CONSTITUTIONAL LAW—The Sixth Amendment Confrontation Right of a Criminal Defendant Charged with Lascivious Acts with Children Is Violated by Placing a Screen in the Courtroom Which Blocked the Defendant from the View of Testifying Victims. *Coy v. Iowa*, 108 S. Ct. 2798 (1988).

TABLE OF CONTENTS

I. FACTS

John Coy was arrested in August 1985 and charged with the sexual assault of two thirteen-year-old girls.[1] The assaults occurred in the early morning hours while the girls were tent camping in a backyard neighboring Coy's home.[2] The assailant wore a stocking mask and shined a flashlight in the girls' eyes during the assaults, making his identification by the victims impossible.[3]

Prior to trial the state moved that the testimony of the two girls be taken outside of the courtroom and viewed via closed-circuit television in the courtroom, or in the alternative for the defendant to be shielded from the witnesses' view by a screen.[4] These measures were approved for child witnesses under age fourteen by a then-recently-enacted Iowa statute.[5]

---

1. Coy v. Iowa, 108 S.Ct. 2798, 2799 (1988). On remand, the Iowa Supreme Court reversed Coy's conviction and remanded for a new trial.
2. *Id.*
3. *Id.*
4. *Id.*
5. This statute is codified at IOWA CODE § 910A.14 (1987). This section provides in relevant part:

> A court may, upon its own motion or upon motion of any party, order that the testimony of a child, as defined in section 702.5, be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court. Only the judge, parties, counsel, persons necessary to operate the equipment, and any person whose presence, in the opinion of the court, would contribute to the welfare and well-being of the child may be present in the room with

Coy objected to the use of either of these procedures on two grounds.[6] First, he alleged that his sixth amendment right to face-to-face confrontation[7] was violated.[8] Second, he contended that his right to due process would be violated because the screening device would erode the presumption of his innocence.[9] The use of a large screen and lighting modifications were approved by the trial court over the defendant's objection.[10] The jury was instructed that no inference of guilt was to be drawn from the use of the screen.[11] The two girls, pursuant to the statute's requirements,[12] presumably were instructed that the defendant could both see and hear them when they testified.[13]

At trial Coy was convicted on two counts of engaging in lascivious acts with a child.[14] He appealed his conviction to the Iowa Supreme Court,

---

the child during the child's testimony.

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

Section 702.5, referred to in this section, defines a child as a person under fourteen years of age. *See* IOWA CODE § 702.5 (1987).

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

7. The sixth amendment, in pertinent part, reads: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI.

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

9. *Id.*

10. *Id.*

11. *Id.* at 2799-2800. The instructions also advised the jury of the recently enacted statute which provided for the use of a screen in cases involving children. The instruction, in full, read:

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

Id. at 2810 (citing App. 17).

12. *See* IOWA CODE § 910A.14(1) (1987). The statute includes a requirement that the child-witness be informed "that the party can see and hear the child during testimony." *Id. See supra* note 5.

13. Coy v. Iowa, 108 S. Ct. 2798, 2806 n.2 (1988) (Blackmun, J., dissenting). The dissent commented in a footnote that the transcript did not contain a record of the trial court having so advised the witnesses, but that the Iowa Supreme Court opinion noted that the appellant " 'makes no assertion [that the] trial court failed to comply with this or other terms of the statute.' " *Id.* (quoting Coy v. State, 297 N.W.2d 730, 733 (Iowa 1986) (citing Brief for Appellant at 5, n.9)).

14. Coy v. Iowa, 108 S. Ct. 2798, 2799 (1988). The defendant was convicted of violating IOWA CODE § 709.8(1) (1985), a class "D" felony. The statute, in pertinent part, states:

claiming that the use of the screen violated his sixth amendment right to confrontation and also violated his right to a fair trial by creating a prejudicial inference of guilt.[15] The court, finding no error, affirmed.[16] The United States Supreme Court granted certiorari and, in a six-to-two decision, reversed and remanded the case.[17] The sixth amendment confrontation right of a criminal defendant charged with lascivious acts with children is violated by placing a screen in the courtroom which blocks the defendant from the view of the testifying victims. *Coy v. Iowa*, 108 S. Ct. 2798 (1988).

II. The Confrontation Clause

Justice Scalia, writing for the majority, traced the history of the confrontation right from biblical times, through early English law and the development of western legal culture, to the modern court.[18] He noted that

---

> It is unlawful for any person eighteen years of age or older to perform any of the following acts with a child with or without the child's consent unless married to each other, for the purpose of arousing or satisfying the sexual desires of either of them:
> (1) Fondle or touch the pubes or genitals of a child.

15. State v. Coy, 397 N.W.2d 730, 733 (Iowa 1987). Coy also claimed that the trial court erred in denying his motion to suppress certain evidence seized from his home. *Id.* at 731. The Iowa Supreme Court determined that the evidence was properly seized. *Id.* at 732-33. This issue was not appealed to the United States Supreme Court. Coy v. Iowa, 108 S. Ct. 2798 (1988).

16. Coy v. Iowa, 108 S. Ct. 2798, 2798 (1988); State v. Coy, 397 N.W.2d 730, 730 (1987).

17. Coy v. Iowa, 108 S. Ct. 2798, 2803 (1988). Justice Kennedy took no part in the consideration or decision of this case.

18. *Id.* at 2800-02 (citing *Acts* 25:16; Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. Pub. L. 381, 384-87 (1959) (quoting General Eisenhower's recollections of fact-to-face confrontation typical in his hometown of Abilene, Kansas)). The unedited text of General Eisenhower's comment to the B'nai B'rith Anti-Defamation League is as follows:

> Meet anyone face-to-face with whom you disagree. You could not sneak up on him from behind, or do any damage to him, without suffering the penalty of an outraged citizenry. If you met him face-to-face and took the same risks he did, you could get away with almost anything, as long as the bullet was in front. And today, although none of you has the great fortune, I think, of being from Abilene, Kansas, you live after all by that same code, in your ideals and in the respect you give to certain qualities. In this country, if someone dislikes you, or accuses you, he must come up in front. He cannot hide behind the shadow. He cannot assassinate you or your character from behind, without suffering the penalties an outraged citizenry will impose.

In *Acts* 25, the apostle Paul, having been accused of serious charges by the Jews, who had petitioned for his death, and fearful of being turned over to a Jewish court in Jerusalem, insisted on a trial according to Roman law. In response to Paul's appeal to Caesar, the governor, Festus, sent Paul to Rome, the capital of the empire, for trial. The Court quotes Festus' statement indicating that confrontation was assumed in Roman law: " 'It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges.' " Coy v. Iowa, 108 S. Ct. 2798, 2800 (1988) (quoting *Acts* 25:16). Paul's journey to the Roman forum was

the Court has typically dealt with the confrontation issue in the context of the admissibility of hearsay statements or restricted cross-examination.[19] Relying on this historical perspective and the literal meaning of the word "confront,"[20] the majority concluded that confrontation demands a "face-to-face" encounter between accusing witnesses and the accused.[21] The Court stressed that the literal right to confront forms " 'the core of the values furthered by the confrontation clause' "[22] which conveys "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.' "[23]

Confrontation is essential to fairness, according to the Court, because it lessens the risk of distortion or mistaken fact and induces truthfulness.[24] The Court observed that this truth-provoking effect, which is identified as a source of potential trauma in the Iowa statute, "is critical for ensuring the 'integrity of the fact-finding process.' "[25] While recognizing the possibility of "upsetting the truthful rape victim or abused child," Justice Scalia acknowledged that "it is a truism that constitutional protections have costs."[26]

III. The Presumption of Trauma

The Court, assessing the impact of the screening device upon Coy, concluded that "[i]t is difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter."[27] In defending the screening procedure, the state contended that the necessity of protecting child-victims of sexual crimes outweighed the defendant's confrontation right.[28] The Court conceded that the right of confrontation is not absolute and may be balanced with competing interests.[29] Justice Scalia, while leaving open the question of whether an interest exists which might outweigh the confrontation right, speculated that an overriding interest

---

instrumental in the spread of Christianity from Jerusalem to the gentiles in Rome. *Acts* 24-28.

19. Coy v. Iowa, 108 S. Ct. 2798, 2800 (1988).

20. The Court explained that the Latin prefix "con" derives from "contra," which means "against" or "opposed," and the noun "frons" means "forehead." For illustration, the Court quoted a passage from Shakespeare's *Richard II* " 'Then call them to our presence—face to face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak . . . .' "*Id.* (quoting *Richard II*, act 1, sc. 1).

21. *Id.*

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

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

24. *Id.* at 2802 (citing Z. Chafee, The Blessings of Liberty 35 (1956)) quoted in Jay v. Boyd, 351 U.S. 345, 375-6 (1956)(Douglas, J., dissenting)).

25. *Id.* (quoting Kentucky v. Stincer, 482 U.S. 703, ____ (1987)).

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

"would surely be allowed only when necessary to further an important public policy."[30]

Inherent in the Iowa statute is a presumption that child sexual abuse victims, as a class, are traumatized by testifying in open court.[31] The statute provided class-wide protection, through screening or closed circuit television, which, by presumption, eliminated the need for an individualized finding in each case.[32] The Court rejected the state's assertion that this presumption of trauma is a sufficiently compelling public policy to create an exception to the confrontation right.[33] The majority reasoned that since the newly created statute was not " 'firmly . . . rooted in our jurisprudence'"[34] it was defective in relying upon a generalized finding of trauma applicable to all child witnesses.[35]

IV. Harmless Error

The Court determined that the trial court's error, like other confrontation clause violations, should be subject to a harmless error analysis.[36] To sustain Coy's conviction, the violation of his confrontation right had to be held harmless beyond a reasonable doubt.[37] This analysis, which was left to the state appellate court on remand, would exclude speculation of whether the testimony or jury determinations would have been unchanged without the error.[38]

V. A Preference for Face-to-Face Confrontation

Justice O'Connor, in a concurrence joined by Justice White, agreed that Coy's confrontation rights had been violated at trial.[39] She departed, however, from the majority's position in so far as it regarded the criminal

---

30. *Id.* at 2803.

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

32. *Id.* at 2803.

33. *Id.*

34. *Id.* (quoting Bourjaily v. United States, 483 U.S. 171, ____ (1987)(citing Dutton v. Evans, 400 U.S. 74, 91 (1970))).

35. *Id.*

36. *Id.* (citing Chapman v. California, 386 U.S. 18, 24 (1967)). The Court in *Chapman* "requir[ed] the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Chapman v. California, 386 U.S. 18, 24 (1967). The Court in *Chapman* relied on an earlier case which judged harmlessness by inquiring, " 'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.' " *Id.* (quoting Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963)).

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

38. *Id.* The Iowa Supreme Court on remand was unable to find the error harmless beyond a reasonable doubt; it reversed the conviction and remanded for a new trial. State v. Coy, 433 N.W.2d 714 (Iowa 1988).

39. Coy v. Iowa, 108 S. Ct. 2798, 2803 (1988). (O'Connor, J., concurring).

defendant's right to physical confrontation of witnesses as an absolute requirement of the sixth amendment.[40] Instead, the concurrence viewed face-to-face confrontation as a preference which may bow to important state interests.[41] Justice O'Connor noted that a literal insistence on the right, as espoused by the majority, would eliminate even well-recognized hearsay exceptions.[42]

The dissent, written by Justice Blackmun and joined by Chief Justice Rehnquist, agreed with the concurrence's proposition that confrontation rights express only a preference for face-to-face encounter and do not preclude minimal infringement to advance competing interests.[43] The dissent explained that the primary purpose of the confrontation clause was to prevent conviction by ex parte affidavits and depositions.[44] Justice Blackmun observed that historically the right " 'compelled the witness to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.' "[45]

The dissent criticized the majority's "apparent fascination with the witness' ability to see the defendant" and "its reliance on literature, anecdote, and dicta from opinions that a majority of [the] Court did not join."[46] Justice Blackmun found support for his rejection of the majority position in Wigmore,[47] which stated that the right was " 'not for the idle

---

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

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

42. *Id.* at 2805 (O'Connor, J., concurring)(citing Bourjaily v. United States, 483 U.S. 171 (1987)(quoting Ohio v. Roberts, 448 U.S. 56, 63 (1980)). Justice O'Connor emphasized that "precedents recognize a right to face-to-face confrontation at trial, but have never viewed that right as absolute." *Id.* She noted that a literal interpretation has previously been acknowledged as " 'unintended and too extreme.' " *Id.* (citing Bourjaily v. United States, 483 U.S. 171, ____ (1987)(quoting Ohio v. Roberts, 448 U.S. 56, 63 (1980)).

43. Coy v. Iowa, 108 S. Ct. 2798, 2806 (1988) (Blackmun, J., dissenting).

44. *Id.* at 2805, 2807 (Blackmun, J., dissenting)(citing Kentucky v. Stincer, 482 U.S. 730, ____ (1987)(quoting Mattox v. United States, 156 U.S. 237, 242-43 (1895)). The dissent explained that confrontation "provide[d] an opportunity for cross-examination, and to compel the defendant 'to stand face to face *with the jury*.' " *Id.* at 2807 (emphasis in text)(quoting California v. Green, 399 U.S. 149, 158 (1970)).

45. *Id.* at 2806 (Blackmun, J., dissenting)(citing Kentucky v. Stincer, 482 U.S. 730, ____ (1987)(quoting Mattox v. United States, 156 U.S. 237, 242-43 (1895)).

46. *Id.* at 2806 (Blackmun, J., dissenting). Justice Blackmun stated that he was much more persuaded by Wigmore than by President Eisenhower's recollections of Kansas justice or by Shakespeare's words. *Id.* at 2807. The majority responded to this criticism in a lengthy footnote. In the footnote Justice Scalia provided textual support from Wigmore for his view that the right to cross-examine and the right to confront are indistinguishable. *See id.* at 2801 n.2.

47. Dean Wigmore's authoritative treatise on evidence is cited by both the majority and the dissent in text and in footnotes. *See id.* at 2801 n.2, 2802, and 2807 (Blackmun, J., dissenting).

purpose of gazing upon the witness, or *of being gazed upon by him.*' "[48] The purposes of the confrontation right, according to Justice Blackmun, are to ensure testimony under oath, facilitate unrestricted cross-examination, and provide an opportunity for the jury to observe the witness' demeanor and assess his credibility.[49] The dissent was convinced that the procedure used by the Iowa trial court satisfied these guarantees.[50]

VI. Balancing State Interests

The majority, having rejected the state public policy argument, dispensed with an analysis balancing public and defendant interests.[51] Justice O'Connor, although she concurred with the majority in the result, recognized legitimate underlying public policy reasons for the prevalence of child-protection legislation in sexual assault prosecutions.[52]

Justice O'Connor chronicled the states' innovative efforts to protect testifying child-witnesses while preserving criminal defendants' rights.[53] The concurrence made it "clear that nothing in [the] decision necessarily doom[ed] such efforts by state legislatures to protect child witnesses."[54] Justice O'Connor noted that many of the procedures adopted by the states, typically one and two-way closed-circuit television methods, provide for the defendant's presence and, therefore, threaten no infringement of the confrontation right.[55] She suggested that, in cases such as the one at bar, public policy justifications for other witness-shielding devices might outweigh confrontation rights upon an individualized showing of necessity.[56]

---

48. *Id.* at 2807 (Blackmun, J., dissenting)(quoting 5 J. Wigmore, Evidence § 1395, at 150 (J. Chadbourn rev. 1974) (emphasis in text).

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

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

51. *Id.* at 2803.

52. *Id.* at 2803-04 (O'Connor, J., concurring). Justice O'Connor noted that one-way and two-way closed circuit television procedures are provided for by one-half of the states. *Id.* at 2804. She directed the reader to two state codes as examples which provide for one-way closed-circuit television with the defendant present. *See* Ala. Code § 15-25-3 (Supp. 1987); Ga. Code Ann. § 17-8-55 (Supp. 1987). Two state codes which provided for two-way closed-circuit television are also referenced. *See* N.Y. Crim. Proc. Law 65.00-65.30 (McKinney Supp. 1988); Cal. Penal Code § 1347 (West Supp. 1988). The appendix of the Brief of Amicus Curiae American Bar Association described in detail twenty-one statutes providing for one-way closed-circuit television, screens, or mirrors, and five statutes providing for two-way closed-circuit television which were current as of August 1, 1987. The statutory descriptions included information on: who might request the procedure; the age limits of the child; whether the procedure was limited to use where certain types of crimes were charged; and what, if any, criteria the judge might consider. All the statutes described left the decision on use to the judge's discretion. App. to Brief for American Bar Association as Amicus Curiae 1a-95.

53. Coy v. Iowa, 108 S. Ct. 2798, 2804 (1988) (O'Connor, J., concurring).

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

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

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

The dissent concluded that a significant state interest existed which arose from the rising incidence of child sexual abuse and the emotional trauma experienced by testifying child-witnesses.[57] Social science research was cited to show that testifying is " 'associated with increased behavioral disturbances in children,' "[58] a phenomenon characterized as "secondary victimization."[59] Justice Blackmun proposed two probable consequences of open-court testimony which could be destructive of the truth-seeking function of courtroom confrontation: psychological injury to the child, and a resultant inability of the child to give effective testimony.[60] For these reasons the dissent approved of the procedure used by the Iowa trial court as implementing the important public policy of child-witness protection.[61] Contrary to the majority and concurrence, Justice Blackmun would permit the Iowa statutory protection without a case-specific finding of necessity.[62]

VII. Inherent Prejudice

While the majority found it unnecessary to reach the issue of whether screening of a defendant is inherently prejudicial, the dissent briefly addressed the question. The proper inquiry, according to the dissent, should determine whether the procedure created a risk of impermissible erosion of the defendant's presumption of innocence.[63] Justice Blackmun distinguished cases in which prison garb,[64] or shackles and gags,[65] " 'brand[ed] the [defendant] with an unmistakable mark of guilt.' "[66] Justice Brennan concluded that the screen was not inherently prejudicial to Coy because it was "unlikely that the use of the screen had a subconscious effect on the jury's attitude toward [Coy]" and because the jury was given an instruction which cautioned that no inference of guilt should be drawn from the screening procedure.[67]

---

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

58. *Id.* (Blackmun, J., dissenting)(quoting Goodman, Jones & Pyle, *The Emotional Effects of Criminal Court Testimony on Child Sexual Assault Victims*, Proceedings of the International Conference on Child Witnesses: Do the Courts Abuse Children?, p. ____ (British Psychological Association, in press)).

59. *Id.* (Blackmun, J., dissenting)(referencing Avery, *The Child Abuse Witness: Potential for Secondary Victimization*, 7 Crim. Just. J. 1, 3-4 (1983)).

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

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

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

63. *Id.* at 2810 (Blackmun, J., dissenting)(citing Estelle v. Williams, 425 U.S. 501, 505 (1976)).

64. *Id.* (Blackmun, J., dissenting)(citing Estelle v. Williams, 425 U.S. 501 (1976)).

65. *Id.* (Blackmun, J., dissenting)(citing Illinois v. Allen, 397 U.S. 337 (1970)).

66. *Id.* (Blackmun, J., dissenting)(citing Holbrook v. Flynn, 475 U.S. 560, 571 (1986)(quoting Estelle v. Williams, 425 U.S. 501, 518 (1976)).

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

VIII. Conclusion

The Court in *Coy*, has grafted evidentiary standards ordinarily applicable to out-of-court hearsay statements to the entirely in-court testimony at issue here by requiring that the witnesses' statements either "fall within a firmly rooted [hearsay] exception" or be made in open court, by witnesses who are face-to-face with the defendant, absent an exception founded on an individualized showing of necessity. Since the testimony against Coy was given in court, under oath, and subject to unrestricted cross-examination in full view of the jury, it should have been constitutionally sufficient that the courtroom procedure preserved his essential confrontation rights. There was no need to impose an inappropriate exception/necessity analysis derived by analogy from caselaw pertaining to hearsay.

Beginning from a literal and antiquated perspective, the Court in this decision fortified the rights of criminal defendants. It did so despite the concerned efforts of the majority of our states, as expressed in their legislative endeavors, to protect sexually victimized children and prevent their revictimization by our judicial system. This decision sounds the death knell for the statutory presumption of trauma. In future child sexual assault cases, it will be necessary to establish potential witness trauma on a case-by-case basis to avoid a violation of the defendant's sixth amendment confrontation rights.

Jacqueline A. Rypma