id.* No authority is cited for this proposition. Presumably, the Court wants the American public to accept this assertion by finding support in that concept of human nature mentioned in the text accompanying note 99.

102. *Id.* This assertion defeats the majority’s position. The heart of Coy’s complaint is that the testifying girls cannot see him. The screen merely achieves, with a one-way mirror, what the girls could easily secure by themselves by hiding their eyes, thus safely avoiding eye contact with the defendant. The net effect of these procedures is identical. The method employed by the Iowa judiciary, pursuant to recent legislation, simply aided the court in seeking the truth by respecting the legitimate fear experienced by the two child victims. Therefore, the screen procedure caused no more damage to a criminal defendant’s confrontation clause rights than the testimony given by a witness who receives court permission to hide her eyes while testifying.

103. *Id.* The majority implied that an accusing witness at trial, who refuses to make eye contact with the accused, is more likely to be lying than the gallant witness who defiantly chooses to stare down the defendant. Again, no legal authority or statistics were offered to substantiate this assertion.

The same behavior is susceptible to numerous other interpretations. The majority chose to refer only to those which discredit witness testimony. The author asserts that an equal number of reasonable interpretations may be gleaned from this behavior, which effectively buttress the witness’s credibility. For example, such behavior may suggest that her fear of the defendant is genuine and that the accused is the guilty party.

104. *Id.* (citing *Kentucky v. Stincer*, 107 S. Ct. 2658, 2662 (1987)). Justice Scalia points out that Iowa can hardly disagree that the import of a face-to-face meeting between defendant and witness, in the case at bar, will have a “profound effect” on the witness’s testimony. *Coy*, 108 S. Ct. at 2802.

105. *Id.* This statement must be based on the majority’s feeling that concern over the health and safety of our children is either (1) a concern not “firmly rooted in our jurisprudence” (*id.* at 2803 (citing *Bourjaly v. United States*, 107 S. Ct. 2775, 2783 (1987))), or (2) a concern not of sufficient importance to warrant a partial, minor infringement of the defendant’s confrontation clause rights. *Coy*, 108 S. Ct. at 2803.

tunity to confront adverse witnesses face-to-face¹⁰⁶ made it easier to resolve the second issue: whether the screen violated Coy's right to confrontation. The screen, employed by Iowa's prosecutor, was utilized for the specific purpose of preventing either of the abused girls from seeing the accused.¹⁰⁷ Additionally, the judge in the trial court personally sat in the witness chair and determined that the shield successfully attained this objective.¹⁰⁸ Therefore, because of the preclusion of eyeball-to-eyeball confrontation, the Court found a violation of the defendant's confrontation rights.¹⁰⁹ The prosecution argued that the defendant's right to confrontation was outweighed by the state's interest in safeguarding its children against sexual abuse.¹¹⁰ However, the majority disposed of this argument by commenting that historically the Court has infringed on a defendant's confrontation rights only when the rights in question were "reasonably implicit,"¹¹¹ as opposed to the narrow and express rights that are clearly set forth in the confrontation clause.¹¹² The Court further stated that the search for conditions which would justify deny-

106. See *supra* note 93.

107. *Coy*, 108 S. Ct. at 2802.

108. Joint Appendix of Trial Transcript at 10-11, *Coy v. Iowa*, 108 S. Ct. 2798 (1988) (No. 86-6757). Additionally, the judge sat at the defense table while someone sat in the witness stand, and he determined that the defendant would be able to see the child witnesses. *Id.* at 10.

109. *Coy*, 108 S. Ct. at 2802. It should be noted that the Iowa statute which provided for the placement of the screen was not held to be unconstitutional. See *infra* note 191 and accompanying text.

110. *Coy*, 108 S. Ct. at 2802. This argument is based on the notion that the confrontation clause rights are not absolute and must be abridged should the facts of a particular case mandate. *Mattox v. United States*, 156 U.S. 237, 243 (1895); see also *supra* note 24 and accompanying text; see also *infra* note 128 and accompanying text.

111. *Coy*, 108 S. Ct. at 2802. In *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973), the Court reversed a state court's guilty verdict because the defendant was denied the opportunity to cross-examine an adverse witness. In *Ohio v. Roberts*, 448 U.S. 56, 63-65 (1980), the Court found that the preliminary hearing testimony of a now unavailable witness could be admitted as an exception to the hearsay rule over the defendant's complaint that he was denied the right to cross-examine the witness. In *Kentucky v. Stincer*, 107 S. Ct. 2658, 2664 (1987), the Court held that the defendant's confrontation clause rights were not abridged when the defendant was denied the opportunity to be present at a competency hearing for two child witnesses against him.

112. *Coy*, 108 S. Ct. at 2802. Justice Scalia's reasoning is premised on the notion that some confrontation clause rights are more important than others. He maintains that those rights narrowly defined and clearly set forth in the confrontation clause are never waived, regardless of the competing social policy at stake. Such a rationale is devoid of any merit or authority. Whereas some confrontation clause rights may be more essential than others, depending on the facts of a certain case; the determination of whether to abridge one of these rights rests with an analysis of the importance of the conflicting social policy when balanced against the challenged right. There is no authority for Justice Scalia's implied assertion that only those confrontation rights not

ing the defendant the right of face-to-face confrontation would necessarily be decided later.¹¹³

Iowa asserted another argument designed to demonstrate that the circumstances of this particular case justified depriving the defendant of his right of face-to-face confrontation.¹¹⁴ Specifically, the prosecution argued that the state statute itself, which authorized the placement of the screen, was sufficient evidence of the legislature's concern for reducing the trauma suffered by child witnesses.¹¹⁵ However, the demise of this argument resulted from the failure to make a sufficient showing of an important policy interest.¹¹⁶ Ultimately, the majority refrained from deciding the defendant's due process claim because the violation of Coy's right of face-to-face confrontation provided sufficient justification for the Court's decision.¹¹⁷

B. *The Concurring Opinion*

Justice O'Connor,¹¹⁸ while agreeing with the majority, wrote separately to stress the fact that the guarantees of the confrontation clause must occasionally be set aside for the purposes of furthering an important policy interest.¹¹⁹ However, she asserted that Iowa did not present a showing of need sufficient to abridge the defendant's

narrowly and clearly set forth in the language of the sixth amendment can be abridged. *Id.* at 2805 (O'Connor, J., concurring).

113. *Id.* at 2803. Justice Scalia's language seems to evidence his disbelief as to whether "any exceptions exist." *Id.* (emphasis added). Justice Scalia does recognize that conditions may arise which would permit abridging the defendant's confrontation clause rights. *Id.* Those conditions would naturally include the protection of a vital public interest. *Id.* (citing *Ohio v. Roberts*, 448 U.S. 56, 64 (1980); *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973)).

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

115. *Id.*

116. *Id.* The majority opined that more evidence relating to the seriousness of the trauma suffered by sexually abused child witnesses was needed to add strength to Iowa's argument. *Id.* Justice Scalia's reasoning was that exceptions to the confrontation clause, which are not "firmly . . . rooted in our jurisprudence" require a greater showing of need than the alleged "legislatively imposed presumption of trauma" created by the existence of the child shield statute. *Id.* (citing *Bourjaly v. United States*, 107 S. Ct. 2775, 2783 (1987)). Scalia further stated that the 1985 statute could not be considered firmly rooted. *Id.*

However, this reliance on the concept of "firmly . . . rooted in our jurisprudence" is misplaced. "[T]he concept of firmly rooted should not be synonymous with longevity." Goldman, *Not So "Firmly Rooted": Exceptions to the Confrontation Clause*, 66 N.C.L. REV. 1, 12 (1987). Additionally, the Wisconsin Supreme Court recently stated that " 'firmly rooted' does not turn upon how long the rule has been accepted but rather how solidly it is grounded on considerations of reliability and trustworthiness—the very reason for the right of confrontation." *State v. Wyss*, 124 Wis. 2d 681, 709-10, 370 N.W.2d 745, 759 (1985). Therefore, Justice Scalia's assertion that the 1985 Iowa statute representing legislative evidence of concern for the trauma suffered by abused child witnesses cannot be firmly rooted is subject to question.

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

118. Joining Justice O'Connor's concurrence was Justice White.

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

rights so as to justify the denial of face-to-face confrontation.¹²⁰

Justice O'Connor's concurrence more closely examined the societal interests competing with Coy's sixth amendment rights.¹²¹ Justice O'Connor reviewed the contemporary protective statutes and posited that such legislation is the result of many states' attempts to shield sexually abused children from the rigors of the courtroom.¹²² Justice O'Connor agreed with the dissent that the protection of sexually abused child witnesses is a policy of sufficient importance to justify the creation of an exception to the confrontation clause.¹²³

Significantly, Justice O'Connor stressed "that nothing in today's decision necessarily dooms such efforts by state legislatures to protect child witnesses."¹²⁴ While supporters of Iowa's position may disagree with Justice O'Connor's analysis, perhaps they may find solace in the Court's failure to declare the Iowa statute unconstitutional.¹²⁵ Many of today's statutes are free from the constitutional infirmity which plagued section 910A.14 of the Iowa Code.¹²⁶ Additionally, those statutes which inherently violate the confrontation clause may

120. *Id.* Justice O'Connor feels that reliance on the legislature's general concern for child abuse victims is not sufficient to infringe upon the defendant's right of confrontation. *Id.* (O'Connor, J., concurring). Some of the child shield statutes require a case-by-case determination of necessity and thereby prohibit automatic, broad application and ultimately result in fewer infringements on defendants' confrontation rights. *Id.* (O'Connor, J., concurring). See, e.g., CAL. PENAL CODE § 1347(d)(1) (West Supp. 1989); FLA. STAT. ANN. § 92.54(4) (West Supp. 1988); MASS. GEN. LAWS ANN ch. 278, § 16D(b)(1) (West Supp. 1988); N.J. STAT. ANN. § 2A:84A-32.4(b) (West Supp. 1988).

121. *Coy*, 108 S. Ct. 2803-05 (O'Connor, J., concurring). Justice O'Connor points out that as recently as the previous term a plurality of justices recognized that child abuse is one of the most difficult crimes to spot and prosecute, largely because the sexually abused child is the only witness. *Id.* at 2803-04 (O'Connor, J., concurring) (citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987); accord, Meyers, *Little Witnesses*, *STUDENT LAW.*, Sept. 1982, at 15; Note, *supra* note 7, at 806-07; Note, *Should a Two Year Old Take the Stand?*, 52 MO. L. REV. 207, 208, 221 (1987); Comment, *Preserving the Child Sexual Abuse Victim's Testimony: Videotaping is not the Answer*, 1987 DET. C.L. REV. 469, 472 n.11 (citing CLARK, *Family Court: Evidence in Sexual Abuse Cases*, in *CHILD SEXUAL ABUSE* 168 (1985)).

122. *Coy*, 108 S. Ct. at 2804 (O'Connor, J., concurring). See *supra* note 3 for a list of the existing, applicable state statutes and cases.

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

124. *Coy*, 108 S. Ct. at 2804 (O'Connor, J., concurring). The majority's opinion did not find the Iowa statute unconstitutional. Rather, the Court held that the use of the screen to prevent the victim from seeing the defendant in this particular case was a violation of Coy's confrontation clause rights. *Id.* at 2803.

125. Thus, legislators of a majority of the states need not be concerned at this time about the constitutionality of their child abuse shield statutes. Rather, their concern should focus on those statutes which affect or alter the traditional courtroom setting.

126. *Coy*, 108 S. Ct. at 2804 (O'Connor, J., concurring). Such shield laws provide for witness testimony to be given via closed-circuit television while the defendant is present. See, e.g., ALA. CODE § 15-25-3 (Supp. 1988); CAL. PENAL CODE § 1347 (West Supp.

be valid pursuant to an exception to the clause.¹²⁷ Furthermore, a trial procedure which alters the normal methods of obtaining witness testimony, by eliminating any face-to-face confrontation between the defendant and the accusing witness, may be essential to promote a vital societal interest when balanced against the right of an individual criminal defendant.¹²⁸

C. *The Dissenting Opinion*

Justice Blackmun's minority opinion¹²⁹ reviewed the guarantees incorporated into the confrontation clause,¹³⁰ the depth of intrusion into those guarantees,¹³¹ the majority's faulty analysis and reliance on questionable authority,¹³² and the reasons justifying a minor intrusion into the defendant's confrontation rights.¹³³

Initially, Justice Blackmun argued that the screen placed in front of the defendant during the testimony of the two sexually assaulted girls did not violate any of the recognized guarantees provided by the confrontation clause.¹³⁴ The girls' testimony was offered under oath, was subject to contemporaneous, adequate cross-examination, and occurred in plain view of the jury.¹³⁵ Additionally, the statutorily authorized procedure did not prevent Coy from viewing and listening to the abused children nor did it impair his ability to confer with his at-

1989); GA. CODE ANN. § 17-8-55 (Supp. 1988); N.Y. CRIM. PROC. LAW §§ 65.00-30 (McKinney Supp. 1988).

The Iowa statute also provides for witness testimony to be given via one-way, closed-circuit television. IOWA CODE § 910A.14 (1987). This part of the statute was not used despite a request by the prosecution. *Transcript, supra* note 67, at 2. While the trial judge felt that the television transmission procedure and the one-way screen procedure were unnatural, imposing alterations to the courtroom, he felt that the screen procedure was less intrusive. *Id.* at 6.

127. *Coy*, 108 S. Ct. at 2804 (O'Connor, J., concurring). Justice O'Connor does not make the same distinction as the majority regarding which of the rights embodied in the confrontation clause may be abridged. *Id.* (O'Connor, J., concurring); see also *supra* note 112. Justice O'Connor makes the following two assertions: (1) A right, even if it is considered to be at the core of the confrontation clause and therefore one of the most important rights found therein, is not absolute; and (2) Virtually all of the recognized exceptions to the confrontation clause involve important public policy areas. *Id.* at 2804-05 (O'Connor, J., concurring) (citing *Bourjaily v. United States*, 107 S. Ct. 2775 (1987); *California v. Green*, 399 U.S. 149, 157 (1970); *Dutton v. Evans*, 400 U.S. 74 (1970)).

128. *Coy*, 108 S. Ct. at 2805 (O'Connor, J., concurring) (citing *Ohio v. Roberts*, 448 U.S. 56, 63-64 (1980); *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973)).

129. Joining Justice Blackmun in the dissent was Chief Justice Rehnquist.

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

131. *Id.* at 2806-07 (Blackmun, J., dissenting).

132. *Id.* at 2806-08 (Blackmun, J., dissenting).

133. *Id.* at 2808-09 (Blackmun, J., dissenting).

134. *Id.* at 2806 (Blackmun, J., dissenting). The dissent states that the procedure, authorized by state statute, in no way interferes with the "purposes of confrontation." *Id.* (Blackmun, J., dissenting) (quoting *California v. Green*, 399 U.S. 149, 158 (1970)).

135. *Coy*, 108 S. Ct. at 2806 (Blackmun, J., dissenting); see *Green*, 399 U.S. at 158; see also *Lee v. Illinois*, 476 U.S. 530, 540 (1986); *supra* note 44 and accompanying text.

torney during the girls' testimony.¹³⁶ C.B. and N.C. were notified, pursuant to the state statute which authorized the alteration of the courtroom,¹³⁷ that the accused was seated directly behind the screen and could see and hear them while they gave their testimony.¹³⁸ Therefore, Coy's complaint was merely that the sexually abused girls could not see him during their testimony.¹³⁹ The majority's determination that Coy's interests necessarily required protection by forcing the two frightened, sexually molested, child victims to be able to see him while they testified "is not borne out by logic or precedent."¹⁴⁰

Justice Blackmun carefully noted that case law has determined that the confrontation clause contemplates a *preference* for face-to-face confrontation between witness and defendant.¹⁴¹ However,

136. *Coy*, 108 S. Ct. at 2806 (Blackmun, J., dissenting). Moreover, the screen did not prevent: (1) the girls and the judge from seeing and hearing each other; (2) the girls and both counsel from seeing and hearing each other; (3) the jury from hearing the testimony and viewing the demeanor of the girls and the defendant. *Id.* (Blackmun, J., dissenting). The Iowa Supreme Court stated that "[t]his screen allowed Coy to see the girls and hear their testimony but prevented them from seeing him." *State v. Coy*, 397 N.W.2d 730, 733 (Iowa 1986).

It was only the girls' opportunity to view the defendant which was denied. Moreover, the girls could have asked that the screen be removed. Since the testimony could have been offered with hand-covered eyes, the net effect would have been the same. *See supra* note 98. However, it seems unlikely that the majority would have found a sixth amendment violation had the girls and the prosecution opted for the "hand over the eyes procedure." The Court stated that "the Confrontation Clause does not compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere." *Coy*, 108 S. Ct. at 2802.

137. IOWA CODE ANN. § 910A.14 (West Supp. 1988). *See supra* note 84 for the applicable text of the statute.

138. *Coy*, 108 S. Ct. at 2806 (Blackmun, J., dissenting). The statute imposes a duty on the court to "inform the child that the party can see and hear the child during testimony." IOWA CODE ANN. § 910A.14(1).

139. *Coy*, 108 S. Ct. at 2806. Nowhere in the history of the interpretation of the confrontation clause had a court found that a criminal defendant had a constitutional right to *compel adverse witnesses to look at him while they testify*. If this "maverick" holding represents the majority's true intention, a number of puzzling questions arise. For instance, is the blind witness who cannot be compelled to view the defendant now incompetent to testify? Can a victim who prefers to look away from the defendant during her testimony now be forced by the court to stare down the accused as a condition precedent to allowing her testimony? Suppose a prosecutor stands between the sexually abused child witness and the accused as a tactic to lessen the victim's fears and anxieties inherently associated with testifying in a sexual abuse case. Does the prosecutor who effectively blocks the defendant's view of the victim, preventing the defendant and the testifying witness from gazing upon one another, create reversible error? Can a blind criminal defendant ever be afforded all of his rights under the confrontation clause?

140. *Id.*; *see supra* note 139.

141. *Coy*, 108 S. Ct. at 2806 (Blackmun, J., dissenting) (citing *Ohio v. Roberts*, 448 U.S. 56, 63-64 (1980)).

when the relative importance of this face-to-face preference is compared to the other confrontation clause rights, the faults in the majority's analysis become manifest.¹⁴² Justice Blackmun found two flaws in Justice Scalia's opinion regarding this preference issue. First, the state's interest in effective prosecution of child sexual abuse cases justifies the minor infringement into Coy's confrontation preference.¹⁴³ Second, the Court's preoccupation with whom the witness can or cannot see may distract state lawmakers from more important concerns.¹⁴⁴

The majority's description of Coy's complaint as revolving around "the irreducible literal meaning of the Clause"¹⁴⁵ was attacked by the dissent.¹⁴⁶ Additionally, Justice Scalia's insistence that the existence of "something deep in human nature"¹⁴⁷ mandates that a witness must look at the accused is thoroughly without legal precedent.¹⁴⁸ Justice Blackmun argued that the contrary is likely true, finding support from Professor Wigmore.¹⁴⁹ Wigmore's discussion of the right of confrontation considers as *latent and expendable* the sixth amend-

142. *Coy*, 108 S. Ct. at 2806. By the language of *Roberts*, the face-to-face notion embodied in the confrontation clause cannot be a firm constitutional guarantee. Had the Supreme Court wanted face-to-face confrontation to be included as one of the major guarantees of the confrontation clause, the opinion in *Roberts* would have so stated. However, the language of the opinion makes it clear that face-to-face confrontation is nothing more than a preference. *Roberts*, 448 U.S. at 63-64.

143. *Coy*, 108 S. Ct. at 2806 (Blackmun, J., dissenting). The state's interest was recognized long ago: "Significantly, every jurisdiction has a strong interest in effective law enforcement." *Roberts*, 448 U.S. at 64; see also *Mattox v. United States*, 156 U.S. 237, 243 (1895).

144. *Coy*, 108 S. Ct. at 2806 (Blackmun, J., dissenting). The majority's opinion makes a major problem out of a minor issue. The holding could serve to divert emphasis away from the more important concerns of the confrontation clause, such as the right to cross-examination or to allow the jury to ascertain veracity and credibility by viewing the demeanor of the testifying witness. *Id.* (Blackmun, J., dissenting).

145. *Id.* at 2803.

146. *Id.* at 2806-07 (Blackmun, J., dissenting). Justice Blackmun points out that this characterization is erroneous and is aptly displayed by the lack of binding authority to which the majority cites. *Id.* at 2806 (Blackmun, J., dissenting). Quotations from literature, anecdotes, and dissenting opinions may be interesting and informative; however, such sources are rarely valid authority for a majority of the Supreme Court to utilize as support for an opinion.

147. *Id.* at 2801.

148. *Id.* at 2807 (Blackmun, J., dissenting). The common law had no such interpretation of the right of confrontation. *Id.* (Blackmun, J., dissenting). In fact, "[t]here never was at common law any recognized right to an indispensable thing called confrontation as distinguished from cross-examination." *Id.* (Blackmun, J., dissenting); J. WIGMORE, *supra* note 40, § 1397 (emphasis in original). Additionally, Wigmore, a noted scholarly authority on the law, is imminently more persuasive than the majority's elaboration of President Eisenhower's tales of Kansas jurisprudence. *Coy*, 108 S. Ct. at 2807 (Blackmun, J., dissenting).

149. From the beginning of the hearsay rule in the early 1700's to the present day, confrontation has been provided "not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination . . ." J. WIGMORE, *supra* note 40, § 1395; see also *Davis v. Alaska*, 415 U.S. 308, 316 (1973).

ment right to require the presence of all adverse witnesses.¹⁵⁰ Furthermore, the prevalence of numerous exceptions to the hearsay rule frustrates the notion that the ability to see the defendant is an essential part of the confrontation clause.¹⁵¹

Justice Blackmun's analysis next considered the balance between the defendant's "preference for face-to-face confrontation at trial"¹⁵² and the state's interests, which dictate that the defendant's constitutional guarantees "must occasionally give way to considerations of public policy and the necessities of the case."¹⁵³ According to Justice Blackmun, Iowa's concern with the alarming escalation of incidents of child abuse, the difficulties inherent in prosecuting these cases, and the potential harm done to the unprotected child victim witness¹⁵⁴ outweighed Coy's narrow right.¹⁵⁵

Finally, the dissent took issue with the majority's determination that the state must establish individualized findings of necessity—that altering the courtroom is essential to promote the child's welfare.¹⁵⁶ Justice Blackmun noted that numerous hearsay exceptions can be employed in any sexual abuse case without an initial showing of need solely because the procedure is statutorily based.¹⁵⁷ More-

150. *Coy*, 108 S. Ct. at 2807 (Blackmun, J., dissenting) (citing J. WIGMORE, *supra* note 40, § 1399 (emphasis added)). A criminal defendant's right to force the testifying witness to look at him while offering testimony is never mentioned, suggesting that the importance of this right is subordinate even to the latent and dispensable portion of the confrontation clause. *Coy*, 108 S. Ct. at 2807 (Blackmun, J., dissenting).

151. *Id.* (Blackmun, J., dissenting). In *Dutton v. Evans*, 400 U.S. 74, 88-89 (1970), a co-conspirator's statement was held admissible even though the declarant was not in the courtroom and therefore could not be forced to look at the defendant while he testified.

152. *Coy*, 108 S. Ct. at 2808 (Blackmun, J., dissenting) (quoting *Ohio v. Roberts*, 448 U.S. 56, 63 (1980)).

153. *Coy*, 108 S. Ct. at 2808 (Blackmun, J., dissenting) (quoting *Mattox v. United States*, 156 U.S. 237, 243 (1895)).

154. *Coy*, 108 S. Ct. at 2808-09 (Blackmun, J., dissenting); *see supra* notes 1-4 and accompanying text.

155. *Coy*, 108 S. Ct. at 2809 (Blackmun, J., dissenting). On balance with the state's interest, Coy's grievance (that he was denied the opportunity to be in the sight of C.B. and N.C. while they testified against him) seems trifling. Additionally, authority exists which suggests that the reliability of the sexually abused child witness is enhanced when measures of protection are taken to ease the child's trauma. *See State v. Shepard*, 192 N.J. Super. 411, 416 (Law Div. 1984); Note, *Parent-Child Incest: Proof at Trial Without Testimony in Court by the Victim*, 15 U. MICH. J.L. REF. 131 (1981).

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

157. *Id.* (Blackmun, J., dissenting). Blackmun's argument is that provisions of the legislature which establish the requisite need to abridge the confrontation clause, and therefore apply to all child abuse prosecutions, are the norm. *Id.* Therefore, no justification exists for the majority's denial of the applicability of the child shield statute in question.

over, the majority supported its disfavor of the placement of the screen with the argument that because of its infancy, the 1985 Iowa statute cannot be "firmly rooted in our jurisprudence."¹⁵⁸ However, Justice Blackmun correctly stated that Justice Scalia's reliance on the "firmly rooted" concept is misplaced.¹⁵⁹ The concept does not apply when the reliability of the testimony offered is not in question.¹⁶⁰

V. IMPACT

There is no constitutional right to eyeball to eyeball confrontation. The choice of the words "face to face" may have resulted from an inability to foresee technological developments permitting cross-examination and confrontation without physical presence.

In the Eighteenth and Nineteenth Centuries, live testimony was the only way that a jury could observe the demeanor of a witness. The use of video tapes does not represent a significant departure from that tradition because the goal of providing a view of the witness's demeanor to the jury is still achieved.

*The intervention of a video screen or one-way mirror does not infringe upon the defendant's right to confrontation. There is a difference between confrontation and intimidation. It would be unconstitutional for the government to take evidence in secret and outside of the presence of the defendant, but there is no right to eyeball to eyeball presence.*¹⁶¹

The early confrontation clause cases were characterized by vigorous application and strict reading.¹⁶² This treatment began to change in the 1970's.¹⁶³ The Court's resolution of *California v. Green*¹⁶⁴ and

158. *Id.* at 2803 (quoting *Bourjaily v. United States*, 107 S. Ct. 2775, 2783 (1987)).

159. *Coy*, 108 S. Ct. at 2809 (Blackmun, J., dissenting). The concept refers only to those out-of-court statements introduced by the government which may lack trustworthiness. *Id.* (Blackmun, J., dissenting). In the case at bar, the girls' testimony is in no way without the sufficient indicia of reliability because the mandate of the confrontation clause was fulfilled: testimony was given under oath, within plain view of the jury, and subject to adequate cross-examination. *Id.* (Blackmun, J., dissenting); *see also supra* note 116 and accompanying text.

160. *Coy*, 108 S. Ct. at 2809 (Blackmun, J., dissenting). The remainder of the dissenting opinion discusses *Coy's* claim that the screen employed by Iowa was "inherently prejudicial," and therefore violative of his constitutional right to due process of law. *Id.* at 2809-10. While the dissent did not find this claim to be convincing, the majority never discussed the issue due to their holding on the confrontation clause issue. *Id.* at 2803.

161. *Commonwealth v. Willis*, 716 S.W.2d 224, 230-31 (Ky. 1986) (emphasis added) (statute allowing testimony of child abuse victim under twelve years of age to be presented by videotape, closed-circuit television or by in-court screening held constitutional).

162. "Early cases" refers to the time period from *Mattox*, decided in 1895, to *Pointer*, decided in 1965. *See supra* notes 20-38 and accompanying text.

163. *See generally* Lilly, *Notes on the Confrontation Clause and Ohio v. Roberts*, 36 U. FLA. L. REV. 207, 219 (1984) (discussing the Supreme Court's decision in the *Roberts* case and its suspected effect on future confrontation clause issues).

164. 399 U.S. 149 (1970) (out-of-court statements may be admitted in court without violating the confrontation clause of the sixth amendment as long as declarant testifies at trial subject to cross-examination).

*Dutton v. Evans*¹⁶⁵ marked the beginning of this shift in the Supreme Court's approach to confrontation clause cases.¹⁶⁶ *Coy* is an unexplained retreat by the Court back to pre-1970 analysis of confrontation clause issues. Instead of encouraging innovative courtroom techniques designed to promote the determination of the truth, the protection of vulnerable witnesses, and judicial economy, the court has quelled the progress made by the states in prosecuting sexual assault cases.

The Court also announces a new hurdle which it finds in the language of the confrontation clause: actual face-to-face confrontation.¹⁶⁷ The phrase "face-to-face confrontation" cannot be found in the language of the sixth amendment.¹⁶⁸ Moreover, the Court announces no test nor gives any factors or guidelines to determine when actual face-to-face confrontation has been achieved.¹⁶⁹ Whereas *Ohio v. Roberts*¹⁷⁰ states a preference for face-to-face confrontation, the Court should always remember that the rights guaranteed by the confrontation clause are not absolute.¹⁷¹

By holding that the screen violated Coy's right of face-to-face confrontation, the majority has become careless and cavalier with their language. The statutorily-authorized Iowa procedure destroys face-to-face confrontation between the complaining witness and the criminal defendant in a manner indistinguishable from a variety of judicially sanctioned procedures.¹⁷² It would be more accurate to say that the screen, as well as the other barriers which defeat face-to-face confrontation, merely curtail the witness's opportunity to make eye contact with the defendant. Just as the witness may remove her hand from covering her eyes, she may also look up from the ground, ask the prosecutor not to stand between her and the defendant while she testifies; or ask that the protective screen be removed from the courtroom. As long as she remains in the courtroom, it simply does

165. 400 U.S. 74 (1970) (right of confrontation not violated by out-of-court statements placed before the jury if they bear indicia of reliability).

166. Lilly, *supra* note 163, at 219.

167. *Coy v. Iowa*, 108 S. Ct. 2798, 2802 (1988). Presumably, this new requirement cannot apply to admissible hearsay if the declarant is unavailable at trial. If the Court intended the new hurdle to apply to hearsay evidence as well, then the scope of the confrontation rights have been greatly increased.

168. See *supra* note 5 for the text of the confrontation clause.

169. Apparently, the use of the screen violated Coy's right of face-to-face confrontation. *Coy*, 108 S. Ct. at 2802; see *supra* note 139.

170. 448 U.S. 56 (1980).

171. *Mattox*, 156 U.S. 237, 243 (1895).

172. See *supra* notes 102 and 139.

not matter which device the witness employs to diminish her opportunity to view the defendant because each achieves the desired effect: operative reduction of the witness's fear of the defendant.

Moreover, the Court's holding in *Coy* is further damaging to sixth amendment jurisprudence because the majority confuses a child victim's legitimate fear of a criminal defendant with a perceived propensity to lie.¹⁷³ Whether "there is something deep in human nature that regards face-to-face confrontation between accused and accuser,"¹⁷⁴ a necessary part of the criminal trial process is independent of the court's and the prosecution's need to protect child witnesses in sexual abuse cases. The screen allays a child victim's fear so that live court testimony becomes possible. The screen does not function as a vehicle to encourage false testimony.¹⁷⁵

Face-to-face confrontation is achieved when the defendant and the witness are in the same room because they are able to communicate effectively with no barriers or restrictions which would deny them the full opportunity for a clear understanding of what the other is saying. Under this definition of face-to-face confrontation, *Coy* was afforded all of his confrontation rights at trial. However, if an "eyeball-to-eyeball" requirement is added to the above definition, *Coy*'s rights were abridged at trial. Yet, no possible benefit is secured by this additional requirement.¹⁷⁶

Obviously, the prosecutors will not benefit from the "eyeball-to-eyeball" requirement. This obstacle prevents most of the sexual abuse cases from ever getting to trial.¹⁷⁷ The criminal defendant receives the only benefit: the constitutional right to intimidate the witness. The author doubts that this effect is a true manifestation of the Supreme Court's intent, but this effect is the eventual result of such a holding.

Coy is an aberration in a long line of confrontation clause cases. As recently as 1985, in *Delaware v. Fensterer*,¹⁷⁸ the Court stated that the confrontation clause merely affords "an opportunity for effective cross-examination, not cross-examination that is effective in

173. See *supra* notes 97-101 and accompanying text.

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

175. The protective screen aids the giving of testimony just as a policeman's firearm facilitates effective law enforcement. Abuse of either faculty is possible; therefore, the Court is justified in balancing a criminal defendant's constitutional rights against a prosecutor's employment of a protective screen or an officer's use of a firearm.

176. This article briefly discussed the trauma which abused children suffer when exposed to the courtroom environment. See *supra* note 10. Certainly the addition of an "eyeball-to-eyeball" requirement will not benefit the abused child witness. In fact, this hurdle is precisely what keeps many legitimate cases from going to trial. See *supra* note 10.

177. See *supra* notes 2, 4, 10 and 11 and accompanying text.

178. 474 U.S. 15 (1985).

whatever way and to whatever extent the defense might wish."¹⁷⁹ A criminal defendant should not be afforded a constitutional right to intimidate a witness.

The majority's ignorance of the language in *Globe Newspaper Co. v. Superior Court*,¹⁸⁰ which states that the policy of "safeguarding the physical and psychological well-being of a minor is a compelling one,"¹⁸¹ is further evidence that the *Coy* decision is inconsistent with current confrontation clause analysis.¹⁸² In *Globe Newspaper*, Chief Justice Burger remarked that "a state certainly should be able to take whatever reasonable steps it believes are necessary to reduce the trauma [suffered by children giving testimony]."¹⁸³ "It is difficult to imagine a more heinous or morally reprehensible crime [than sexual abuse of young children], or one which elicits such a storm of anger and disgust from the public, along with loud demands for retribution."¹⁸⁴ If the opinion in *Coy* is interpreted to say that legislation aimed at protecting children will not suffice as an important policy consideration capable of abridging the defendant's confrontation clause rights, a vast array of state law is in peril.¹⁸⁵

Decisions from lower courts throughout the nation have uniformly held that statutes similar to the Iowa statute in question are not violative of the defendant's right of confrontation.¹⁸⁶ Many of the lower courts support their decisions with the policy argument that the

179. *Id.* at 20 (emphasis in original).

180. 457 U.S. 596 (1982).

181. *Id.* at 607.

182. For some reason, the majority in *Coy* failed to identify the protection of C.B. and N.C. as an important social policy. Rather, the Court glossed over this issue declaring that the determination of "whether any exceptions exist" would be dealt with at another time. *Coy v. Iowa*, 108 S. Ct. 2798, 2803 (1988) (emphasis added).

183. *Globe Newspaper*, 457 U.S. at 619 (Burger, C.J., dissenting).

184. Note, *Should a Two Year Old Take the Stand?*, 52 MO. L. REV. 207, 207 (1987) (discussing issues presented when the only witness to the crime of child abuse is the victim of the crime and advancing methods for eliciting child testimony).

185. See *supra* note 5. Even though the Iowa statute was not declared unconstitutional, such a narrow interpretation of the *Coy* opinion could have far reaching, adverse effects. Specifically, none of the child shield laws would be useful and years of effort and progress will have been needlessly and carelessly erased.

186. Note, *McGuire v. State: Arkansas Child Abuse Videotape Deposition Laws—Room for Improvement*, 41 ARK. L. REV. 155 (1989); see, e.g., Appeal in Pinal County Juvenile Action Nos. J-1123 & J-1124, 147 Ariz. 302, 709 P.2d 1361 (Ariz. Ct. App. 1985); *Chambers v. State*, 504 So. 2d 476 (Fla. Dist. Ct. App. 1987); *People v. Johnson*, 146 Ill. App. 3d 640, 497 N.E.2d 308 (1986); *State v. Johnson*, 240 Kan. 326, 729 P.2d 1169 (1986); *Commonwealth v. Willis*, 716 S.W.2d 224 (Ky. 1986); *State v. Daniels*, 484 So. 2d 941 (La. Ct. App. 1986); *State v. Warford*, 223 Neb. 368, 389 N.W.2d 575 (1986); *State v. Sheppard*, 197 N.J. Super. 411, 484 A.2d 1330 (Law Div. 1984); *State v. Vigil*, 103 N.M. 583, 711 P.2d 28 (Ct. App. 1985); *People v. Henderson*, 132 Misc. 2d 390, 503 N.Y.S.2d

existence of a child shield statute is strong evidence of public concern for the problem of child sexual abuse.¹⁸⁷ The Supreme Court thus stands alone in its analysis and resolution of *Coy*. The Court failed to see the evidence which aptly demonstrated the magnitude of the public's concern for the protection of our children. Specifically:

(1) Shield laws exist in forty-two of the states, not solely in the state of Iowa.¹⁸⁸

(2) An amicus brief, filed on behalf of the State of Iowa, was offered by the Attorneys General from thirty-five states.¹⁸⁹

(3) The various crimes of sexual abuse of a child are often akin to rape. Our legislators have been hard at work trying to protect rape victims in much the same way that Iowa has tried to help child abuse victims. "Perhaps at no time in history has there been more change in the legal response to the crime of rape than in the past fifteen years."¹⁹⁰

(4) An amicus brief, filed on behalf of the State of Iowa, was offered by Judge Schudson of the Wisconsin judiciary. The judge is a noted author and expert on the subject of child victim witness testimony and a competent jurist.¹⁹¹

Coy's counsel before the Supreme Court was Paul Papak.¹⁹² In a news article discussing the case, before the argument was given to the Supreme Court,¹⁹³ Papak himself felt that the confrontation clause argument was the weaker of Coy's two claims of error.¹⁹⁴ For proponents of Iowa's case, the most soothing aspect of the holding in *Coy* was the failure of the Court to declare the Iowa shield statute unconstitutional. Perhaps legislators in the several states can find solace in knowing that their legislation is not per se unconstitutional. However, as the law stands, a particularized showing of need is necessary before a child shield law may be employed. The amount of evidence in *Coy* displaying the state's interest and enumerating the scope of the need to protect the two young girls was held to be insuf-

238 (N.Y. Sup. Ct. 1986); *Commonwealth v. Ludwig*, 366 Pa. Super. 361, 531 A.2d 459 (1987); *State v. Cooper*, 291 S.C. 351, 353 S.E.2d 451 (1987).

187. The majority in *Coy* refused to recognize protection of the child victim witness as an important social policy. See *supra* notes 114-16 and accompanying text.

188. See *supra* note 3.

189. The Attorneys General from the following states contributed to Iowa's cause: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Montana, Nevada, New Jersey, North Carolina, North Dakota, Pennsylvania, South Dakota, Tennessee, Utah, Vermont, Virginia, Virgin Islands, Washington, West Virginia, Wyoming.

190. Note, *Rape Victim Confrontation*, 1985 UTAH L. REV. 687, 688 (discussing the validity and the effect of the recent rape shield legislation). "In response, a large majority of states and the United States Congress have enacted various 'rape shield statutes' designed to limit inquiry into a complaining witness' prior sexual behavior." *Id.* at 689; see also FED. R. EVID. 412.

191. See Schudson, *supra* note 1.

192. *Coy v. Iowa*, 108 S. Ct. 2798, 2799 (1988). Mr. Papak is a professor of law at Iowa State University School of Law.

193. Coyle, *Application of Confrontation Clause, A Difficult Issue in Child Abuse Cases*, Nat'l L.J., Nov. 2, 1987, at 1, col. 2.

194. *Id.* at 10, col. 1.

ficient to justify a minor infringement on Coy's confrontation rights.¹⁹⁵

VI. CONCLUSION

The Supreme Court's holding in *Coy v. Iowa* is infected with faulty reasoning and is inconsistent with contemporary, mainstream confrontation clause analysis. The Court's addition to the constellation of rights embodied in the confrontation clause of the sixth amendment creates more questions than it answers. For example, when is actual face-to-face confrontation achieved? The new requirement of actual face-to-face confrontation is not supported by logic nor is it founded on legal precedent. In addition, conditioning the use of a protective child shield statute at trial on a particular showing of need may create an insurmountable burden for states with legitimate, vital interests to protect.

The Court failed to clearly define what purpose could possibly be served by granting a criminal defendant the right to actual face-to-face confrontation while it simultaneously ignored the need to protect child victim witnesses. The majority's unsupported discussion of how the new addition to the right of confrontation will facilitate proper and effective use of cross-examination is illogical and erroneous. *Coy's* addition to this area of the law is not logical, but deviates from a long line of case law and ultimately adds a right that exists solely by itself. It appears that the Supreme Court has created a constitutional right of intimidation.¹⁹⁶

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195. The author questions how detailed a particularized showing of need must be before the Court will allow a minor infringement. Apparently, in cases where a major infringement is sought, a greater showing of need to protect the victim witness is required. In *Coy*, the Supreme Court may have established an insurmountable burden for the states.

196. At the time of this publication, the Iowa Supreme Court had reviewed the case in light of the United States Supreme Court's holding. *State v. Coy*, 433 N.W.2d 714 (Iowa 1988). After excusing the testimony received while the protective screen was in place, Justice Harris of the Iowa judiciary held that the remaining evidence at trial merely linked John Coy to the crime. *Id.* at 715. "The remaining evidence was clearly not so overwhelming that it can be said beyond a reasonable doubt that the defined error did not contribute to the jury's finding of guilt." *Id.* The case is currently on remand to the trial court.

