

**Defendant's Right to Confront the Witnesses Against Him--Is  
There an Exception Behind the Screen?: Coy v. Iowa**

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# DEFENDANT'S RIGHT TO CONFRONT THE WITNESSES AGAINST HIM—IS THERE AN EXCEPTION BEHIND THE SCREEN?: COY V. IOWA

The confrontation clause of the sixth amendment guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”<sup>1</sup> Supreme Court decisions interpreting the clause have established that it provides a criminal defendant with the right of cross-examination,<sup>2</sup> the right to have the jury observe the demeanor<sup>3</sup> of a dam-

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<sup>1</sup> U.S. CONST. amend. VI. The accused's right to confront the witnesses against him is a fundamental right and applies to the states through the fourteenth amendment. *Pointer v. Texas*, 380 U.S. 400, 403-06 (1965). The precise origin of the confrontation clause has confounded commentators for centuries. See F. HELLER, *THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES* 104 (1951). Heller asserts that dissatisfaction with the evidence admitted at the trial of Sir Walter Raleigh provided the impetus for including the sixth amendment in the Bill of Rights. *Id.* Raleigh had been tried for high treason on November 17, 1603. See Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99, 99-100 (1972). The confession of an alleged coconspirator, Lord Cobham, was the only evidence against Raleigh. *Id.* at 100. When Lord Cobham's *ex parte* written statement was used against him, Raleigh demanded that the accused be required to confront him, stating: "The proof of the Common Law is by witness and jury; let Cobham be here, let him speak it. Call my accuser before my face, and I have done." *Id.* (quoting 2 T. HOWELL, *STATE TRIALS* 15-16 (1816)). Other commentators, however, have concluded that there is little reason to believe that the confrontation clause was designed to prevent reoccurrences of the abuses present at Raleigh's trial. Larkin, *The Right of Confrontation: What Next?*, 1 TEX. TECH L. REV. 67, 70 (1969) (reviewing history of sixth amendment to show insufficient evidence warranting common perception that Raleigh case influenced drafters of confrontation clause). Most authorities agree simply that the intention of the framers in drafting the clause is uncertain. See, e.g., Baker, *The Right to Confrontation, The Hearsay Rules, and Due Process—A Proposal for Determining When Hearsay May Be Used in Criminal Trials*, 6 CONN. L. REV. 529, 532 (1974) (historical record fails to expose intent of draftsmen behind confrontation clause); Note, *Confrontation, Cross-Examination, and the Right to Prepare a Defense*, 56 GEO. L.J. 939, 953 (1968) (historical evidence fails to adequately explain whether drafters intended confrontation clause to secure right of confrontation in addition to cross-examination); Note, *Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials*, 113 U. PA. L. REV. 741, 742 (1965) (language of confrontation clause is ambiguous because words only expressly guarantee defendant right to be present, without opportunity for cross-examination).

<sup>2</sup> See *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987); *Delaware v. Van Arsdall*, 475 U.S. 673, 678-79 (1986); *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973); *Dowdell v. United States*, 221 U.S. 325, 330 (1911); see also Griswold, *The Due Process Revolution and Con-*

aging witness,<sup>4</sup> and the right to a face-to-face encounter with his accuser.<sup>5</sup> The only acceptable limitations on these rights are the admission into evidence of certain hearsay statements<sup>6</sup> and a few restraints on the scope of cross-examination.<sup>7</sup> Recently, in *Coy v. Iowa*,<sup>8</sup> the Supreme Court held that the placement of a screen between a defendant and an allegedly sexually abused child witness during the child's testimony, which prevented the witness from observing the defendant, violated the defendant's constitutional right to a face-to-face confrontation.<sup>9</sup>

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*frontation*, 119 U. PA. L. REV. 711, 713-26 (1971) (reviewing court decisions demonstrating Supreme Court's evolving interpretation of relationship between right of confrontation and cross-examination).

Professor Wigmore claimed the right of confrontation primarily encompassed the right of cross-examination:

Now confrontation is, in its main aspect, *merely another term for cross-examination*. It is the preliminary step to securing the opportunity of cross-examination, and so far as it is essential, this is only because cross-examination is essential. The right of confrontation is the right to the opportunity of cross-examination.

5 J. WIGMORE, EVIDENCE § 1366, at 28 (J. Chadbourn rev. ed. 1970). Wigmore's reduction of confrontation rights to that of mere cross-examination has been vigorously criticized. See Graham, *supra* note 1, at 104 (Wigmore's interpretation "highly partisan and probably inaccurate"); Larkin, *supra* note 1, at 69 n.9 (1969) (authorities relied upon by Wigmore not supportive of his conclusion).

<sup>2</sup> See *California v. Green*, 399 U.S. 149, 158 (1970); *Mattox v. United States*, 156 U.S. 237, 242-43 (1895).

<sup>4</sup> See *Cruz v. New York*, 481 U.S. 186, 190 (1987). The Court said that a witness would be considered "against" a defendant "for purposes of the Confrontation Clause only if his testimony is part of the body of evidence that the jury may consider in assessing his guilt." *Id.*; see also *Richardson v. Marsh*, 481 U.S. 200, 206 (1987) (pretrial confession of one co-defendant not admissible against the other unless confessor takes stand).

<sup>5</sup> See *Ritchie*, 480 U.S. at 51.

<sup>6</sup> See *Dutton v. Evans*, 400 U.S. 74, 83-90 (1970); *Green*, 399 U.S. at 158. In *Green*, the Supreme Court held that the "Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination." *Id.*

<sup>7</sup> See *Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986). The *Van Arsdall* Court stated that a trial judge may impose reasonable limits on defense counsel's inquiry. *Id.* It is generally agreed that the trial court has broad discretion over the scope of cross-examination. See *United States v. Bright*, 630 F.2d 804, 816-17 (5th Cir. 1980). Nevertheless, certain limitations on a defendant's ability to cross-examine the witnesses against him could violate his right of confrontation. See *Davis v. Alaska*, 415 U.S. 308, 319-20 (1974). "The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness." *Id.* at 320; see also *Chavis v. North Carolina*, 637 F.2d 213, 225-26 (4th Cir. 1980) (refusal to allow defendant to cross-examine witness regarding special treatment received from police violated defendant's sixth amendment rights because defendant unable to attack witness' credibility).

<sup>8</sup> 108 S. Ct. 2798 (1988).

<sup>9</sup> *Id.* at 2802.

In *Coy*, the defendant was charged with sexually assaulting two thirteen-year-old girls.<sup>10</sup> At trial, the prosecution moved to allow the child witnesses to testify in accordance with the procedures set forth in a recently enacted Iowa statute.<sup>11</sup> The statute allowed children to testify from behind a screen which enabled the defendant to see and hear the children, but prevented the children from seeing or hearing the defendant.<sup>12</sup> The trial court rejected the defendant's contention that this procedure violated his right under the confrontation clause to a face-to-face confrontation,<sup>13</sup> and allowed the child witnesses to testify from behind the screen.<sup>14</sup> The jury returned a verdict against the defendant.<sup>15</sup> On appeal, the Iowa Supreme Court affirmed the defendant's conviction, rejecting his constitutional claim on the ground that his ability to cross-examine the child witnesses had not been restricted.<sup>16</sup> The Supreme Court of the United States reversed.<sup>17</sup>

Writing for the Court, Justice Scalia explained that while the Court has primarily been called upon to consider the confrontation clause in the context of admissibility of hearsay statements and limitations upon the scope of cross-examination,<sup>18</sup> these are not

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<sup>10</sup> *Id.* at 2799. The incident allegedly occurred while the girls were camping in the backyard of a house next door to that of the defendant. *See id.* The girls said their assailant entered their tent after they had fallen asleep but that they were unable to identify him because he wore a stocking over his face. *See id.*

<sup>11</sup> *Id.* Under the Iowa Code, a child witness may testify via closed circuit television or from behind a screen. IOWA CODE § 910A.14 (1988). Besides Iowa, twenty states have enacted statutes allowing a sexually-abused child to testify without seeing or hearing the defendant. *See Coyle, Application of Confrontation Clause: A Difficult Issue in Child Abuse Cases*, Nat'l L.J., Nov. 2, 1987, at 1, col. 2. Only Iowa has adopted the screening device, however. *Id.* In *People v. Rivera*, decided in light of *Coy*, a New York court held that New York's "two way" closed circuit television procedure did not violate defendant's constitutional right to confrontation. 535 N.Y.S.2d 909, 912 (Sup. Ct. Bronx County 1988).

<sup>12</sup> IOWA CODE § 910A.14(1) (1988). Section 910A.14 of the Iowa Code also provides that if the witness testifies in this manner the defendant and his counsel must be able to speak with each other during the testimony and the child must be told that the defendant can see him and hear the testimony. *Id.*

<sup>13</sup> *See Coy*, 108 S. Ct. at 2799-2800. The trial court rejected the defendant's claim, but instructed the jury not to infer guilt from the use of the procedure. *See id.*

<sup>14</sup> *See id.* at 2799.

<sup>15</sup> *See id.*

<sup>16</sup> *See id.* at 2800. The Iowa Supreme Court also found that the use of the procedure was not inherently prejudicial and, therefore, did not violate defendant's presumption of innocence. *Id.*

<sup>17</sup> *See id.* at 2803. The Court remanded, asking the Iowa Supreme Court to decide if the trial court's error was harmless beyond a reasonable doubt. *See id.*

<sup>18</sup> *See id.* at 2800.

the most significant aspects of the clause.<sup>19</sup> Rather, Justice Scalia declared that it is the defendant's right to a face-to-face encounter with an adversary witness that is at the "core" of a defendant's confrontation rights,<sup>20</sup> as that right serves to "ensure the integrity of the fact-finding process."<sup>21</sup> Justice Scalia then determined that the one-way screening procedure authorized by the Iowa statute violated the defendant's right of confrontation because it allowed the adverse witness to testify without facing the defendant.<sup>22</sup> Without deciding whether an exception would be available when there is a compelling state interest to protect child victims of sexual abuse,<sup>23</sup> Justice Scalia found the statute under consideration

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<sup>19</sup> See *id.* Justice Scalia suggested there is "at least some room for doubt" as to whether these elements are included within the confrontation clause. *Id.*

<sup>20</sup> *Id.* at 2801. Justice Scalia relied on several prior decisions of the Court which demonstrated the Court's consistent view that the right of confrontation is a fundamental right contained within the confrontation clause. *Id.* at 2801-02. For example, in *Kirby v. United States*, the Court stated that under the clause, "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, whom he is entitled to cross-examine, and whose testimony he may impeach." 174 U.S. 47, 55 (1899). In *California v. Green*, the Court noted that the defendant's right to confront the witnesses against him forms "the core of the values furthered by the Confrontation Clause." 399 U.S. 149, 157 (1970). Moreover, in *Pennsylvania v. Ritchie*, the Court said the defendant's right to physically confront the witnesses against him was one of two protections afforded defendants by the confrontation clause. 480 U.S. 39, 51 (1987).

<sup>21</sup> *Coy*, 108 S. Ct. at 2802 (quoting *Kentucky v. Stincer*, 107 S. Ct. 2658, 2662 (1987)). Justice Scalia asserted that "confrontation is essential to fairness" because a witness is more likely to tell the truth when testifying face-to-face with the defendant. *Id.* Although Justice Scalia recognized that testifying face-to-face with the defendant may be emotionally upsetting, he stressed the ultimate fact that the face-to-face confrontation requirement may also expose a witness who is lying or who has been coached. *Id.* Thus, Justice Scalia felt the stress a witness may suffer as a result of testifying in front of the defendant is a reasonable cost of the protection afforded the defendant. See *id.*; see also *Kentucky v. Stincer*, 107 S. Ct. 2658, 2662 (1987) (confrontation clause reflects attempt to protect accuracy of "truth-finding functions of a criminal trial"); *Lee v. Illinois*, 476 U.S. 530, 540 (1986) (right to confront and cross-examine "is primarily a functional right that promotes reliability in criminal trials").

<sup>22</sup> *Coy*, 108 S. Ct. at 2802. Justice Scalia believed that it would be "difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter." *Id.*

<sup>23</sup> *Id.* at 2803. Justice Scalia noted that the Court has previously acknowledged exceptions to the rights conferred by the confrontation clause. *Id.* at 2802. However, he distinguished these cases from the case at hand:

The rights referred to in those cases . . . were not the right narrowly and explicitly set forth in the Clause, but rather rights that are, or were asserted to be, reasonably implicit—namely, the right to cross-examine; the right to exclude out-of-court statements; and the asserted right to face-to-face confrontation at some point in the proceedings other than the trial itself.

*Id.* at 2802-03 (citations omitted). Justice Scalia explained that while the Court has ex-

unconstitutional in any event because it failed to require individualized findings as to the necessity of protecting the particular child witness.<sup>24</sup>

Justice O'Connor, joined by Justice White, concurred, agreeing with the majority that the defendant has a right to a face-to-face encounter with the witnesses against him,<sup>25</sup> but emphasizing that the right is not absolute.<sup>26</sup> She further maintained that upon a case-specific finding of necessity, an exception might properly be made to further the state's interest in protecting child witnesses.<sup>27</sup>

Justice Blackmun, joined by Chief Justice Rehnquist, dissented, arguing that the defendant's right to a face-to-face encounter was not at the "core" of the rights afforded by the confrontation clause.<sup>28</sup> Thus, he found that as with the other rights

amined other important interests in determining "what implications are reasonable," this does not mean the Court has authorized an all-encompassing exception to the defendant's right to confront the witnesses against him. *Id.* at 2803. Justice Scalia decided to "leave for another day . . . the question whether any exceptions exist." *Id.*

<sup>24</sup> *Id.* Justice Scalia declared that if an exception were permissible, it would only be allowed where "necessary to further an important public policy." *Id.* Moreover, while Iowa had an interest in protecting child sexual abuse victims, it failed to show that the procedures authorized by the statute were necessary under these circumstances. *Id.* Thus, Justice Scalia concluded, "[s]ince there have been no individualized findings that these particular witnesses needed special protection, the judgment here could not be sustained by any conceivable exception." *Id.*

<sup>25</sup> *Id.* at 2805 (O'Connor, J., concurring). Justice O'Connor also agreed with the majority that the defendant's right to confront the adverse witnesses was violated in this case. *Id.* at 2804 (O'Connor, J., concurring).

<sup>26</sup> *Id.* at 2804 (O'Connor, J., concurring). Justice O'Connor said the Court has often stated "that the Clause 'reflects a preference for face-to-face confrontation at trial,' and [has] expressly recognized that this preference may be overcome in a particular case if close examination of 'competing interests' so warrants." *Id.* (O'Connor, J., concurring) (quoting *Ohio v. Roberts*, 448 U.S. 56, 63-64 (1980)). Thus, simply because the right is expressly stated in the confrontation clause does not mandate a conclusion that the right is absolute. *See id.* at 2804-05 (O'Connor, J., concurring).

<sup>27</sup> *Id.* (O'Connor, J., concurring). Justice O'Connor recognized the growing problem of child sexual abuse. *See id.* at 2803 (O'Connor, J., concurring). Prosecuting child sexual abuse offenders presents unique problems because of both the difficulty in detecting the crime when the child is the only witness and, even if it is detected, the fear of further traumatizing the child by following traditional trial procedures. *Id.* at 2803-04 (O'Connor, J., concurring). As a result, many states have enacted statutes authorizing procedures designed to protect the child witness from further psychological damage. *Id.* at 2804 (O'Connor, J., concurring). Justice O'Connor agreed with the majority that a specific finding of necessity is required before an exception to the defendant's right of confrontation can be established. *See id.* (O'Connor, J., concurring). However, "if a court makes a case-specific finding of necessity . . . the strictures of the Confrontation Clause may give way to the compelling state interest of protecting child witnesses." *Id.* at 2805 (O'Connor, J., concurring).

<sup>28</sup> *Id.* at 2806-07 (Blackmun, J., dissenting). Justice Blackmun argued that according to Wigmore "[t]here never was at common law any recognized right to an indispensable thing

contained within the clause, an exception could be created to further important state interests.<sup>29</sup> Justice Blackmun, however, while agreeing with Justice O'Connor that the protection of child sexual abuse victims was a compelling policy consideration,<sup>30</sup> did not believe that the state should be required to demonstrate why the procedure was essential in each individual case.<sup>31</sup>

The *Coy* majority stated that although the Court has historically recognized exceptions to the rights implicitly guaranteed a defendant by the confrontation clause, such decisions did not signify the Court's wholesale acceptance of an exception to the right to physically confront adverse witnesses.<sup>32</sup> It is submitted that the *Coy* Court implied that the test for finding such an exception is identical to that which the Court has utilized in the past for finding exceptions to a defendant's right of cross-examination. This Comment will review the *Coy* Court's decision and compare the circumstances under which a defendant may be denied the right to physically confront adversary witnesses with the test used to arrive at exceptions to the hearsay rule or the right of cross-examination. This Comment will then examine the constitutionality of denying a

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called confrontation *as distinguished from cross-examination.*" *Id.* at 2807 (Blackmun, J., dissenting) (quoting 5 J. WIGMORE, *supra* note 2, § 1397, at 158). Justice Blackmun further maintained that Wigmore also did not believe that a defendant's right to have witnesses testify before him was a secondary part of the confrontation clause rights. *See id.* (Blackmun, J., dissenting). Justice Scalia, on the other hand, disagreed with Wigmore's finding that the right of confrontation only guarantees the defendant the right of cross-examination. *See id.* at 2801 n.2.

<sup>29</sup> *Id.* at 2808 (Blackmun, J., dissenting). Justice Blackmun stated that "'preference' [for face-to-face confrontation] . . . like all Confrontation Clause rights, "'must occasionally give way to considerations of public policy and the necessities of the case.'" *Id.* (Blackmun, J., dissenting) (quoting *Ohio v. Roberts*, 448 U.S. 56, 63 (1980) (quoting *Mattox v. United States*, 156 U.S. 237, 243 (1895))).

<sup>30</sup> *Id.* (Blackmun, J., dissenting). Justice Blackmun noted that the number of reported incidents of child maltreatment increased from 670,000 to over 1.9 million from 1976 to 1985. *Id.* (Blackmun, J., dissenting). He further recognized that a child who testifies in the traditional courtroom setting may experience psychological trauma resulting in injury so severe as to prevent the child from testifying accurately. *See id.* at 2809 (Blackmun, J., dissenting).

<sup>31</sup> *Id.* (Blackmun, J., dissenting). Justice Blackmun argued that it was not necessary to make specific findings regarding the necessity of protecting the particular child witness because "[a]s the many rules allowing the admission of out-of-court statements demonstrate, legislative exceptions to the Confrontation Clause of general applicability are commonplace." *Id.* (Blackmun, J., dissenting).

Justice Brennan also dissented, but he did not address the confrontation clause issues. He indicated that the defendant's conviction should be affirmed because the procedure used was not inherently prejudicial. *Id.* at 2810 (Brennan, J., dissenting).

<sup>32</sup> *See id.* at 2802-03.

defendant the right to face the witnesses against him. Finally, this Comment will examine the consequences of the *Coy* decision, manifested in the recently decided case of *Craig v. State*,<sup>33</sup> and will demonstrate the analysis that the *Craig* court should have employed in light of the *Coy* decision.

#### FRAMEWORK FOR AN EXCEPTION

The rights implicit in the confrontation clause have never been deemed absolute.<sup>34</sup> The *Coy* Court suggested, however, that a defendant's right to a face-to-face confrontation must be examined under a more stringent light than implicit confrontation rights since the defendant's right to physically confront witnesses is expressly set forth in the clause.<sup>35</sup> Exceptions to physical confrontation will be permitted only if the procedural alterations do not impermissibly impinge upon the defendant's right to a fair trial.<sup>36</sup> Additionally, the *Coy* Court indicated that for an exception to be permissible, a finding must be made that it advances an important public policy.<sup>37</sup> Thus, it is suggested that the *Coy* opinion espouses the view that denying a defendant the right to face an adverse witness may be constitutional if two contingencies are met: (1) the

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<sup>33</sup> 76 Md. App. 250, 544 A.2d 784, cert. granted, 314 Md. 458, 550 A.2d 1168 (1988).

<sup>34</sup> *Coy*, 108 S. Ct. at 2802. In *Coy*, Justice Scalia recognized that the rights implicit in the Confrontation Clause "may give way to other important interests." *Id.* Justice Scalia also noted that the Court has characterized a defendant's right to have a face-to-face encounter with the witnesses against him as a "literal right to 'confront' the witness at the time of trial." *Id.* at 2801 (quoting *California v. Green*, 399 U.S. 149, 157 (1970)).

<sup>35</sup> See *id.* at 2802-03.

<sup>36</sup> *Id.* at 2802. According to Justice Scalia, people generally believe that if someone disagrees with them, then that person should confront them in person. See *id.* at 2801. The right of confrontation promotes fairness because it is more difficult to "tell a lie about a person 'to his face' than 'behind his back.'" *Id.* at 2802.

<sup>37</sup> *Id.* at 2803. In *Mattox v. United States*, 156 U.S. 237 (1895), the Supreme Court considered whether at the defendant's second trial copies of the stenographer's notes of the testimony of two adverse witnesses who had since died were admissible. See *id.* at 240. The defendant claimed that to allow this would violate his sixth amendment right to be confronted with the witnesses against him. See *id.* Although admitting the transcripts would deprive the defendant of the rights guaranteed by the confrontation clause, the Court concluded that "general rules of law of this kind, 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." *Id.* at 243; see also *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (right of confrontation "not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process"); *Dowdell v. United States*, 221 U.S. 325, 330 (1911) (sixth amendment "has always had certain well recognized exceptions"); *Kirby v. United States*, 174 U.S. 47, 61 (1899) (admission of dying declarations "an exception which arises from the necessity of the case").



procedures are necessary to safeguard an important public policy; and (2) they ensure a fair trial. It is further submitted that these two tests are identical to the rationale supporting the admissibility of certain out-of-court statements, *i.e.*, hearsay, against a defendant notwithstanding the confrontation clause.

### *Necessity*

The *Coy* Court indicated that alternative procedures for child witnesses will satisfy constitutional concerns only if the procedures are "necessary" to further an important public policy.<sup>38</sup> The confrontation clause also requires that before hearsay may be admitted as evidence, the declarant must be unavailable as a witness.<sup>39</sup> It is submitted that both the "necessity" test and the "unavailability" test require a finding that the witness is unable to testify in front of the defendant. The only difference is that in the case of

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<sup>38</sup> See *Coy*, 108 S. Ct. at 2803. While the Court did not expressly say that the state's interest in protecting child sex abuse victims was an important public policy, both the concurring and the dissenting opinions recognized that the state was justified in its efforts to protect child sexual abuse victims. See *id.* at 2805 (O'Connor, J., concurring); *id.* at 2809 (Blackmun, J., dissenting). Several states have upheld the constitutionality of statutes permitting the child victim to testify via closed circuit television, uniformly discussing the pervasiveness of child sexual abuse and the substantial state interest in protecting child witnesses. See, e.g., *In re R.C. Jr.*, 514 So. 2d 759, 764 (La. App. 1987) (allowing child's testimony via closed circuit television due to state's compelling interest in protecting physical and psychological health of minor); *State v. Warford*, 223 Neb. 368, 374, 389 N.W.2d 575, 580 (1986) (state has public interest in easing emotional burden on child witnesses); *People v. Algarin*, 129 Misc. 2d 1016, 1023, 498 N.Y.S.2d 977, 982 (Sup. Ct. Bronx County 1986) (state has compelling interest in protecting well-being of child sex offense victims). In *State v. Sheppard*, 197 N.J. Super. 411, 484 A.2d 1330 (Law Div. 1984), the court explained that "[we] cannot evade [our] responsibility, as *parens patriae* of all minor children, to preserve them from harm. The possibility of serious psychological harm to the child . . . transcends all other issues." *Id.* at 421, 484 A.2d at 1335 (quoting *Sorentino v. Family & Children's Soc. of Elizabeth*, 72 N.J. 127, 132, 367 A.2d 1168, 1171 (1976)). It is submitted that the protection of child witnesses warrants finding an exception to defendant's right to face-to-face confrontation.

<sup>39</sup> See *Ohio v. Roberts*, 448 U.S. 56, 62-66 (1980). In *Roberts*, the Court stated that the "Sixth Amendment establishes a rule of necessity." *Id.* at 65. Under this rule, the prosecution must show that the declarant whose statement it wishes to use against the defendant is "unavailable." *Id.* Once the prosecution has demonstrated that the witness is unavailable, it must next prove the statement bears adequate "indicia of reliability." *Id.* at 66. The reliability of the statement "can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception . . . [otherwise] the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." *Id.*; see *Mancusi v. Stubbs*, 408 U.S. 204, 213 (1972) ("even though the witness be unavailable his prior testimony must bear some . . . 'indicia of reliability'"); see also *infra* notes 43-47 and accompanying text (discussing "indicia of reliability" test).

hearsay statements, the witness is unavailable in fact, while in the context of child witnesses, the witness is not available as a matter of policy. It is suggested that this difference does not amount to a legal distinction, however, for the danger that the introduction of the fiction might abrogate the defendant's confrontation right is vitiated by the fact that the absence of the witness will not be total, as it would be in the hearsay situation, but limited to the extent demanded by the underlying policy rationale of protecting the child.<sup>40</sup> The defendant's right of confrontation might be further safeguarded by requiring the trial court to specifically find that if the child witness is forced to testify in the traditional courtroom setting, there is a substantial likelihood that the child will suffer severe psychological injury.<sup>41</sup>

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<sup>40</sup> Some states that have upheld statutes allowing the child witness to testify without having to face the defendant have done so in part because the defendant's other confrontation rights were preserved. See *Commonwealth v. Willis*, 716 S.W.2d 224, 227 (Ky. 1986) (testimony via closed circuit television not unconstitutional where right of cross-examination not duly inhibited and jury able to evaluate demeanor and credibility of witness); *Commonwealth v. Lohman*, 370 Pa. Super. 404, 409, 536 A.2d 809, 811 (1988) (no constitutional invalidation if right of cross-examination preserved and witness observed).

<sup>41</sup> See Graham, *The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship*, 72 MINN. L. REV. 523, 559-560 (1988) ("unavailability" under confrontation clause requires establishing likelihood of severe psychological injury); Graham, *Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions*, 40 U. MIAMI L. REV. 19, 83 (1985) ("unavailability" requires that court find that emotional trauma likely to be suffered by child victim is "significantly more severe than the emotional distress or trauma often suffered by other witnesses"); see also *Hochheiser v. Superior Court*, 161 Cal. App. 3d 777, 793, 208 Cal. Rptr. 273, 283 (1984) (basis for decision that child can testify without facing defendant must specify "nature, degree and potential duration" of injury).

Several commentators have examined the effect on a child sexual abuse victim of testifying in open court before the defendant. Testifying at trial may create fear or stress, and cause withdrawal, anxiety, enuresis, guilt, antisocial behavior, and lack of self-esteem. See Parker, *The Rights of Child Witnesses: Is the Court a Protector or Perpetrator?*, 17 NEW ENG. L. REV. 643, 649-53 (1982) (proposing legislation to reduce trauma and protect victim without violating defendant's constitutional rights). See generally Goodman, *The Child Witness: Conclusions and Future Directions for Research and Legal Practice*, reprinted in NATIONAL LEGAL RES. CENTER FOR CHILD ADVOC. & PROTECTION, PAPERS FROM A NATIONAL CONFERENCE ON LEGAL REFORMS IN CHILD SEXUAL ABUSE CASES 61 (1985) (suggesting need for additional research on emotional trauma likely to be suffered by child witnesses). Facing the accused again is one component of the trial proceedings having a damaging psychological effect on the child. See Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977, 984 (1969). Other aspects of the criminal justice system likely to traumatize the child victim include "cross-examination; . . . official atmosphere in court; [and] the acquittal of the accused for want of corroborating evidence to the child's trustworthy testimony." *Id.* See generally J. SILKEN & P. SCHOUTEN, *THE CHILD SEXUAL ABUSE CASE IN THE COURTROOM: A SOURCE BOOK* (1987) (discussing current issues involving child sexual abuse victims, including medical and psychological issues).

### *Ensuring a Fair Trial*

The Coy Court recognized that guaranteeing the defendant the right to confront the witnesses against him promotes a criminal justice system "in which the perception as well as the reality of fairness prevails."<sup>42</sup> Likewise, the confrontation clause permits the admission of out-of-court statements only if the prosecution demonstrates that the statement bears sufficient "indicia of reliability" to ensure its accuracy.<sup>43</sup> If the witness has previously testified under oath<sup>44</sup> so that a factfinder has been able to judge the witness' demeanor,<sup>45</sup> and if the defendant has had the opportunity for cross-examination,<sup>46</sup> then the out-of-court statement will generally be deemed reliable.<sup>47</sup> Similarly, it is asserted that under a con-

It has also been suggested that requiring physical confrontation with the defendant produces unreliable evidence since it may impair the child's ability to remember. See Note, *Videotaping Children's Testimony: An Empirical View*, 85 MICH. L. REV. 809, 819-21 (1987).

<sup>42</sup> *Coy*, 108 S. Ct. at 2802 (quoting *Lee v. Illinois*, 476 U.S. 530, 540 (1986)). The Court in *Pointer v. Texas*, 380 U.S. 400 (1965), held that the defendant's sixth amendment right to confront the witnesses against him was a fundamental right made applicable to the states by the fourteenth amendment. *Id.* at 403. The fact that the right of confrontation was included in the Bill of Rights "reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution." *Pointer*, 380 U.S. at 404; cf. *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963) (sixth amendment right to counsel "fundamental and essential to a fair trial").

<sup>43</sup> See *Roberts*, 448 U.S. at 65-66; *Mancusi*, 408 U.S. at 213; see also *Dutton v. Evans*, 400 U.S. 74, 89 (1970) (adequacy of indicia of reliability determines whether "statement may be placed before the jury though there is no confrontation of the declarant"). See generally *supra* note 39 (discussing two-pronged "unavailability"/"indicia of reliability" test).

<sup>44</sup> See *California v. Green*, 399 U.S. 149, 158 (1970). The confrontation clause ensures that the witness will give his statements under oath, which serves to foster truthfulness by impressing upon the witness the seriousness of the matter. *Id.*

<sup>45</sup> See *id.* Allowing the jury to observe the witness' demeanor aids the jury in evaluating his or her credibility. *Id.*; see also *Barber v. Page*, 390 U.S. 719, 725 (1968) (right of confrontation includes giving jury opportunity to assess witness' demeanor).

<sup>46</sup> See *Pointer*, 380 U.S. at 404 ("no one . . . would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case"); see also *Kentucky v. Stincer*, 107 S. Ct. 2658, 2662 (1987) (cross-examination "critical for ensuring the integrity of the fact finding process"); *Delaware v. Fensterer*, 474 U.S. 15, 22 (1985) (*per curiam*) (cross-examination calls "to the attention of the fact finder the reasons for giving scant weight to the witness' testimony").

<sup>47</sup> See *Mancusi v. Stubbs*, 408 U.S. 204, 213 (1972). In determining whether the prior testimony of an unavailable witness was admissible against the defendant, the *Mancusi* Court reasoned:

Since there was an adequate opportunity to cross-examine [the witness] at the first trial, and counsel for [the defendant] availed himself of that opportunity, the transcript of [the witness'] testimony in the first trial bore sufficient "indicia of reliability" and afforded "the trier of fact a satisfactory basis for evaluating the truth of the prior statement . . . ."

frontation exception, the reliability of a child's testimony will be assured only if the child witness is required to testify under oath in the presence of the jury, and the defendant is ultimately given the opportunity to cross-examine.

### *Additional Safeguards*

In *Coy*, Justice Scalia was concerned that a defendant's right to a fair trial would be impaired if a child witness testified outside of the defendant's presence because in that situation it is less likely that the child will feel compelled to speak the truth.<sup>48</sup> Thus, an exception to the right of confrontation should be permitted only if the court informs the child witness that the defendant is able to see and hear the child during the child's testimony.<sup>49</sup> Advising the child of the defendant's presence, it is submitted, addresses Justice Scalia's concern without jeopardizing the state's interest in protecting the child from psychological damage.

A final suggested protection has its origins in the defendant's right to receive a fair trial.<sup>50</sup> A criminal defendant's due process rights are violated if the procedure adopted is likely to be inherently prejudicial.<sup>51</sup> Although a procedure designed to allow the child witness to testify without facing the defendant may not nec-

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*Id.* at 216 (quoting *Dutton*, 400 U.S. at 89). The Supreme Court has expressly stated that "a witness under oath, subject to cross-examination, and whose demeanor can be observed by the trier of fact, is a reliable informant." *Dutton*, 400 U.S. at 88; *see also Green*, 399 U.S. at 165 (where at preliminary hearing witness was under oath and subject to cross-examination, and defendant represented by counsel, testimony admissible at trial despite fact that defendant did not have opportunity for face-to-face confrontation).

<sup>48</sup> *Coy*, 108 S. Ct. at 2802; *see supra* note 21.

<sup>49</sup> *See Coy*, 108 S. Ct. at 2806 n.2 (Blackmun, J., dissenting). The Iowa statute in *Coy* required that the court advise the child of the defendant's ability to see and hear his or her testimony; the defendant did not assert that the court had not complied with this provision. *Id.* (Blackmun, J., dissenting).

<sup>50</sup> *See In re Murchison*, 349 U.S. 133, 136 (1955); *see also Pate v. Robinson*, 383 U.S. 375, 385-86 (1966) (defendant deprived of due process right to fair trial if incompetent to stand trial). In *Irvin v. Dowd*, 366 U.S. 717 (1961), Justice Frankfurter declared: "One of the rightful boasts of Western civilization is that the State has the burden of establishing guilt solely on the basis of evidence produced in court and *under circumstances assuring an accused all the safeguards of a fair procedure.*" *Id.* at 729 (Frankfurter, J., concurring) (emphasis added).

<sup>51</sup> *See Estes v. Texas*, 381 U.S. 532, 542-43 (1965) (state procedure may involve "such a probability that prejudice will result that it is deemed inherently lacking in due process"). Furthermore, a criminal defendant is entitled to a presumption of innocence. *Coffin v. United States*, 156 U.S. 432, 459 (1895). If the procedures used infringe upon this presumption they will be deemed inherently prejudicial. *See Estelle v. Williams*, 425 U.S. 501, 503-05 (1976).

essarily cause the jury to prejudge the defendant's guilt or innocence,<sup>52</sup> the potential for unfairness<sup>53</sup> dictates the conclusion that the judge should instruct the jury to refrain from drawing any inferences from the procedure employed in the courtroom.<sup>54</sup>

### RAMIFICATIONS OF *Coy*

The *Coy* Court's cryptic reasoning has generated confusion among lower courts faced with challenges to the constitutionality of statutes permitting child witnesses to testify without facing the defendant. The recent decision by the Court of Special Appeals of Maryland in *Craig v. State*<sup>55</sup> exemplifies a court's attempt to formulate a coherent exception consistent with the *Coy* decision.

The defendant in *Craig* owned and operated a kindergarten and pre-kindergarten school,<sup>56</sup> which the victim attended for two years beginning at age four.<sup>57</sup> The child testified that on several occasions the defendant had sexually abused her.<sup>58</sup> Following a

<sup>52</sup> See *Coy*, 108 S. Ct. at 2810 (Blackmun, J., dissenting). Justice Blackmun concluded that the use of the screen at trial was not inherently prejudicial because it did not indicate that the defendant was guilty. *Id.* (Blackmun, J., dissenting).

<sup>53</sup> See *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). In *Tumey*, the Court explained: [T]he requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.

*Id.* at 532. The importance of fairness was highlighted in *In re Murchison*, when the Court stated that "[f]airness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." 349 U.S. at 136.

<sup>54</sup> See *Coy*, 108 S. Ct. at 2810 (Brennan, J., dissenting). Justice Brennan indicated that the instruction given by the trial court made it unlikely that the jury drew improper inferences from the use of the screen. See *id.* (Brennan, J., dissenting). The trial court in *Coy* instructed the jury, *inter alia*:

[Y]ou are to draw no inference of any kind from the presence of that screen. You know, in the plainest of language, that is not evidence of the defendant's guilt, and it shouldn't be in your mind as an inference as to any guilt on his part. It's very important that you do that intellectual thing.

*Id.* (Brennan, J., dissenting).

<sup>55</sup> 76 Md. App. 250, 544 A.2d 784, *cert. granted*, 314 Md. 458, 550 A.2d 1168 (1988).

<sup>56</sup> *Id.* at 254, 544 A.2d at 786.

<sup>57</sup> See *id.*

<sup>58</sup> See *id.* The child testified that the defendant had kicked her on the legs and in her "private parts," and that she had stuck her with thumbtacks. *Id.* at 264, 544 A.2d at 791. She also stated that the defendant had touched her with a stick "in her private parts." *Id.*

jury trial, the defendant was convicted of committing various sexual offenses against the child.<sup>59</sup> At trial, the court permitted the child witness to testify via closed circuit television pursuant to the procedures authorized by Maryland statute.<sup>60</sup> On appeal, the Court of Special Appeals of Maryland rejected the defendant's contention that the procedure violated his sixth amendment right to confront the witnesses against him.<sup>61</sup>

The *Craig* court recognized that the procedure used by the trial court did not satisfy the defendant's right to face-to-face confrontation.<sup>62</sup> However, *Craig* interpreted the *Coy* decision as merely striking down the procedures adopted by the Iowa legislature as they applied to the facts in that case.<sup>63</sup> *Coy* was further understood as reserving for the future a decision as to whether an exception to a defendant's right of confrontation would be constitutional.<sup>64</sup> Consequently, the *Craig* court found *Coy* inapplicable,<sup>65</sup> relying instead on the decision of the Court of Appeals of Maryland in *Wildermuth v. State*.<sup>66</sup> *Wildermuth* had held that the procedure instituted pursuant to the Maryland statute was constitutional because it satisfied the *Ohio v. Roberts* test of "unavailability" and "indicia of reliability."<sup>67</sup> Thus, the *Craig*

<sup>59</sup> See *id.* at 257, 544 A.2d at 787.

<sup>60</sup> See *id.* The Maryland Code provides in pertinent part:

(a) (1) In a case of abuse of a child . . . a court may order that the testimony of a child victim be taken outside the courtroom and shown in the courtroom by means of closed circuit television if:

(i) The testimony is taken during the proceeding; and

(ii) The judge determines that the testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate.

MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (Supp. 1988).

<sup>61</sup> See *Craig*, 76 Md. App. at 284, 544 A.2d at 800.

<sup>62</sup> *Id.* at 281, 544 A.2d at 799. The child witnesses testified in the judge's chambers where they were unable to see or hear the defendant but the defendant could see and hear them. *Id.*

<sup>63</sup> *Id.* at 282, 544 A.2d at 799.

<sup>64</sup> *Id.* The *Craig* court drew the following three conclusions from the *Coy* decision: 1) the question of whether the defendant had an absolute right to confront the adverse witnesses was left open; 2) the state's interest in protecting child witnesses may justify an exception; and 3) if, in fact, Justice Scalia considered a specific finding of necessity to be required, only four Justices agreed with this view. *Id.* at 280, 544 A.2d at 798-99.

<sup>65</sup> *Id.* at 281, 544 A.2d at 799.

<sup>66</sup> 310 Md. 496, 530 A.2d 275 (1987).

<sup>67</sup> See *Craig*, 76 Md. App. at 283, 544 A.2d at 800. The *Wildermuth* court applied the *Ohio v. Roberts* test as the basis for an exception to the defendant's right to a face-to-face confrontation: "[I]f there is sufficient necessity for not permitting the accused to confront his accuser directly (unavailability), and if the situation is such that there is some reason-

court determined an exception could be made where the child witness would be unable to reasonably communicate if compelled to testify face-to-face with the defendant and the state ensured that the defendant's other confrontation clause rights were preserved.<sup>68</sup> It is submitted that by relying on the *Wildermuth* decision, the *Craig* court correctly applied the guidelines suggested by the Supreme Court in *Coy* for finding an exception. However, it is also submitted that in doing so the *Craig* court neglected to give sufficient consideration to the right that Justice Scalia believed had to be fiercely protected—the defendant's right to a fair trial. The trial court in *Craig* neither advised the child that the defendant was able to see and hear her testify,<sup>69</sup> nor, apparently, did it inform the jury that no inference of guilt should be drawn by reason of the procedure implemented.<sup>70</sup> Hence, it is submitted that the *Craig* court failed to fully safeguard the defendant's constitutional right to a fair trial.

### CONCLUSION

The *Coy* Court confirmed the prevailing view that the confrontation clause guarantees the defendant the right to physically confront adversary witnesses, but declined to decide whether or not this right was absolute. This Comment has suggested that precisely the same factors considered in determining the constitutionality of admitting certain hearsay statements should be considered in determining the constitutionality of child witness protection statutes. The *Coy* Court, by failing to recognize the similarities between the two determinations, has left the state of the law unrec-

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ble substitute for the truth-seeking confrontation requirement of physical presence (reliability), then the right of confrontation may still be satisfied." *Wildermuth*, 310 Md. at 515, 530 A.2d at 284 (citing *Ohio v. Roberts*, 448 U.S. 56, 73-77 (1980)). The *Wildermuth* court explained that the "reliability" test is met if the defendant has the opportunity to cross-examine the witness, the testimony is given under oath, and the judge and jury are able to observe the witness during the testimony. *Id.*, 530 A.2d at 285. The court determined that the statute ensures that the unavailability test will be met because in order for the child to testify without viewing the defendant "the judge must determine 'that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate.'" *Id.* at 519, 530 A.2d at 286 (quoting Md. CTS. & JUD. PROC. CODE ANN. § 9-102(a)(1)(ii) (Supp. 1988)).

<sup>68</sup> See *Craig*, 76 Md. App. at 280-82, 544 A.2d at 799.

<sup>69</sup> See *Craig*, 76 Md. App. at 288, 544 A.2d at 802-03. The Maryland statute does not require that the judge inform the child of the defendant's ability to perceive him or her. Md. CTS. & JUD. PROC. CODE ANN. § 9-102 (Supp. 1988).

<sup>70</sup> See *Craig*, 76 Md. App. at 255-56, 544 A.2d at 786-87.

essarily uncertain.<sup>71</sup> It is suggested that the Supreme Court alleviate this uncertainty by sustaining at the first opportunity an exception to the defendant's right to physically confront witnesses against him when such an exception would promote the state's compelling interest in protecting child witnesses without substantially infringing upon the defendant's constitutional rights.

*Alisa Odeen*

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<sup>71</sup> Compare *Craig v. State*, 76 Md. App. 250, 284-89, 544 A.2d 784, 800-03, cert. granted, 314 Md. 458, 550 A.2d 1168 (1988) (permitting child to testify via closed circuit television did not violate of defendant's confrontation clause rights under *Coy*) with *Gibson v. State*, 533 So. 2d 338, 339 (Fla. Dist. Ct. App. 1988) (allowing child victim to testify behind one-way mirror violated defendant's confrontation clause rights).

In another recently decided case, the Superior Court of Pennsylvania decided that *Coy* did not prevent a seven-year-old victim of sexual abuse from being told prior to cross-examination that she did not have to look at the defendant while testifying. See *Commonwealth v. Groff*, 548 A.2d 1237, 1244 (Pa. Super. 1988).