To Keep the Balance True: The Case of Coy v. Iowa

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by

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Introduction

"There are few subjects, perhaps, upon which [the Supreme] Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country’s constitutional goal." Yet, there are times when a balance must be struck between this essential right and other fundamental rights. In no other area is this more apparent than when a child victim of sexual abuse takes the witness stand. Despite evidence that the incidence of sexual assaults on children is reaching staggering proportions, no system has been established yet to preserve the accused’s constitutional rights while at the same time protecting the child victim.

Statistics show that successful prosecutions of sexual assault are rare. One reason cited is the necessary reliance on the testimony of the victim. Although children may be the sole eyewitness to the abuse, youth, compounded by the trauma that results from testifying to intimate details of the assault in front of the defendant, may hinder effective testimony. Commentators have noted that the courtroom experience can “precipitate as much of a psychological crisis as the rape itself.”6 This...
lessens the child’s ability to testify effectively.\textsuperscript{7}

States have responded to this problem by enacting laws to protect the minor victim.\textsuperscript{8} These statutes authorize a range of procedures designed to shield the victim from the trauma of confronting the defendant in an intimidating courtroom atmosphere. While the statutes provide necessary protections for the child victim, their use may compromise essential constitutional rights of the accused.

The constitutionality of one such statute was the subject of the United States Supreme Court opinion in \textit{Coy v. Iowa}.\textsuperscript{9} \textit{Coy} involved a rape trial in which a one-way screening barrier was placed between the defendant and the complaining child witnesses at the jury trial, so that the defendant was able to see and hear the child testify while the child was not able to see the defendant. The defendant was convicted, and he appealed charging violations of his sixth amendment right to confront his accuser and his fourteenth amendment right to due process of law.\textsuperscript{10} The Iowa Supreme Court upheld the use of the procedure, but the United States Supreme Court reversed.\textsuperscript{11} The Court ruled that the use of the screen violated the defendant’s confrontation clause rights.\textsuperscript{12}

This Comment discusses and criticizes the \textit{Coy} opinion and assesses its probable effect on future adjudications involving child sexual assault. Part I examines the problem of the child victim testifying in court and describes the efforts of states to address that problem. The \textit{Coy} Court’s response to state intervention is discussed in Part II, while Part III criticizes the opinion and explores the potential implications of \textit{Coy} on future adjudications.

\textbf{I. The Problem and Resulting State Intervention}

The child victim’s testimony is crucial to obtaining convictions in sexual abuse cases. Their eyewitness testimony may be the only direct link between the victim, the crime, and the offender.\textsuperscript{13} As communities become increasingly aware of the high incidence of sexual assault\textsuperscript{14}, they


\textsuperscript{7} Skoler, \textit{New Hearsay Exceptions for a Child’s Statement of Sexual Abuse}, \textit{18 J. Marshall L. Rev.} 1, 37-38 (1984) ("Guilt, fear, trauma, cognitive immaturity, and ‘incest dynamics’ may all undermine the child’s ability to testify effectively.").

\textsuperscript{8} \textit{See infra} notes 20-58 and accompanying text.

\textsuperscript{9} 108 S. Ct. 2798 (1988).

\textsuperscript{10} Id. at 2799.

\textsuperscript{11} Id. at 2803.

\textsuperscript{12} Id. at 2802.

\textsuperscript{13} Flammang, \textit{Interviewing Child Victims of Sex Offenders}, in \textit{The Sexual Victimization of Youth} 175, 178 (L. Schultz ed. 1980).

\textsuperscript{14} The National Center on Child Abuse and Neglect estimates that four hundred thou-
place more pressure on the criminal justice system to prosecute cases. Thus, child victims are necessary and increasingly sought participants in the legal system.

The children who serve as witnesses must endure a frightening experience. They must testify in an adult environment, the courtroom, which is unfamiliar with their needs. The courtroom experience is stressful for any witness, but many commentators believe it is particularly traumatic for children unaccustomed to legal proceedings. The victims must describe repeatedly the intimate and often embarrassing details of the event while the defense counsel vigorously attacks their credibility. In recognition of the children's situation, several states have enacted statutes to protect child witnesses. These enactments attempt to provide a reasonable and compassionate compromise to balance the interests of the accused and accuser. Initially, reform was urged in the physical configuration of the courtroom. This view was replaced, however, with emphasis on creating new hearsay exceptions, allowing videotaped testimony, allowing closure of the courtroom, and using closed circuit television.


[T]here are several reasons to predict greater stress for children. The situation will be more novel and less predictable for the child than for adults; the sight of the defendant may be particularly disturbing because the child might believe that the defendant will retaliate against the child in the courtroom; or the child may think he or she, rather than the defendant, will be sent to jail or taken from home.

See also Note, Videotaping Children's Testimony: An Empirical View, 85 Mich. L. Rev. 809, 813-17 (1987) (empirical investigation revealed that children's recall and willingness to report recall differs with settings). But see Libai, The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System, 15 Wayne L. Rev. 977, 1015 (1969) (Empirical evidence has proven inconclusive. In psychological studies of actual victims, it is extremely difficult to distinguish between the trauma caused by the sexual abuse itself and trauma caused by the courtroom experience. Experiments that simulate courtroom situations cannot ethically expose subjects to overly realistic and stressful situations to obtain this information.).

17. American Bar Association, supra note 3, at 21. (The greatest ordeal children must face is direct and cross-examination. The defense counsel attacks the child's credibility and the prosecutor cannot object for fear of appearing overly protective of the witness. Judges forgo interference for fear of influencing the jury.).

18. Forty-one states have laws protecting child witnesses. Twenty-seven states have enacted videotaping statutes. Twenty-two states have enacted hearsay exception statutes. Twenty-six states have enacted courtroom closure statutes. Twenty-one states have enacted closed-circuit television statutes. See infra notes 26, 33, 45, 52.

A. Background

At first, the implementation of a "child's courtroom" was recommended to protect the child witness during testimony.\textsuperscript{20} This courtroom provided a more informal setting for child witnesses than the traditional courtroom. Only the judge, the prosecutor, the defense counsel, and the child examiner\textsuperscript{21} would be present for the child's testimony. The jury, the accused, and the audience would sit behind a one way glass partition, which would enable them to observe the proceedings, but would prevent the child from seeing the defendant and others in the courtroom. The accused would have a microphone and earphone to allow communication with counsel. If identification of the defendant was necessary, the defendant would be allowed to emerge from behind the partition for a moment. Ostensibly, these changes would reduce the trauma for the child, but still provide a constitutionally fair trial for the defendant.

Although this early suggestion was never implemented, it prompted the proposal of a model act to protect child witnesses.\textsuperscript{22} The act incorporated many early suggestions as well as some modifications and additions. It advocated the construction of a special child courtroom and the employ of a Child Hearing Officer, who was actually an attorney trained in psychology, nursing, social work, or clinical interviewing, to act as counsel to the child witness during trial.\textsuperscript{23} Additionally, speedy trial and discovery would be encouraged to prevent subjecting the child to "the trauma of delayed or drawn-out proceedings."\textsuperscript{24} The goal of the proposed legislation was "to reduce the trauma to the child at both the pre-trial and trial stages by affording him as much protection as is consistent with the constitutional rights of the accused."\textsuperscript{25}

Like the child's courtroom, this model act was never implemented. Nevertheless, the early proposals sparked state experimentation with various mechanisms for protecting child witnesses. The resulting legislative enactments are examined below.

B. Videotaping Statutes

Twenty-seven states have enacted videotaping statutes, which authorize the child's testimony to be preserved on videotape for later pres-
entation at trial.\textsuperscript{26} The use of videotaped testimony serves many purposes. First, repetitive interviews and the subsequent trauma are reduced.\textsuperscript{27} Second, the child’s initial reaction and memory of the event are recorded for later use in therapy.\textsuperscript{28} Third, an immediate recording of the interviews may prevent the complaint from being disavowed.\textsuperscript{29} Finally, a defendant may plead guilty when faced with a videotaped statement by a child witness.\textsuperscript{30}

Although the use of videotaped testimony may compromise the defendant’s sixth amendment right to confront the witness, many courts are upholding its introduction at trial. For example, in \textit{Jolly v. Texas},\textsuperscript{31} a Texas appellate court found that the trial court did not abuse its discretion by admitting a videotaped recording of an interview of the victim by a child placement specialist. The Court of Appeals of Arizona, in \textit{State v. Melendez},\textsuperscript{32} also has allowed the admission of videotaped testimony of a child molestation victim.

Some states resolve the constitutional issues in their statutory schemes. For example, nine states require that the defendant be present and cross-examination be allowed at the videotaping session.\textsuperscript{33} In these

\begin{itemize}
\item \textsuperscript{27} MacFarlane, \textit{Diagnostic Evaluations and the Use of Videotapes in Child Sexual Abuse Cases}, 40 U. MIAMI L. REV. 135, 136-37 (1983).
\item \textsuperscript{28} \textit{Id.} at 139.
\item \textsuperscript{29} \textit{Id.} at 141 ("The likelihood that sexually abused children will take back their disclosures of abuse is becoming increasingly well documented.").
\item \textsuperscript{30} Eatman, \textit{Videotaping Interviews with Child Sex Offense Victims}, 7 CHILDREN’S LEGAL RTS. J. 13 (1986).
\item \textsuperscript{31} 681 S.W.2d 689, 696 (Tex. Ct. App. 1984).
\item \textsuperscript{32} 135 Ariz. 390, 393, 661 P.2d 654, 657 (Ariz. Ct. App. 1982).
states, the sixth amendment requirement of confrontation and cross-examination are met.

C. Hearsay Exception Statutes

Twenty-two states have enacted hearsay exception statutes. The Federal Rules of Evidence define hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." While some of the child's out-of-court statements are admissible under established exceptions to the hearsay rule, some commentators have argued for expanding the hearsay exception. Such expansion would permit the admission of the child's out-of-court statements concerning the sexual abuse. Arguments favoring the enactment of hearsay exceptions include the recognition of the limitations of traditional exceptions and the child's need to be protected from the trauma of courtroom testimony.

The principal argument against admission of the child's hearsay statements is the potential compromise of the defendant's sixth amendment right to confront witnesses. The Supreme Court established general standards of admissibility of hearsay statements in Ohio v. Roberts. First, the witness must be unavailable, and second, the statement must bear adequate "indicia of reliability." Applying this test in State v. Myatt, the Kansas Supreme Court found that the defendant's sixth amend-


35. FED. R. EVID. 801.

36. E.g., FED. R. EVID. 803(1) (present sense impression); FED. R. EVID. 803(2) (excited utterance); FED. R. EVID. 803(3) (then existing mental, emotional, or physical condition); FED. R. EVID. 803(4) (statements for purposes of medical diagnosis or treatment); FED. R. EVID. 803(24) & 804(b)(5) (other exceptions); FED. R. EVID. 801(d)(1) (prior statement by witness as non hearsay); FED. R. EVID. 804(b)(1) (former testimony).

37. See Skoler, supra note 7, at 40.

38. Id. at 2.

39. Id. at 7.


41. 448 U.S. 56 (1980).

42. Id. at 66.

ment rights were not violated by the admission of hearsay statements when the child was disqualified as a witness and the evidence fell within a deeply rooted hearsay exception. Similarly, in *State v. Ryan*, the Washington Supreme Court found that the hearsay statute allowing statements of sexual abuse facially conformed to the requirements of *Roberts*.

Expanded hearsay exceptions statutes, therefore, are constitutional if they conform to the requirements announced in *Roberts*: the child victim must be unavailable to testify and the statement must be reliable.

**D. Courtroom Closure Statutes**

Twenty-six states have enacted legislation giving the trial court discretion to close the courtroom. This enables the trial judge to exclude spectators and the press, thereby lessening the trauma to the child victim. The purposes of closure are twofold: (1) to reduce reluctance to report the crime for fear of testifying in public; and (2) to avoid the undue trauma accompanying courtroom testimony.

Closing the courtroom, however, implicates both the public's and press' first amendment right to acquire information, and the defendant's right to an open trial. The Supreme Court ruled on the constitutionality of one closure statute in *Globe Newspaper v. Superior Court*.

In *Globe*, members of the press were denied access to a rape trial during


48. The sixth amendment guarantees the right to a speedy and public trial. U.S. CONST. amend. VI.

the testimony of a minor victim pursuant to a Massachusetts statute mandating closure in all sex offense trials. While the Court recognized that the protection of minor victims of sexual crimes from further trauma was "a compelling governmental interest," it found that mandatory closure of all cases was not justified. Instead, the Court advised a case-by-case analysis that would take into account the victim's age, psychological maturity and understanding, the nature of the crime, the desires of the victim, and the interests of parents and relatives.

Courtroom closure statutes may be upheld if they give the trial judge discretion to close the courtroom during the testimony of a child victim of sexual abuse. The judge must be cognizant of the competing interests at stake and allow closure only when justified.

E. Closed-Circuit Television Statutes

States also have explored the use of one-way and two-way closed-circuit television to allow child victims of sexual abuse to testify without having to see their alleged attacker. Twenty-one states have enacted provisions permitting the use of one-way closed-circuit televisions, one-way screens, and one-way mirrors. An additional four states permit two-way closed-circuit televised testimony in which a television monitor projects the defendant's image into the room where the child is testifying. The enactment of these statutes reflects a desire to protect the child victim, as well as a "perceived need to strengthen the prosecutor's hand" in child sexual abuse trials.

Although the use of this form of protective device implicates the defendant's sixth amendment rights, several state courts have upheld the

50. Id. at 607.
51. Id. at 608.
use of television in these contexts. In State v. Sheppard, a ten year old sexual assault victim testified in a room near the courtroom that was equipped with video and audio systems. The court allowed the procedure after considering psychological testimony that children tend to become fearful, guilty, and anxious on the witness stand and that these feelings produce inaccurate testimony.\textsuperscript{56} A Texas appellate court also approved the trial court's use of closed-circuit televised testimony in Hightower v. State,\textsuperscript{57} reasoning that public policy should not require the child to relate the details of the offense in front of the defendant and strangers. Similarly, in Commonwealth v. Ludwig, the court allowed the six year old victim who froze on the stand to testify by closed circuit television, recognizing that "[t]he Confrontation Clause is not implacable in its demands."\textsuperscript{58}

The above mentioned statutes illustrate the states' willingness to provide a reasonable and compassionate compromise to balance the interests of accused and accuser. While recognizing the competing interests at stake, the statutes offer a range of techniques aimed at lessening the child victim's trauma. Many of these statutes, however, have been enacted recently and their effectiveness in ameliorating the problem has not yet been ascertained.

II. The Supreme Court's Response to State Intervention: Coy v. Iowa

The Supreme Court recently reviewed State v. Coy,\textsuperscript{59} which questioned the constitutionality of one form of statutory protection for child victims of sexual assault. The statute in question provided for the use of a screen between the defendant and the victim during the victim's testimony.\textsuperscript{60} Although the Iowa Supreme Court upheld the constitutionality of the procedure, the Supreme Court reversed the conviction finding that the use of the screen violated the defendant's sixth amendment rights.\textsuperscript{61}

A. Facts

On the evening of August 2, 1985, two thirteen year old girls spent the night in a make-shift tent in one girl's backyard. They were awakened early in the morning by the presence of the assailant in their tent. According to the girls' testimony, the assailant fondled their genitalia

\textsuperscript{56} Id. at 416, 484 A.2d at 1332.
\textsuperscript{57} 736 S.W.2d 949, 953 (Tex. Ct. App. 1987).
\textsuperscript{60} Coy v. Iowa, 108 S. Ct. 2798, 2799 (1988).
\textsuperscript{61} Id. at 2802.
and forced them to perform oral sexual acts.\textsuperscript{62} He also unsuccessfully demanded that they urinate on him.\textsuperscript{63} Upon the assailant’s departure, he warned the girls that they should not tell or “they would have to go through a lot.”\textsuperscript{64} The girls never saw the assailant’s face, as he wore a mask and shined a flashlight in their eyes when they looked at him.\textsuperscript{65}

Later that day, based on a tip from the father of one of the girls, a search warrant for John Coy’s house was obtained.\textsuperscript{66} This search produced items implicating Coy in the assault.\textsuperscript{67} Subsequently, Coy was arrested and charged with two counts of lascivious acts with a child.

B. Courtroom Procedure

Pursuant to Iowa law,\textsuperscript{68} the prosecution requested that the testimony of the two child witnesses be taken by closed-circuit television or that the defendant be confined behind a screen or mirror.\textsuperscript{69} The trial court considered both options, and decided that the screen would be “a more moderate and [the] least obtrusive approach.”\textsuperscript{70} Defendant’s counsel objected, stating that the device was unnecessary since the victims could not identify their assailant.\textsuperscript{71} The court decided, however, that the statute was intended to protect child victims even if they could not identify their attacker.\textsuperscript{72}

Over defense counsel’s objections, the screen was positioned in the courtroom. Although the witness was in full view of the defendant, judge, jury, and counsel, she could not see the defendant because the

\textsuperscript{62} Id. at 2799.
\textsuperscript{64} Id. at 66.
\textsuperscript{65} Id. at 66, 96, 99-100.
\textsuperscript{66} The father and one of his neighbors entered Coy’s home and discovered a yellow plastic drinking cup that was the same type of cup the girls had in the tent. They immediately informed the police. The Supreme Court of Iowa found no violation of the defendant’s fourth amendment rights because the father and neighbor were not acting as agents of the police. See Coy, 397 N.W.2d at 732-33.
\textsuperscript{67} The items seized included a flashlight, a yellow plastic drinking cup, and a clothing-bag shaped item, all of which the assailant had taken from the tent. Id. at 732.
\textsuperscript{68} Iowa Code § 910A.14 (Supp. 1985) provides:
Upon its own motion or upon motion for either party, in a proceeding when the child is under the age of 14, the court may order use of the one-way closed-circuit television, or the confinement of the witness behind a screen or mirror, at the same time insuring that the party and counsel can confer, and informing the child that he or she can be seen or heard.
\textsuperscript{69} Transcript, \textit{supra} note 63, at 35.
\textsuperscript{70} Id. at 40.
\textsuperscript{71} Id. at 49.
\textsuperscript{72} Id. at 50-54.
Recognizing that the procedure created a dramatic effect, the judge gave a special jury instruction to ensure that the defendant received a fair trial. At the start of the trial, he told the jury that the screen was being used pursuant to a recently enacted law, and that no inference should be drawn from the presence of the screen. Specifically, the judge warned that "[the screen was] 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." A unanimous jury found the defendant guilty of two counts of lascivious acts with a child. Coy appealed, contending that the courtroom procedures had violated his constitutional rights.

C. The Iowa Supreme Court Decision

Coy based his appeal on three claims. First, he asserted that his constitutional right to confront the witnesses against him was violated. Second, he claimed that the use of the screen created a strong and prejudicial inference of guilt, violating his right to a fair trial. Finally, although Coy did not allege that the trial court failed to comply with the specific terms of the statutory provision, he argued that a finding of necessity was proper before the statute was implemented.

After reviewing Coy's claim of errors, the Iowa Supreme Court upheld his conviction. The court found that Coy's constitutional rights were fully protected by the express requirements of the statute, and that the trial court had no obligation to make an independent finding of necessity.

D. The United States Supreme Court Opinions

(1) The Majority Opinion

Writing for the majority, Justice Scalia reversed the decision of the Iowa Supreme Court, finding that the barrier violated Coy's right to confront his accusers. His opinion set forth a history of the sixth amendment, complete with quotations from the Roman Governor Festus,
Shakespeare, and President Eisenhower. The Court noted that the language of the sixth amendment "comes to us on faded parchment" and found that the confrontation clause confers at least "a right to meet face to face all those who appear and give evidence at trial." In support of its historical discussion of the right to face to face confrontation, the Court stated that "[t]his opinion is embellished with references to and quotations from antiquity in part to convey that there is something deep in human nature that regards face to face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'" Although the face to face presence may upset the truthful rape victim or abused child, "it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs.

The Court ruled that the procedure used by the Iowa court was an obvious and damaging violation of Coy's right to a face to face encounter. While it recognized that rights conferred by the confrontation clause may at times give way to other important interests, the only rights that may be overcome in the balance are those that are reasonably implicit, rather than explicitly stated, in the clause: 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.

The Court did not directly consider whether the confrontation between a child sexual assault victim and the accused could constitute an exception to the face to face encounter requirement of the confrontation clause. Rather, it said, "We leave for another day . . . the question whether any exceptions exist." The Court hinted at its position, though, by noting that even if exceptions do exist, they would have to be "firmly . . . rooted in our jurisprudence." Apparently, the Court did not feel that an exception created by a statute enacted in 1985 was firmly rooted in jurisprudence. Therefore, the procedure violated Coy's right of confrontation.

83. Id. at 2800-01.
84. Id. at 2800 (quoting California v. Green, 399 U.S. 149, 174 (1970) (Harlan, J., concurring)).
85. Id.
86. Id. at 2801 (citation omitted).
87. Id. at 2802.
88. Id.
89. Id. at 2802-03.
90. Id. at 2803.
91. Id. (quoting Bourjaily v. United States, 107 S. Ct. 2775, 2783 (1987)).
92. Because the Court found a sixth amendment violation, it did not reach Coy's due process claim. Id.
(2) The Concurrence

Justice O'Connor wrote a concurring opinion, in which Justice White joined. Although Justice O'Connor agreed that Coy's confrontation rights were violated in this instance, she noted that confrontation clause rights "may give way in an appropriate case to other competing interests so as to permit the use of certain procedural devices designed to shield a child witness from the trauma of courtroom testimony." Justice O'Connor recognized the increasing problem of child abuse in today's society, and that half of the states have authorized the use of one-or-two-way closed-circuit televisions. She wrote especially to clarify that the majority decision did not "doom[] such efforts by state legislatures to protect child witnesses."

(3) The Dissent

Justice Blackmun wrote the dissenting opinion, in which Chief Justice Rehnquist joined. The opinion expressed strong disagreement with the majority's analysis of the confrontation clause as applied in the case. Two reasons were given for this disagreement. First, the majority did not mention the minimal infringement upon the appellant's confrontation clause interests in considering whether competing public policies justified the procedures employed. Second, the majority opinion may induce states that are attempting to adopt innovative protective techniques to sacrifice other, more central, confrontation interests for the sake of preserving face to face confrontation. The dissent further criticized the Court's reliance on literature, anecdote, and dicta rather than precedent.

Similar to the concurrence, the dissent noted the important state interests underlying the Iowa statute.

The fear and trauma associated with a child's testimony in front of the defendant has two serious identifiable consequences: It may cause psychological injury to the child, and it may so overwhelm the child as to prevent the possibility of effective testimony, thereby undermining the truthfinding function of the trial itself.

In Justice Blackmun's view, this public policy outweighed the nar-
row infringement on the defendant's confrontation clause right. Justice Blackmun concluded that the procedure authorized by the Iowa statute was constitutionally permissible. The following section supports and expands upon the conclusion reached by the dissent.

III. Criticism and Implications

"Constitutional review by an independent judiciary is a tool of proven use in the American quest for an open society of widely dispersed powers." This power of review, however, must be exercised with care and caution. As both the concurring and dissenting opinions point out, the *Coy* majority neither adhered to precedent nor gave proper weight to the societal interests in protecting the child victims in arriving at its decision. The Court's opinion was inconsistent with prior cases involving the confrontation clause, and it did not fully consider the pressing public policy behind the implementation of the Iowa statute.

A. Prior Confrontation Clause Cases

The confrontation clause of the sixth amendment of the United States Constitution states: "[I]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with witnesses against him." Prior to *Coy*, the Supreme Court was less stringent in its demand for face to face confrontation in interpreting the confrontation clause. A review of these Supreme Court cases illustrates the *Coy* break with precedent.

The landmark Supreme Court opinion on this issue is *Mattox v. United States*. *Mattox* involved a murder trial in which two of the state's witnesses died before trial. The trial court admitted a reporter's notes of the witnesses' testimony at a former trial. The defendant challenged the evidence as abridging his sixth amendment rights. The Court held the testimony admissible as a hearsay exception. Justice Brown wrote: "There is doubtless reason for saying that the accused should never lose the benefit of any of these safeguards . . . [b]ut general rules of law of this kind . . . must occasionally give way to considerations of public policy and the necessities of the case."

101. *Id.*
102. *Id.*
104. 108 S. Ct. at 2805 (O'Connor, J., concurring); *id.* at 2808 (Blackmun, J., dissenting).
105. *See infra* notes 107-30 and accompanying text.
106. *See infra* notes 131-41 and accompanying text.
107. U.S. Const. amend. VI.
108. 156 U.S. 237 (1895).
109. *Id.* at 238.
110. *Id.* at 244.
111. *Id.* at 243.
Seventy-five years later, in *California v. Green*, the Supreme Court held that prior inconsistent statements made by a witness at the respondent’s preliminary hearing were admissible at trial. In writing for the majority, Justice White explained that the right of confrontation evolved from the practice of trying defendants on evidence that consisted solely of affidavits and depositions by the examining magistrate. This practice denied the defendant the opportunity to challenge his accuser in a face to face encounter before the jury. The purpose of the confrontation clause, therefore, was to insure that the witness gives his statement under oath, to force the witness to submit to cross-examination, and to permit the jury to observe the demeanor of the witness in making his statement.

More recent cases have prompted a clarification and reiteration of the underlying premise of the sixth amendment. In *Ohio v. Roberts*, an unavailable witness’ preliminary hearing testimony was held admissible after an initial finding of necessity and indicia of reliability. Justice Blackmun, writing for the Court, emphasized that the confrontation clause reflected a preference for direct confrontation, but the primary interest protected was cross-examination. Similarly, the Court in *Delaware v. Fensterer* upheld a murder conviction in which an expert’s opinion testimony was admitted despite his inability to recall the basis for his opinion. The Court found that the confrontation clause guarantees only an opportunity for cross-examination, not the effectiveness of the cross-examination. Moreover, the Court’s language in *Green* was repeated: “[A]ssurances of reliability our cases have found in the right of cross-examination are fully satisfied in cases such as this [in which] the factfinder can observe the witness’ demeanor under cross-examination, and the witness is testifying under oath and in the presence of the accused.”

Two additional Supreme Court cases are worthy of mention because of their factual similarity to *Coy*. In *Pennsylvania v. Ritchie*, the defendant was charged with rape, involuntary sexual intercourse, incest, and corruption of a minor. The Court considered whether the state’s interest in the confidentiality of its investigative files concerning child abuse must yield to the defendant’s sixth amendment right to discover

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112. 399 U.S. 149, 156 (1970).
113. *Id.*
114. *Id.* at 158.
116. *Id.* at 63.
118. *Id.*
119. *Id.*
favorable evidence. The defendant claimed that "by denying him access to information necessary to prepare his defense, the trial court interfered with his right of cross-examination." The Court reaffirmed the Fensterer opinion, holding that failure to disclose the file did not violate the confrontation clause. A confrontation clause infringement claim will only be upheld when there is "a specific statutory or court-imposed restriction at trial on the scope of questioning."

Similarly, the Court found no constitutional violation in Kentucky v. Stincer. The defendant was convicted of committing sodomy with two minor girls. He was excluded from the hearing in which the victims competency to testify was determined. The defendant's counsel, however, was present. According to the Court, because this was a pretrial hearing in which the validity of the accusations were not at issue, the exclusion did not violate the defendant's rights. The Court ruled that the right to cross-examination is essentially "a 'functional' right to promote reliability in the truth-finding function of a criminal trial."

In summary, the Supreme Court's analysis of confrontation clause cases emphasizes the right of cross-examination, which Dean Wigmore called "the greatest legal engine ever invented for the discovery of truth." In each case, the ultimate issue was whether the defendant had an opportunity to cross-examine the witness either before or during the trial. The requirements that the testimony be taken under oath and that the defendant and jury be able to observe the witness' demeanor while testifying are of less importance.

The constitutionality of the barrier device used in Coy should have been upheld as the principles inherent in the right of confrontation were preserved. First, the child witnesses testified under oath. In no way was this requirement abridged. Second, both the defendant and the jury were able to observe the witnesses' demeanor while they testified. Finally, the defendant was given an unrestricted opportunity to cross-examine the witnesses. The screening device used fully satisfied the interests of witnesses, defendants, and the jury. Thus, no violation of the sixth amendment resulted.

121. Id. at 994.
122. Id. at 998.
123. Id. at 999.
124. Id. at 1000.
126. Id. at 2659.
127. Id. at 2666.
128. Id. at 2662.
129. Green, 399 U.S. at 158 (quoting 5 J. Wigmore, Evidence § 1367 (3d ed. 1940)).
130. See supra notes 114-28 and accompanying text.
B. Societal Interests

In focusing on a mundane and previously unrecognized interpretation of "confrontation," the majority opinion also deemphasized the societal interests involved. Justice Scalia dismissed the public policy issue stating, "It is a truism that constitutional protections have costs."\(^{131}\) The majority failed to take into account, however, that without the child victim's testimony, successful prosecutions of sexual crimes are rare.\(^ {132}\) This hampers the effective administration of justice.\(^ {133}\) Protecting the child victim, on the other hand, advances two interests: (1) it helps the court in ascertaining the truth; and (2) it protects the child from undue trauma.

The first interest in ascertaining the truth requires consideration of the child's emotional state. Ignoring the child's guilt, fear, trauma, and cognitive immaturity hampers the child's ability to testify effectively.\(^ {134}\) The trauma of testifying may reduce the reliability of the victim's testimony,\(^ {135}\) deter the witness from testifying in an uninhibited manner,\(^ {136}\) and cause the victim to "freeze" on the witness stand, which diminishes credibility and reduces the amount of information gathered.\(^ {137}\) Thus, addressing the child's needs enhances the quality and quantity of testimony.

The second interest is in avoiding the child's exposure to undue trauma. A child may not understand the reason for confrontation and "the anticipation of being in close proximity to the defendant can be overwhelming."\(^ {138}\) As Justice Blackmun noted in his dissent, "studies of children who have testified in court indicate that such testimony is 'associated with increased behavioral disturbance in children.' "\(^ {139}\) Allowing the use of ameliorative techniques may reduce the psychological impact of testifying.

To conclude, weighing these interests against the "narrow Confrontation Clause right at issue here—the 'preference' for having the defend-

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\(^ {131}\) Coy, 108 S. Ct. at 2802.

\(^ {132}\) See Skoler, supra note 7, at 5-6.


\(^ {134}\) Skoler, supra note 7, at 38.


\(^ {136}\) See Note, supra note 133, at 364.


\(^ {139}\) Id.; see also Goodman, The Emotional Effects of Criminal Court Testimony on Child Sexual Abuse Victims, Proceedings from the International Conference on Child Witnesses: Do the Courts Abuse Children? (BRITISH PSYCHOLOGICAL ASSOCIATION, in press).
ant within the witness' sight while the witness testifies," the societal interests must prevail. As Justice Cardozo proclaimed: "Justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."

C. Implications

Most of the statutory schemes reviewed were enacted recently. Courts have not yet established the acceptable boundaries of the legislation. The Coy Court's invalidation of the barrier device may portend the invalidation of similar statutes. Indeed, the Globe decision illustrates the profound effect the Supreme Court's disapproval can have on lower courts. After the Globe case invalidated mandatory closure statutes, only three reported appellate court decisions upheld closure of the courtroom during the testimony of a child sexual assault victim. The Globe decision could have been an opening for trial judges to assess each individual case and protect the minor victim when necessary. Instead, the decision served to reduce actual closures.

The majority opinion may cultivate Justice Blackmun's fears "that the Court's apparent fascination with the witness' ability to see the defendant will lead the States that are attempting to adopt innovations... to sacrifice other, more central, confrontation interests." Because neither hearsay exceptions, admission of videotaped testimony, nor closed-circuit television allow for face to face confrontation, these protective systems could be invalidated, leaving nothing in their place. Consequently, the child would be required to either testify with no protective device at all, or sacrifice testimony completely. Neither alternative would strengthen the truth finding function of the court.

On the other hand, Coy's impact on future adjudications could be minimal. The reasons for this are twofold. First, the Iowa provision authorizing the use of the screen is the only statute of its kind. Second, four Justices—O'Connor, White, Blackmun, and Rehnquist—demonstrated their belief that other protective procedures might be found constitutional. One state court already has relied on this language to uphold legislation allowing a child abuse victim to testify via closed-circuit tele-

140. Coy, 108 S. Ct. at 2809 (Blackmun, J., dissenting).
143. Coy, 108 S. Ct. at 2806 (Blackmun, J., dissenting).
144. The majority in Coy insisted upon face to face confrontation because of their belief that this ensures the integrity of the fact finding process. 108 S. Ct. at 2802. If the child witness does not testify, however, the integrity of such process is severely undermined.
145. See supra notes 93-102 and accompanying text.
vision. "[W]e construe the majority opinion in Coy as did the concurring justices, as simply striking down one procedure used in that case and reserving for future consideration whether the more common approaches authorized by most states will suffice."\textsuperscript{146} Therefore, statutes that provide two-way viewing and have a necessity prong may pass constitutional muster.\textsuperscript{147} Conversely, statutes with few requirements will probably not be upheld because of the preeminence of the accused’s constitutional rights.

Conclusion

The confrontation clause affords criminal defendants an opportunity to confront their accusers in all criminal prosecutions. Although this right may be essential to a fair trial, at times it must be balanced with other interests. One such interest is the protection of child victims of sexual abuse from the trauma of testifying face to face with the accused. States have enacted legislation aimed at protecting the child witness, but the suggested techniques may infringe the accused’s constitutional rights.

The Supreme Court recently considered the constitutionality of one procedure designed to protect child victims. In Coy v. Iowa, the trial court permitted a one-way screening barrier to be placed between the accused and the complaining child witnesses at trial. The Court found that the procedure violated Coy’s sixth amendment right of confrontation and reversed the conviction.

The Court’s opinion is subject to criticism on two grounds. First, the decision was inconsistent with prior confrontation clause cases. The children testified under oath, the defendant and jury were able to witness their demeanor, and the defendant was given an unrestricted opportunity to cross-examine the witnesses. Thus, the barrier technique satisfied the sixth amendment requirements set forth in prior Supreme Court decisions. Second, the majority underplayed the societal interests involved. Protecting the child victim enhances the truth finding function of the courts, and avoids the child’s exposure to undue trauma.

Although Supreme Court decisions often have great impact on emerging areas of law, the Coy decision will most likely bar only those statutes that do not provide for two-way viewing and a necessity prong. As Justice O’Connor specified in her concurrence, “our cases suggest that the strictures of the Confrontation Clause may give way to the com-


\textsuperscript{147} “[I]f a court makes a case-specific finding of necessity, as is required by a number of state statutes, . . . our cases suggest that the strictures of the Confrontation Clause may give way to the compelling state interest of protecting child witnesses.” Coy, 108 S. Ct. at 2805 (O’Connor, J., concurring) (citations omitted).
pelling state interest of protecting child witnesses." Therefore, legisla-
tion that is carefully crafted to accommodate the defendant’s preeminent
constitutional rights should be acceptable.

148. Id.