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The Confrontation Clause Applied to Minor Victims of Sexual Abuse

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RECENT DEVELOPMENT

The Confrontation Clause Applied to Minor Victims of Sexual Abuse

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I. INTRODUCTION

Dramatic increases in reports of child abuse and an even more alarming rise in reports of sexual abuse of children¹ have contributed to growing media attention and public awareness of these problems.² Concern for effective prosecution of the abusers, as well as for protection of the minor victims from further psychological trauma,³ has prompted a growing number of states to develop statutory measures that provide special protection from trauma for children during testimony at trial.⁴ The minor victim reportedly has the most difficulty facing his or her family and the defendant during testimony.⁵ Creative solutions⁶ to this problem have been developed while balancing protection of the defendant's constitutional right to confrontation.⁷ Typically, these statutes provide for the child to testify via closed-circuit television, by means of videotaped direct testimony, or from behind a screen.⁸

Such procedures have been deemed necessary by state legislatures primarily for two reasons. First, the state has a strong interest in criminal justice; conviction rates for juvenile sex abuse cases remain "strikingly low" while reports of abuse continue to escalate annually.⁹ Low

1. See Brief for the American Bar Association, *Coy v. Iowa*, 108 S. Ct. 2798 (1988) (No. 86-6757) [hereinafter *Amicus Brief*]; see also AM. ASS'N. FOR PROTECTING CHILDREN, HIGHLIGHTS OF OFFICIAL CHILD NEGLECT AND ABUSE REPORTING 1985, at 3 (1987) (stating that reports of child abuse increased from an annual rate of 669,000 in 1976 to over 1.9 million in 1985, and that in 1985, 12% of all reported maltreatment concerned child sexual abuse).

2. See Watson, *Special Report: A Hidden Epidemic*, NEWSWEEK, May 14, 1984, at 30, col. 3 (quoting statistics which predict that child molestation will occur this year between 100,000 and 500,000 times); Recent Development, *Criminal Law—Right of Confrontation—Screen Used at Trial That Prevents Testifying Child Sex Abuse Victim from Viewing Accused Violates Accused's Sixth Amendment Right to Face-to-Face Confrontation*, 20 ST. MARY'S L.J. 219, 220 (1988); see also Vartabedian & Vartabedian, *Striking a Delicate Balance*, JUDGES J., Fall 1985, at 16, 17.

3. See Casenote, *Pennsylvania v. Ritchie: The Supreme Court Examines Confrontation and Due Process in Child Abuse Cases*, 34 LOY. L. REV. 181, 186 (1988) (stating that "[l]ess than ten percent of the cases reported in any year are ever prosecuted because of the difficulty in obtaining evidence and the trauma to the child caused by the criminal justice system").

4. See *infra* note 75 and accompanying text. The policy underlying these "child shield" statutes is to provide an atmosphere as comfortable and unthreatening as possible in which the child may testify, while still allowing the defendant to participate fully in the proceeding.

5. See, e.g., Ginkowski, *The Abused Child: The Prosecutor's Terrifying Nightmare*, CRIM. JUST., Spring 1986, at 30, 31; Vartabedian & Vartabedian, *supra* note 2, at 18.

6. Ginkowski, *supra* note 5, at 35.

7. U.S. CONST. amend. VI; see also *infra* notes 24-28 and accompanying text.

8. See Ginkowski, *supra* note 5, at 35.

9. See Note, *The Revision of Article 38.071 after Long v. State: The Troubles of a Child Shield Law in Texas*, 40 BAYLOR L. REV. 267, 267 (1988). Many authorities, however, do not believe that the current number of sexual abuse reports accurately reflects the amount of abuse that is actually occurring. See, e.g., Comment, *Children's Testimony in Sexual Abuse Cases: Ohio's Proposed Legislation*, 19 AKRON L. REV. 441, 441 n.5 (1986) (reporting that "[i]t is likely that more than 20,000 felony child molestations occur in Ohio each year: [and that] 2,000 (10%) of these

rates of conviction have been noted by courts and psychologists as due in large part to the child's reluctance or inability to testify in open court.¹⁰ If the child is psychologically able to testify at all, the quality of that testimony may weaken the state's case dramatically.¹¹ The witness is better able to testify effectively and accurately when a court is authorized statutorily to permit these children to testify in unorthodox manners that shield the child from the trauma of testifying face-to-face with the defendant.¹²

In addition to facilitating prosecution and conviction, the state has a strong social interest in protecting the psychological welfare of minors who are victims of sexual abuse. Virtually all commentators, judges, prosecutors, and support professionals who deal with child victims acknowledge that the pre-existing trauma of the abuse is only exacerbated¹³ by the emotional demands put upon the child during testimony at trial.¹⁴ Feelings of guilt, fear, and isolation are among the most com-

offenses are reported to law enforcement authorities' " (quoting Ohio State Sen. Lee Fisher, sponsor of OHIO S. 16 (Jan. 30, 1985) (proposed child shield legislation))).

10. See *State v. Sheppard*, 197 N.J. Super. 411, 484 A.2d 1330 (Law Div. 1984). There, the state's case-in-chief disclosed:

In most cases, prosecutions are abandoned or result in generous plea agreements, either because the child's emotional condition prevents [him or] her from testifying or makes the testimony obviously inaccurate or inadequate. One attorney, who had handled 30 to 40 of these cases for the State, was able to complete a trial in only one. In most, while the child victim was able to provide her with information sufficient to support a prosecution and was sometimes able to appear with difficulty before a grand jury, [he or] she could not testify in court face-to-face with the accused and other relatives.

Id. at 417, 484 A.2d at 1333.

11. See D. WHITCOMB, E. SHAPIRO & L. STELLWAGEN, *WHEN THE VICTIM IS A CHILD: ISSUES FOR JUDGES AND PROSECUTORS* 17-18 (1985) [hereinafter *CHILD VICTIM ISSUES*] (noting that "the most frequently mentioned fear was facing the defendant [as] the participation and experience of being in close proximity to the defendant can be overwhelming").

12. The ABA's amicus curiae brief submitted in *Coy v. Iowa* argued:

Testifying in sight of the defendant may . . . weaken the state's case. The trauma may contribute to the child "freezing" on the witness stand, fidgeting, stammering, and in general casting false doubt upon his or her credibility and veracity. If the child is unable to testify effectively, the case may be dismissed.

Amicus Brief, *supra* note 1, at 9-10.

13. See, e.g., Ginkowski, *supra* note 5, at 31 (stating that "[i]ronically, the criminal justice system, supposedly the child protector of last resort, often becomes the perpetrator of child abuse").

14. See Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977 (1969). Libai discussed the following elements that adversely affect child witnesses:

Psychiatrists have identified components of the legal proceedings that are capable of putting a child victim under prolonged mental stress and endangering his emotional equilibrium: repeated interrogations . . . ; facing the accused again; the official atmosphere in court; the acquittal of the accused for want of corroborating evidence . . . ; and the conviction of a molester who is the child's parent or relative.

Id. at 984; see also Amicus Brief, *supra* note 1, at 8-9; Vartabedian & Vartabedian, *supra* note 2, at 18; Note, *supra* note 9, at 268.

mon emotions experienced by these witnesses. Moreover, the alleged abuser is very often a family member, which adds a sense of betrayal.¹⁵

Attempts to help ease such trauma have led to efforts to alleviate the primary cause of the feelings—the child being forced to look at the defendant while testifying.¹⁶ In response to public outcry state legislatures have enacted various forms of “child shield” statutes and the American Bar Association (ABA) has approved guidelines for treatment of child abuse victims during testimony.¹⁷ The ABA guidelines include procedural reforms that allow the child to testify from a different location than that normally reserved for witnesses.¹⁸

In *Globe Newspaper Co. v. Superior Court*¹⁹ the Court recognized the protection of child sexual assault victims during trial as a “compelling” state interest, sufficient to warrant alteration of usual trial procedure. The *Globe* Court weighed the press’s first amendment right to attend trials against the state’s interest in “protect[ing] . . . minor victims of sex crimes from further trauma and embarrassment . . . [and encouraging] such victims to come forward and testify.”²⁰ Ultimately, the Court found that “safeguarding the physical and psychological well-being of a minor” is a compelling interest.²¹ Thus, until very recently, the trend in both legislative action and judicial decisions was to extend the greatest protection possible to children who are required to testify regarding sexual abuse.

In *Coy v. Iowa*,²² however, the Supreme Court struck down a statute that permitted minor witnesses to testify from behind a one-way screen. The statute was held to violate a defendant’s confrontation rights.²³ Although limiting its decision to the statute at hand, the Court’s interpretation of the confrontation clause raised uncertainties about the future of many child shield statutes.

This Recent Development considers whether the Court’s analysis of the confrontation clause in *Coy v. Iowa* was justified in light of past decisions and whether it will be beneficial for the prosecution of child sexual abuse cases. Part II examines the development of confrontation

15. See Vartabedian & Vartabedian, *supra* note 2, at 18.

16. See *supra* notes 5-8 and accompanying text.

17. See *infra* note 75 and accompanying text; see also A.B.A., GUIDELINES FOR THE FAIR TREATMENT OF CHILD WITNESSES IN CASES WHERE CHILD ABUSE IS ALLEGED (adopted July 10, 1985, by the ABA House of Delegates in Washington, D.C.) [hereinafter CHILD WITNESS GUIDELINES].

18. CHILD WITNESS GUIDELINES, *supra* note 17. Among the ABA’s suggestions for alternative modes of testimony are closed-circuit television and a one-way mirror. *Id.*

19. 457 U.S. 596 (1982).

20. *Id.* at 607; see also Casenote, *supra* note 3, at 187.

21. *Globe*, 457 U.S. at 607.

22. 108 S. Ct. 2798 (1988).

23. *Id.* at 2802.

clause interpretation, including its purpose and application. Part III explores recent cases and child shield statutes that apply well-developed law to the problem of child abuse. In particular, it examines *Coy v. Iowa* against the background of cases dealing with similar confrontation issues. Part IV concludes that the decision in *Coy* was not justified by existing case law and that some child shield statutes may now be in danger of being held unconstitutional. Finally, Part V outlines ways in which future legislation might protect child victims of sexual abuse and still meet the Court's criteria for confrontation.

II. LEGAL BACKGROUND

A. Historical Interpretation of the Confrontation Clause

1. The "Truthfinding" Function

In all criminal trials the sixth amendment gives the defendant "the right . . . to be confronted with the witnesses against him." The purpose of the amendment is to compel each witness to testify in the presence of the jury so that the jurors may evaluate his demeanor on the stand.²⁴

Even the United States Supreme Court, however, acknowledges that the intent of the drafters of the Bill of Rights is unclear.²⁵ Consequently, an early judicial decision, *Mattox v. United States*,²⁶ has become the foundation for interpreting the confrontation clause. The Court in *Mattox* held that the primary objectives of the confrontation clause are to allow the defendant to challenge the witness's conscience

24. U.S. CONST. amend. VI. This right is binding upon the states through the due process clause of the fourteenth amendment. See *Pointer v. Texas*, 380 U.S. 400 (1965) (holding that the right to confrontation is fundamental and essential to a fair trial and is made obligatory on the states by the fourteenth amendment).

25. See, e.g., *California v. Green*, 399 U.S. 149, 175-76 (1970) (Harlan, J., concurring). Justice Harlan noted:

Similar guarantees to those of the Sixth Amendment are found in a number of the colonial constitutions and it appears to have been assumed that a confrontation provision would be included in the Bill of Rights that was to be added to the Constitution after ratification. The Congressmen who drafted the Bill of Rights amendments were primarily concerned with the political consequences of the new clauses and paid scant attention to the definition and meaning of particular guarantees. Thus, the confrontation clause was apparently included without debate along with the rest of the Sixth Amendment package of rights If anything, the confrontation guarantee may be thought, along with the right to compulsory process, merely to constitutionalize the right to a defense as we know it, a right not always enjoyed by the accused, whose only defense prior to the late 17th century was to argue that the prosecution had not completely proved its case.

Id. (footnotes omitted); see also Comment, "Face-to Television Screen-to Face": Testimony by Closed-Circuit Television in Cases of Alleged Child Abuse and the Confrontation Right, 76 Ky. L.J. 273, 279 (1988).

26. 156 U.S. 237 (1895).

and recollection and to compel the witness to stand before *the jury* in order to judge his demeanor and credibility.²⁷ The Court also noted that while face-to-face confrontation is preferred, that right is not absolute and must occasionally yield to public policy and the necessities of a given case.²⁸

Since *Mattox*, the Court has consistently refused to classify confrontation rights as absolute²⁹ and has recently held that adverse state interests may justify dispensing with confrontation at trial.³⁰ In spite of these exceptions, however, the Court has scrupulously guarded the defendant's right to confrontation and has said that its unjust denial constitutes severe constitutional error.³¹ Under the current standard for modifying a defendant's right to confront witnesses, the court balances public policy considerations against the state's need to operate an effective criminal justice system.³² Proponents of child shield statutes argue that such public policy considerations are invoked by the state's interest in prosecution of sexual abuse cases. Therefore, the objectives of the confrontation clause may be preserved while protecting child witnesses and facilitating prosecutions.³³

The primary functions of the confrontation clause traditionally have been delineated as: (1) ensuring reliability by requiring the witness to give his or her statements under oath; (2) forcing the witness to submit to cross-examination in order to discover the truth; and (3) permitting the jury to observe the witness's demeanor to aid in assessing credibility.³⁴ In view of these purposes the Court has characterized the right to confrontation as a "functional" truth-finding device that promotes reliability of testimony.³⁵ The courts consistently have empha-

27. *Id.* at 242-43 (emphasis added).

28. *Id.* at 243. It has been observed that with confrontation issues, the Court "departs from its usual course of examination to determine whether the infringement of this right . . . is based on a compelling State interest. Instead, cases arising under the confrontation clause are treated as evidentiary questions." Comment, *supra* note 9, at 443.

29. See, e.g., *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Illinois v. Allen*, 397 U.S. 337 (1970); *Barber v. Page*, 390 U.S. 719 (1968); *Pointer*, 380 U.S. at 407; *Dowdell v. United States*, 221 U.S. 325 (1911).

30. *Ohio v. Roberts*, 448 U.S. 56, 64 (1980).

31. *Brookhart v. Janis*, 384 U.S. 1, 3 (1966).

32. See Recent Development, *supra* note 2, at 222 (citing *Roberts*, 448 U.S. at 56).

33. See, e.g., Amicus Brief, *supra* note 1, at 14.

34. *Green*, 399 U.S. at 158.

35. *Kentucky v. Stincer*, 482 U.S. 730, 737 (1987); see also *Lee v. Illinois*, 476 U.S. 530, 540 (1986) (holding that the right to confrontation was violated when a defendant was not allowed to cross-examine a co-defendant regarding his confession). The Court has consistently held that "the Confrontation Clause guarantees only 'an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" *Stincer*, 482 U.S. at 739 (emphasis in original) (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985)).

sized cross-examination as central to the process of determining the truth and promoting reliability at trial. Indeed, leading cases have held that satisfaction of the right to confrontation turns solely on the opportunity for cross-examination.³⁶

When the issue has involved a child testifying about sexual abuse, however, a few courts have held that face-to-face confrontation, rather than mere cross-examination, is required because of a perceived increased chance for unreliable testimony.³⁷ The majority of cases, nonetheless, have emphasized that confrontation is accomplished through cross-examination and does not require "eyeball-to-eyeball" contact.³⁸ Until *Coy*, child shield statutes that allowed complete and effective cross-examination of the witness generally were held constitutional in spite of the fact that there was no face-to-face confrontation.³⁹ The holdings in such cases were based on the fact that cross-examination ensured sufficient reliability to fulfill the guarantees of the confrontation clause.⁴⁰

2. "Adequate Indicia of Reliability" as a Measuring Rod

In cases when the opportunity to cross-examine a witness is not available to the defendant, the Supreme Court still has admitted such testimony. Normally, the admission is conditioned on both a showing of

36. See, e.g., *Stincer*, 482 U.S. at 739; see also *Davis v. Alaska*, 415 U.S. 308, 315 (1974) (requiring that the defendant be allowed to cross-examine the prosecution's witness in order to impeach testimony); *Pointer*, 380 U.S. at 407 (holding that admitting into evidence a statement of the declarant whom the defendant had no opportunity to cross-examine violated the confrontation right); *Douglas v. Alabama*, 380 U.S. 415, 420-21 (1965) (holding that the refusal to allow the defendant to cross-examine the codefendant violated the confrontation clause). See generally Recent Development, *supra* note 2, at 223.

37. See, e.g., *Coy v. Iowa*, 108 S. Ct at 2798, 2902 (1988).

38. *State v. Sheppard*, 197 N.J. Super. 411, 432, 484 A.2d 1330, 1343 (Law Div. 1984); see also *Stincer*, 482 U.S. at 739 (holding that the functional purpose of the right to confrontation is to ensure an opportunity to cross-examine adverse witnesses); *Douglas*, 380 U.S. at 418-19 (stating that the confrontation clause is satisfied by an adequate opportunity for cross-examination); *Commonwealth v. Ludwig*, 366 Pa. Super. 361, 365, 531 A.2d 459, 461 (1987) (asserting that the right of confrontation is satisfied when the witness is subject to cross-examination), *appeal granted*, 518 Pa. 617, 541 A.2d 744 (1988); cf. Note, *supra* note 9, at 272 (noting that advocates of child shield statutes contend that the right to confrontation guarantees more than face-to-face confrontation).

39. See, e.g., *Stincer*, 482 U.S. at 730-31; *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987); *In re Appeal in Pinal County Juvenile Action*, 147 Ariz. 302, 709 P.2d 1361 (1985); *McGuire v. State*, 288 Ark. 388, 706 S.W.2d 360 (1986); *Commonwealth v. Willis*, 716 S.W.2d 224 (Ky. 1986); *Sheppard*, 197 N.J. Super. at 411, 484 A.2d at 1330; *Ludwig*, 366 Pa. Super. at 361, 531 A.2d at 459; *State v. Cooper*, 291 S.C. 351, 353 S.E.2d 451 (1987). *Contra United States v. Benfield*, 593 F.2d 815 (8th Cir. 1979) (holding that the confrontation right was violated when the defendant was not allowed to "fully participate" in cross-examination and when the witness was unaware of his presence); *Herbert v. Superior Court*, 117 Cal. App. 3d 661, 172 Cal. Rptr. 850 (1981) (holding that the confrontation right was violated when the defendant was able to hear, but not to see the witness).

40. E.g., *Stincer*, 482 U.S. at 739.

the witness's unavailability and adequate indicia of reliability regarding the testimony that will not be subject to cross-examination.⁴¹

In *Ohio v. Roberts*, however, the Court indicated that while the confrontation clause requires a showing of unavailability, competing state interests such as "public policy and the necessities of the case" may allow the elimination of confrontation without proof of unavailability or reliability.⁴² More importantly for child sexual abuse cases, the Court indicated that when the utility of confrontation is remote, the demonstration of unavailability is not required.⁴³ This view has been reiterated in recent Supreme Court cases. For example, in construing the co-conspirator exception to the hearsay rule, the Court in *United States v. Inadi*⁴⁴ noted that the confrontation clause does not always require a showing of the declarant's unavailability.⁴⁵

Once the first prong of the *Roberts* test is met through a demonstration of unavailability or an adequate showing of reasons to waive that requirement, the Court also requires proof of adequate indicia of reliability to admit the testimony.⁴⁶ The test for reliability can be met in one of two ways. Reliability is inferred when the "evidence falls within a firmly rooted hearsay exception."⁴⁷ In other cases, the Court requires a "showing of particularized guarantees of trustworthiness" for the admission of the evidence.⁴⁸

This ultimate emphasis on reliability as fulfilling the purpose of the confrontation clause has been affirmed in subsequent cases construing violations of the right to confrontation.⁴⁹ In *Inadi*⁵⁰ and *Bourjaily v. United States*⁵¹ the Court admitted evidence that fell within a "firmly rooted hearsay exception" without requiring separate showings of unavailability or reliability. The Court noted that the "hearsay rules and the Confrontation Clause are generally designed to protect similar val-

41. *Ohio v. Roberts*, 448 U.S. 56, 65-66 (1980).

42. *Id.* at 64 (quoting *Mattox v. United States*, 156 U.S. 237, 243 (1895)).

43. *Id.* at 65 n.7 (citing *Dutton v. Evans*, 400 U.S. 74 (1970) (holding that the prosecution was not required to produce a seemingly available witness when the utility of confrontation seemed remote)).

44. 475 U.S. 387 (1986).

45. *Id.* at 387. See generally Graham, *The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship*, 72 MINN. L. REV. 523, 551-54 (1988).

46. See *Roberts*, 448 U.S. at 65; see also *Dutton v. Evans*, 400 U.S. 74 (1970).

47. *Roberts*, 448 U.S. at 66.

48. *Id.*

49. See generally Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 559-60 (1988).

50. 475 U.S. at 387.

51. 483 U.S. 171 (1987).

ues.'⁵² Thus, when statements fall within a hearsay exception, the confrontation clause does not require an independent inquiry into their reliability.⁵³

In determining the level of confrontation required to preserve a defendant's rights in sexual abuse cases, the Court has held that reliability is the primary interest secured by the sixth amendment. In *Kentucky v. Stincer*⁵⁴ the defendant was excluded from the competency hearing of two child witnesses.⁵⁵ The Court held that the defendant's right to confrontation was not violated, stressing that the purpose of confrontation was to promote reliability.⁵⁶ These cases indicate that the Court is willing to find, in the face of reliable evidence, that the confrontation clause is not necessarily breached if a defendant is unable to confront every witness against him.⁵⁷

Conversely, in cases outside valid hearsay exceptions, the Court requires adequate guarantees of reliability to satisfy the right to confrontation. In *Lee v. Illinois*⁵⁸ the defendant's rights were held to have been violated when a nontestifying codefendant's statement did not bear adequate indicia of reliability.⁵⁹ The Court unanimously agreed that to satisfy the confrontation clause, hearsay must have certain guarantees of trustworthiness.⁶⁰ It did not, however, rule out the possibility that guarantees of trustworthiness could exist in situations outside a valid hearsay exception.

B. *The Confrontation Clause Applied to the Federal Rules of Evidence*

In addition to the reliability test, *Roberts* established a requirement of unavailability. Some commentators, however, believe that this condition has been virtually eliminated by *Inadi*,⁶¹ and that the only

52. *Id.* at 182-83 (quoting *California v. Green*, 399 U.S. 149, 155 (1970)).

53. *Id.* at 183.

54. 482 U.S. 730 (1987).

55. *Id.* at 735.

56. *See id.* at 736-37.

57. *See Greenhalgh & Lobelson, Tacking to the Right: Confrontation, Cruel and Unusual Punishment Clauses Re-Examined*, A.B.A. J., Jan. 1, 1988, at 35, col. 3 (noting that the Court is willing to find that an available declarant need not testify, even when the evidence admitted under the "reliability" test is the pivotal factor resulting in conviction); *see also Bourjaily*, 483 U.S. at 171; *Stincer*, 482 U.S. at 730; *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987); *Inadi*, 475 U.S. at 387.

58. 476 U.S. 530 (1986).

59. A year later, however, in *Bourjaily*, the Court included the co-conspirator exception among those "firmly enough rooted in our jurisprudence that . . . a court need not independently inquire into the reliability of such statements." *Bourjaily*, 483 U.S. at 183.

60. *See Lee*, 476 U.S. at 530; *see also Jonakait*, *supra* note 49, at 560.

61. 475 U.S. at 387. *Inadi* held that statements of nontestifying co-conspirators can be admitted without a showing of unavailability. If applied to other hearsay areas, this reasoning implies

remaining requirement of unavailability is found in the Federal Rules of Evidence.⁶²

Federal Rule of Evidence 804(a) provides five grounds of unavailability for a witness: privilege; refusal to testify; testimony to lack of memory; death or then existing physical or mental infirmity; and presence not procurable by process or other reasonable means.⁶³ When one of these unavailability criterion is met, Rule 804 provides a hearsay exception under which the testimony of the unavailable declarant is admissible. The rule's use of "unavailable" refers to the availability of testimony, not to the witness's physical presence at trial.⁶⁴ Thus, in sexual abuse prosecutions, use of a minor witness's testimony when there is no confrontation would be allowed under Federal Rule of Evidence 804(a) on the grounds of unavailability, incompetence, and the danger of severe psychological injury to the child.⁶⁵

Proponents of child shield statutes generally emphasize psychological unavailability.⁶⁶ The statutes themselves⁶⁷ usually are conditioned upon a judicial finding that the child would experience at least some emotional trauma from testifying in open court.⁶⁸ While many commentators and some courts have implied that this standard is insufficient to meet constitutional guarantees of confrontation,⁶⁹ the cases upholding the statutes have done so primarily because of concerns for psychological injury to the witness.⁷⁰

In applying the Federal Rules of Evidence to the reliability requirement in *Roberts*, the opinions in *Lee*, *Inadi*, and *Bourjaily* reaf-

that "out-of-court statements generally can be constitutionally introduced without producing an available declarant." Jonakait, *supra* note 49, at 561.

62. See Jonakait, *supra* note 49, at 564, 573.

63. FED. R. EVID. 804(a). Note that the witness is *not* unavailable within the meaning of the rule if any of these conditions are due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from testifying. *Id.*

64. See Graham, *supra* note 45, at 554.

65. *Id.*

66. See generally Amicus Brief, *supra* note 1, at 17-19; CHILD VICTIM ISSUES, *supra* note 11, at 16; Vartabedian & Vartabedian, *supra* note 2, at 48.

67. See *infra* note 75 and accompanying text.

68. *Id.*; see also Graham, *supra* note 45, at 559.

69. See, e.g., *Coy v. Iowa*, 108 S. Ct 2798 (1988) (upholding a defendant's right to face-to-face confrontation but not ruling that all child shield statutes are unconstitutional); *United States v. Benfield*, 593 F.2d 815 (8th Cir. 1979) (holding unconstitutional the inability of the defendant to participate fully in a videotaped deposition); *Hochheiser v. Superior Court*, 161 Cal. App. 3d 777, 208 Cal. Rptr. 273 (1984) (rejecting "shield" procedures because the trial court had implemented them before they had been passed by the legislature). See generally Graham, *supra* note 45; Jonakait, *supra* note 49.

70. See, e.g., *Kentucky v. Stincer*, 482 U.S. 730 (1987); *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987); *State v. Boodry*, 96 Ariz. 259, 394 P.2d 196, *cert. denied*, 379 U.S. 949 (1964); *State v. Myatt*, 237 Kan. 17, 697 P.2d 836 (1985); *State v. Sheppard*, 197 N.J. Super. 411, 484 A.2d 1330 (Law Div. 1984); *State v. Gilbert*, 109 Wis. 2d 501, 326 N.W.2d 744 (1982).

firmed the rule that no showing of reliability is required if the evidence falls within a firmly established hearsay exception. Moreover, the *Roberts* Court held that statements not within a firmly rooted hearsay exception still satisfy constitutional requirements for admissibility if they exhibit "particularized guarantees of trustworthiness."⁷¹ This language is analogous to the rationale supporting residual hearsay exceptions.⁷² Consequently, evidence admitted under those exceptions seems to meet the reliability requirements of the confrontation clause.⁷³ Many statutory provisions for child sexual abuse prosecutions use similar language in an effort to create hearsay exceptions that protect the minor witness and the defendant.⁷⁴

III. RECENT DEVELOPMENTS

A. "Child Shield" Statutes

Based on the United States Supreme Court's indications that unavailability and sufficient indicia of reliability satisfy the elements of confrontation, a majority of states have sought to protect their "compelling" interests through the adoption of "child shield" statutes.⁷⁵

71. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

72. See *Graham*, *supra* note 45, at 563; see also *FED. R. EVID.* 803(24), 804(b)(5).

73. See *Graham*, *supra* note 45, at 564.

74. *Id.* at 563; see also *infra* note 77 and accompanying text.

75. See Amicus Brief, *supra* note 1, at 1a-18a. The following 21 statutes provide for videotaped testimony of a minor witness at the discretion of the trial court. Unless otherwise indicated, only the attorneys, technicians, and a support person for the minor witness may be in the room. ALA. CODE § 15-25-3 (Supp. 1988) (stating that defendant must be present); ARIZ. REV. STAT. ANN. § 13-4253 (Supp. 1988); CONN. GEN. STAT. ANN. § 54-86g (West Supp. 1987); FLA. STAT. ANN. § 92.54 (West Supp. 1989); GA. CODE ANN. § 17-8-55 (Supp. 1988) (stating that defendant must be present and proceedings must be televised live to the jury); IND. CODE ANN. § 35-37-4-8 (West 1986); IOWA CODE ANN. § 910.A14 (West Supp. 1989); KAN. STAT. ANN. § 38-1558 (1986); KY. REV. STAT. ANN. § 421-350(1) (*Michie/Bohbs-Merrill Supp.* 1988); LA. REV. STAT. ANN. § 15:283 (West Supp. 1989); MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (Supp. 1988); MASS. GEN. LAWS ANN. ch. 278, § 16D(b)(1) (*Law. Co-op. Supp.* 1989); MINN. STAT. ANN. § 595.02(4) (West 1988); MISS. CODE ANN. § 13-1-405 (Supp. 1988); N.J. REV. STAT. § 2A:84A-32.4 (1985); OKLA. STAT. ANN. tit. 22, § 753 (West Supp. 1989); PA. CONS. STAT. ANN. tit. 42 §§ 5982, 5985 (*Purdon Supp.* 1989); R.I. GEN. LAWS § 11-37-13.2 (Supp. 1988); TEX. CODE CRIM. PROC. ANN. art. 38.071, § 3 (*Vernon Supp.* 1989); UTAH CODE ANN. § 77-35-15.5(3) (Supp. 1989); VT. R. EVID. § 807.

The following four statutes provide for simultaneous, live two-way broadcasting of the child's testimony by means of closed-circuit television. The procedure is at the trial court's discretion. Unless otherwise indicated, only the attorneys, technicians, and a support person for the minor witness may be in the room. CAL. PENAL CODE § 1347 (West 1989); N.Y. CRIM. PROC. LAW §§ 65.00-.30 (*McKinney Supp.* 1989); OHIO REV. CODE ANN. § 2907.41(c), (e) (*Anderson* 1987); VT. R. EVID. § 807.

The following 33 statutes provide for use at trial of a child's videotaped deposition or prior testimony. These procedures are not to be used in lieu of testimony, but are a sufficient substitute should the court find the minor unavailable for testimony at trial. Unless otherwise indicated, the defendant must be present and not hidden from the child's view. ALA. CODE § 15-25-2 (Supp. 1988); ALASKA STAT. § 12.45.047 (1984); ARIZ. REV. STAT. ANN. §§ 13-4251, 13-4253(b), (c) (Supp.

These statutes attempt to facilitate prosecution in child sexual abuse trials while protecting the minor witnesses.⁷⁶

The ABA supports measures for the protection of child witnesses. As early as 1984 the ABA Criminal Justice Section's Defense and Prosecution Function Committee began a collective project that combined the advice of its own governing council of professors, defense lawyers, prosecutors, judges, and others to create *Child Witness Guidelines* for sexual abuse cases.⁷⁷ Ratified in 1985 by the ABA House of Delegates, the guidelines offer procedural reforms designed to lessen the trauma to a testifying child while preserving the defendant's right to confrontation. Included among the recommendations are modifications for the manner and location of the child's testimony.⁷⁸ In addition, the *Child Witness Guidelines* specifically advise that child witnesses should be able to testify, when necessary, through closed-circuit television, a one-way mirror, or in any other manner that does not impair the defend-

1988); ARK. STAT. ANN. § 16-44-203 (SUPP. 1985). CAL. PENAL CODE § 1346 (West 1989); COLO. REV. STAT. §§ 18-3-413, 18-6-401.3 (1986); CONN. GEN. STAT. ANN. § 54-86g (West Supp. 1987) (providing that the court shall ensure the child can neither see nor hear the defendant); DEL. CODE ANN. tit. 11, § 3511 (1987) (providing that the court may require the defendant to be out of the child's view by means of a two-way mirror or screen); IND. CODE ANN. § 35-37-4-8(c), (d), (f), (g) (West 1986); IOWA CODE ANN. § 910A.14 (West Supp. 1989); KAN. STAT. ANN. § 38-1558 (1986) (providing that the court shall ensure that the child is unable to hear or see the defendant); KY. REV. STAT. ANN. § 421.350(4) (Michie/Bobbs-Merrill Supp. 1988) (providing that the court shall ensure that the child is unable to hear or see the defendant); MASS. GEN. LAWS ANN. ch. 278, § 16D(b)(2) (Law. Co-op. Supp. 1989) (providing that the court may arrange for the child not to see or hear the defendant); MINN. STAT. ANN. § 595.02(4) (West 1988) (providing that the defendant may observe and listen unless it is traumatic to the child); MISS. CODE ANN. § 13-1-407 (Supp. 1988) (providing that the court may order the defendant placed where the child cannot see or hear the defendant); MO. ANN. STAT. §§ 491.675-.690 (Vernon Supp. 1989) (providing that the court may exclude the defendant); MONT. CODE ANN. §§ 46-15-401 to -403 (1987); NEV. REV. STAT. ANN. § 174.227 (Michie 1986); N.H. REV. STAT. ANN. § 517:13-a (Supp. 1988); N.M. STAT. ANN. § 30-9-17 (Supp. 1988); OHIO REV. CODE ANN. § 2907.41(A), (B), (D), (E) (Baldwin Supp. 1987) (providing that the court may exclude the defendant; however, a closed-circuit monitor must be provided so that the defendant is in view during the deposition); OKLA. STAT. ANN. tit. 22, § 753(C) (West Supp. 1989) (providing that the court shall ensure that the child cannot see or hear the defendant); PA. CONS. STAT. ANN. tit. 42, §§ 5982, 5984 (Purdon Supp. 1989) (providing that the court shall ensure that the child cannot see or hear the defendant); R.I. GEN. LAWS § 11-37-13.2 (Supp. 1988) (providing that the court shall ensure that the child cannot see or hear the defendant); S.C. CODE ANN. § 16-3-1530(G) (Law Co-op. 1984); S.D. CODIFIED LAWS ANN. § 23A-12-9 (1988); TENN. CODE ANN. § 24-27-116(d)-(f) (Supp. 1986); TEX. CODE CRIM. PROC. ANN. art. 38.071, § 3 (Vernon Supp. 1989) (providing that the court shall ensure that the child cannot see or hear the defendant); UTAH CODE ANN. § 77-35-15.5(3), (4) (Supp. 1989) (providing that the court may order the defendant hidden from the child's view); VT. R. EVID. § 807 (providing that the court may order the defendant placed so that the child cannot see or hear the defendant); WIS. STAT. ANN. § 967.04(7)-(10) (West 1986 & Supp. 1988); WYO. STAT. § 7-11-408 (1987) (providing that the court may have the defendant hidden from the child's view).

76. See *supra* notes 12-18 and accompanying text.

77. See CHILD WITNESS GUIDELINES, *supra* note 17.

78. See *id.*

ant's right to confrontation.⁷⁹ These guidelines are based on evidence that as children testify in court with greater frequency as victims, they find the criminal justice system "alien and discomfoting."⁸⁰ Thus, it is important that the children, as well as the defendants, receive protection of their rights.⁸¹ The ABA recognizes that in spite of the unavoidable discomfort of testifying, courts and attorneys have the power to lessen this trauma for child witnesses through modification of procedures.⁸²

As stipulated in the *Child Witness Guidelines*, the child shield statutes make provisions for protection of the defendant's right to confrontation.⁸³ Many statutes require that the child be available to testify and to be cross-examined at trial, even if the deposition was videotaped.⁸⁴ Moreover, even those statutes that allow the videotape to substitute for the child's presence attempt to preserve the constitutionally required indicia of reliability by insisting that the child be available for cross-examination, either in court or on videotape.⁸⁵

Child shield laws that permit cross-examination generally have been found constitutional, in spite of a lack of face-to-face confrontation.⁸⁶ In *State v. Johnson* the Kansas Supreme Court upheld its child shield law, reasoning that the provisions for cross-examination provided sufficient indicia of reliability to meet the constitutional requirements for confrontation.⁸⁷ In addition, the court in *Commonwealth v. Ludwig*⁸⁸ stressed that the right to confront does not confer the right to intimidate and noted that the reliability of a child's testimony cannot

79. *Id.* procedural reform (g).

80. CHILD WITNESS GUIDELINES, *supra* note 17.

81. See Shepherd, *Introduction to CHILD WITNESS GUIDELINES*, *supra* note 17.

82. *Id.* at 19-22.

83. See generally Note, *supra* note 9, at 292-94.

84. See Amicus Brief, *supra* note 1, at 1a-18a.

85. *Id.*

86. The following state child shield laws have been held by state courts not to violate the right to confrontation: Arizona (*State v. Robinson*, 153 Ariz. 191, 735 P.2d 801 (1987)); Florida (*Chambers v. State*, 504 So. 2d 476 (Fla. Dist. Ct. App. 1987)); Indiana (*Miller v. State*, 498 N.E.2d 1008 (Ind. Ct. App. 1986), *rev'd on other grounds*, 517 N.E.2d 64 (Ind. 1987)); Kansas (*State v. Johnson*, 240 Kan. 326, 729 P.2d 1169 (1986), *cert. denied*, 481 U.S. 1071 (1987)); Kentucky (*Hardy v. Commonwealth*, 719 S.W.2d 727 (Ky. 1986)); Louisiana (*Louisiana ex rel R.C., Jr.*, 514 So. 2d 759 (La. Ct. App. 1987)); Maine (*State v. Twist*, 528 A.2d 1250 (Me. 1987)); Maryland (*Wildermuth v. State*, 310 Md. 496, 530 A.2d 275 (1987)); New Mexico (*State v. Tafoya*, 105 N.M. 117, 729 P.2d 1371 (Ct. App. 1986)); Pennsylvania (*Commonwealth v. Ludwig*, 366 Pa. Super. 361, 531 A.2d 459 (1987), *appeal granted*, 518 Pa. 617, 541 A.2d 744 (1988)); South Carolina (*State v. Cooper*, 291 S.C. 351, 353 S.E.2d 451 (1987)). *Contra Hochheiser v. Superior Court*, 161 Cal. App. 3d 777, 208 Cal. Rptr. 273 (1984) (holding that legislative authorization to protect witnesses from undue embarrassment does not empower a court to order testimony of a minor victim of sexual molestation via closed-circuit television).

87. *Johnson*, 240 Kan. at 326, 729 P.2d at 1169; see also Graham, *supra* note 45, at 576-80.

88. 366 Pa. Super. 361, 531 A.2d 459 (1987).

be measured in terms of how well he or she is able to withstand the psychological trauma of testifying face-to-face with the defendant. The court felt that the reliability of the child's testimony was assured through the child's cross-examination, which allowed the jury and defendant to observe the witness's demeanor.⁸⁹

B. Confrontation in Sexual Abuse Cases

1. *Kentucky v. Stincer* and *Pennsylvania v. Ritchie*

The theme of cross-examination also has arisen in recent Supreme Court cases that address the issue of confrontation. In *Kentucky v. Stincer*⁹⁰ the defendant claimed that his exclusion from the competency hearing of two minor victims of sexual abuse violated his right to confrontation. The Supreme Court held that the confrontation clause had not been violated. Noting that a competency hearing generally encompasses matters unrelated to basic trial issues, the holding in *Stincer* rested predominantly upon the grounds that the primary object of the confrontation clause is to secure for the defendant the right to cross-examination.⁹¹ The Court stressed that the right's primary purpose of the right to confrontation was to promote reliability,⁹² not to entitle defendants to confront witnesses face-to-face. In addition, the Court stated that the central question was not whether a particular proceeding was critical to the outcome of the trial, but whether there was interference with the defendant's right to cross-examination.⁹³

The Court also addressed confrontation in *Pennsylvania v. Ritchie*,⁹⁴ in which the defendant, convicted of sexual abuse of a minor, had been denied the right to see the contents of the witness's Children and Youth Services file. In approving an *in camera* inspection of the file, a plurality held that unlimited access would be counterproductive to the state's efforts to encourage reports of sexual abuse and to aid abused children.⁹⁵ The plurality based this decision on the defendant's rights under the confrontation clause to face any witness against him and to cross-examination before a jury.⁹⁶ The Court emphasized, however, that the right to effective cross-examination does not include the right to cross-examination in whatever manner and to whatever extent

89. *Id.* at 463.

90. 482 U.S. 730 (1987).

91. *Id.* at 737-39.

92. *Id.*

93. *Id.* at 744-45 n.17.

94. 480 U.S. 39 (1987).

95. *Id.* at 60.

96. *Id.* at 54. See generally Casenote, *supra* note 3, at 191-92.

the defendant might wish.⁹⁷

2. *Coy v. Iowa*

In light of recent rulings by the current Supreme Court on confrontation and state court treatment of child shield statutes,⁹⁸ commentators understandably perceived a trend toward judicial protection of child witnesses and away from a strict reading of the confrontation clause.⁹⁹ The Court, however, introduced a radical departure from its previous course in the recent case of *Coy v. Iowa*.¹⁰⁰

In *Coy* the Supreme Court addressed the constitutionality of child shield statutes for the first time. The defendant had been convicted of sexually assaulting two minor girls. Under an Iowa shield law,¹⁰¹ the victims had been allowed to testify at trial from behind a screen. Special lighting adjustments had enabled the defendant to see the witnesses. The witnesses could not see the defendant but had been informed of his presence. In addition, the witnesses had been in full view of the judge, jury, and defendant's counsel. The defendant claimed that his right to confrontation had been violated through the lack of face-to-face confrontation. The Iowa Supreme Court, however, affirmed the conviction, stating that because the ability to cross-examine the witness had not been impaired, there had been no violation of the confrontation clause.¹⁰²

The Court declared the Iowa statute unconstitutional and found that the confrontation clause does, in fact, guarantee the right to face-to-face confrontation.¹⁰³ The Court drew upon a number of unconventional sources of authority to reach this conclusion. First, the Court looked to "the beginnings of Western legal culture" and noted that a form of the right of confrontation was recognized under both Roman and ancient English law.¹⁰⁴ The Court also examined the Latin roots of

97. *Ritchie*, 480 U.S. at 53 (citing *Delaware v. Fensterer*, 474 U.S. 15 (1985)).

98. See *supra* notes 86-89, 91-97, and accompanying text.

99. See, e.g., Note, *supra* note 9, at 285; Casenote, *supra* note 3, at 196. See generally Jonakait, *supra* note 49.

100. 108 S. Ct. 2798 (1988).

101. IOWA CODE ANN. § 910A.14(1) (West Supp. 1989). The Iowa statute provides in part: The court may require a party be confined to an adjacent room or behind a screen or mirror that permits the party to see and hear the child during the child's testimony, but does not allow the child to see or hear the party. However, if a party is so confined, the court shall take measures to insure that the party and counsel can confer during the testimony and shall inform the child that the party can see and hear the child during testimony.

Id.

102. *State v. Coy*, 397 N.W.2d 730 (Iowa 1986), *rev'd*, 108 S. Ct. 2798 (1988).

103. *Coy*, 108 S. Ct. at 2800 (citing *Stincer*, 482 U.S. at 748 (Marshall, J., dissenting)).

104. *Id.*

the word "confront"¹⁰⁵ to reach an implication that the word itself connotes a literal, face-to-face confrontation. In addition, the Court quoted Shakespeare's *Richard II* to describe the root meaning of confrontation.¹⁰⁶ Moreover, President Dwight D. Eisenhower is cited as describing face-to-face confrontation as part of the "code" in his hometown of Abilene, Kansas.¹⁰⁷ Finally, the Court pointed out that the phrase, "'Look me in the eye and say that,'" still persists in our society.¹⁰⁸

The Court distinguished previous rulings on the confrontation clause as involving either the admissibility of out of court statements¹⁰⁹ or restrictions on the scope of examination.¹¹⁰ The Court saw none of the previous readings of the sixth amendment as applicable to the question of face-to-face confrontation. While acknowledging that face-to-face confrontation serves the same purpose as cross-examination,¹¹¹ the Court pointed to other cases that described literal confrontation as the "core of the values furthered by the Confrontation Clause"¹¹² and as "'essential to a fair trial.'"¹¹³ Consequently, the Court concluded that the constitutional guarantees of reliability in the confrontation clause demand literal confrontation, despite the psychological "costs" to witnesses.¹¹⁴

105. *Id.* (noting that "confront" derives from the prefix "con-" (from "contra" meaning "against" or "opposed") and the noun "frons" (forehead)).

106. *Id.* "'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 I, scene 1).

107. *Id.* at 2801. President Eisenhower stated:

In Abilene . . . it was necessary to "[m]eet 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 . . . In this country, if someone dislikes you, or accuses you, he must come up in front. He cannot hide behind the shadow."

Id. (quoting President Eisenhower, Remarks given to the B'nai B'rith Anti-Defamation League (Nov. 23, 1953)).

108. *Id.*

109. *See, e.g.,* *Ohio v. Roberts*, 448 U.S. 56 (1980); *Dutton v. Evans*, 400 U.S. 74 (1970).

110. *See, e.g.,* *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *Davis v. Alaska*, 415 U.S. 308 (1974); *cf. Delaware v. Fensterer*, 474 U.S. 15 (1985) (asserting that admission of expert opinion despite the expert's inability to recall the basis for that opinion did not restrict the scope of counsel's cross-examination).

111. *Coy*, 108 S. Ct. at 2802. "[B]oth 'ensur[e] the integrity of the fact-finding process.'" *Id.* (quoting *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987)).

112. *California v. Green*, 399 U.S. 149, 157 (1970).

113. *Pointer v. Texas*, 380 U.S. 400, 404 (1965) (quoting *Alford v. United States*, 282 U.S. 687, 692 (1931)).

114. *Coy*, 108 S. Ct. at 2802. The Court concluded further:

The State can hardly gainsay the profound effect upon a witness of standing in the presence of the person the witness accuses, since that is the very phenomenon it relies upon to establish the potential "trauma" that allegedly justified the extraordinary procedure in the present case. That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child

The Court acknowledged past cases holding that confrontation is not absolute, and may give way to other interests. The Court characterized those rights as implicit, however, and not as narrowly drawn as literal confrontation.¹¹⁵ The Court acknowledged that some exceptions to the rule may exist,¹¹⁶ but declined to identify any exceptions and stated that they would be recognized only to further an important public policy.¹¹⁷ Moreover, the Court will require more than a generalized finding of trauma to justify alternative methods of testimony since such an exception is not “‘firmly . . . rooted in our jurisprudence.’”¹¹⁸

IV. ANALYSIS

A. *The Reliability Requirement*

Despite the variety of specific findings, all cases construing the confrontation clause acknowledge that its primary function is to ensure reliability in the truth-finding procedure at trial.¹¹⁹ The *Coy* Court concluded that reliability can be assured only through face-to-face confrontation. Most courts disagree, however, with the idea that a fair trial can be secured only through literal confrontation with the witness. The following sections discuss alternative methods for obtaining adequate indicia of reliability.

coached by a malevolent adult. It is a truism that constitutional protections have costs.

Id.

115. *Id.* In the Court's opinion:

The rights referred to in those cases, however, 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).

116. *Id.* at 2803.

117. *Id.*

118. *Id.* (quoting *Bourjaily v. United States*, 483 U.S. 171, 183 (1987)). The *Coy* Court noted: The State maintains that such necessity is established here by the statute, which creates a legislatively imposed presumption of trauma. Our cases suggest, however, that even as to exceptions from the normal implications of the Confrontation Clause, as opposed to its most literal application, something more than the type of generalized finding underlying such a statute is needed when the exception is not “‘firmly . . . rooted in our jurisprudence.’”

Id.

119. See *supra* note 35 and accompanying text; see also *Bourjaily v. United States*, 483 U.S. 171, 182 (1987); *Ohio v. Roberts*, 448 U.S. 56, 66 (1980); *Dutton v. Evans*, 400 U.S. 74, 89 (1970); *California v. Green*, 399 U.S. 149, 158 (1970); *Mattox v. United States*, 146 U.S. 237, 244 (1895). See generally Goldman, *Not So “Firmly Rooted”: Exceptions to the Confrontation Clause*, 66 N.C.L. Rev. 1 (1987).

1. Guarantees of Reliability Through Cross-Examination

A pervasive bias that children often lie about sexual abuse presents particular problems in sexual abuse cases.¹²⁰ It is thought that forcing them to look at the defendant during testimony will mitigate this propensity to a large degree.¹²¹

Children's testimony also is distrusted in these cases because of the presumption that children are incompetent to testify. Recent studies, however, show this presumption to be greatly exaggerated.¹²² In fact, children's ability to remember and recount "real life" events is quite accurate.¹²³ Other studies have found no nexus between age and honesty.¹²⁴ More importantly, reports of sexual abuse, contrary to the conventional wisdom, have proven to be approximately as credible as those of any other crime.¹²⁵ Therefore, courts should feel confident in the reliability of information elicited from minor witnesses during testimony and cross-examination. Essentially, the testimony of children should be regarded with the same degree of trust as that of any other witness or crime victim.

In addition, the process of cross-examination serves to reinforce the reliability of testimony given by child witnesses. While the *Coy* majority cited *California v. Green* for the proposition that the literal right to confront witnesses is a "core value" protected by the confrontation clause,¹²⁶ the dissent pointed out that *Green* itself went on to explain that the confrontation clause was designed to prevent the use of *ex parte* affidavits, to provide for cross-examination, and to compel the witness to stand face-to-face *with the jury*.¹²⁷ The dissent also noted that even if the majority believed that "something deep within human nature" makes face-to-face confrontation essential, this was never a part of the common-law right to confrontation.¹²⁸

Indeed, *Coy* is the first Supreme Court case to hold that literal con-

120. See *Coy*, 108 S. Ct. at 2802 (referring to child witnesses "coached by a malevolent adult").

121. *Id.*

122. See Ginkowski, *supra* note 5, at 32.

123. See *id.*; see also Goldman, *Studies of Children as Witnesses Find Surprising Accuracy*, N.Y. Times, Nov. 6, 1984, at C1, col. 1.

124. See Ginkowski, *supra* note 5, at 33; see also Melton, *Children's Competency to Testify*, 5 LAW & HUM. BEHAV. 73 (1981).

125. See Ginkowski, *supra* note 5, at 33.

126. See *supra* note 112 and accompanying text.

127. *Coy*, 108 S. Ct. at 2807 (Blackmun, J., dissenting) (emphasis in original).

128. *Id.* Justice Blackmun stated: "There never was at common law any recognized right to an indispensable thing called confrontation as distinguished from cross-examination . . . [Confrontation is] not for the idle purpose of gazing upon the witness, or of being gazed upon by him,' but, rather, to allow for cross-examination." *Id.* (emphasis in original) (quoting 5 J. WIGMORE, EVIDENCE § 1397, at 158 (J. Chadbourn rev. ed. 1974)).

frontation is explicit in the sixth amendment. Prior to *Coy*, the Court had acknowledged only a judicial *preference* for face-to-face confrontation.¹²⁹ The opportunity for cross-examination had been viewed consistently as the primary right protected by the confrontation clause.¹³⁰ Recent cases leading up to *Coy* had implied that cross-examination alone satisfied the confrontation clause with no need for physical confrontation.¹³¹

The Iowa statute challenged in *Coy*, as well as the other child shield laws,¹³² provided for cross-examination in which the defendant could fully participate, either through personal attendance or through counsel. Moreover, it met what the Court has previously recognized as "the purposes of confrontation."¹³³ In *Coy* the child victims' testimony had been given under oath, subjected to unrestricted cross-examination, and the judge and jury had been able to observe their demeanor during testimony.¹³⁴ Under the interpretation of the confrontation clause in all cases prior to *Coy*, it is difficult to see how the right to confrontation, and its attendant indicia of reliability, is meaningfully impaired when the procedure preserves completely the defendant's right to cross-examine witnesses.¹³⁵

2. Guarantees of Reliability Through Hearsay Exceptions

In holding that the legislative presumption of trauma was not firmly enough rooted in our jurisprudence to warrant an exception to face-to-face confrontation,¹³⁶ the *Coy* Court implicitly rejected the hearsay exception of psychological unavailability.¹³⁷ The requirement that an exception to the confrontation clause be firmly rooted in our jurisprudence, however, has been imposed in the past only when there was a

129. See *Coy*, 108 S. Ct. at 2804 (O'Connor, J., concurring) (emphasis in original); see also *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987); *Ohio v. Roberts*, 448 U.S. 56, 63-64 (1980); *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973).

130. See, e.g., *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974); *Douglas v. Alabama*, 380 U.S. 415, 418 (1965); *Pointer v. Texas*, 380 U.S. 400, 406-07 (1965).

131. See, e.g., *Kentucky v. Stincer*, 482 U.S. 730, 739 (1987); *Douglas*, 380 U.S. at 418; see also *Recent Development*, *supra* note 2, at 223.

132. See *supra* note 75.

133. *Coy*, 108 S. Ct. at 2806 (Blackmun, J., dissenting) (quoting *California v. Green*, 399 U.S. 149, 158 (1970)); see *Lee v. Illinois*, 476 U.S. 530, 540 (1986); see also *supra* note 34 and accompanying text.

134. *Coy*, 108 S. Ct. at 2806 (Blackmun, J., dissenting); see *Green*, 399 U.S. at 158.

135. Cf. *United States v. Benfield*, 593 F.2d 815 (8th Cir. 1979) (holding that the right to confrontation was violated when the defendant was denied active participation in the cross-examination process).

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

137. See *id.* at 2805 (O'Connor, J., concurring) (noting that the case does not employ a literal reading of the confrontation clause that would bar the use of any out of court statement when the declarant is unavailable).

question as to the reliability of an out of court statement.¹³⁸

Bourjaily v. United States reaffirmed the rule that when hearsay falls within an established exception, no further proof of reliability is required.¹³⁹ In cases such as *Coy*, which utilize statutory procedures guaranteeing reliability through cross-examination,¹⁴⁰ no case-by-case determination of reliability is needed. The procedures themselves create the requisite indicia of reliability that are guaranteed by firmly established hearsay exceptions.

Moreover, state statutes for child victim hearsay generally require the court to make the same ad hoc determination of trustworthiness required by the confrontation clause.¹⁴¹ Such decisions turn on the facts of the case and surrounding circumstances.¹⁴² These statutory requirements for hearsay admission are supported by the statement in *Dutton v. Evans*¹⁴³ that the confrontation clause would be satisfied if the court had an adequate basis for determining the truth of the out of court statement.¹⁴⁴ *Dutton* indicated that the most important factors for establishing the truth of a hearsay statement are its probative value, certainty that the statement was made, and indicia of reliability.¹⁴⁵

In addition to general guarantees of reliability, courts utilizing the hearsay exception for psychological unavailability generally are required by statute to make a determination of any mental or physical harm that will result if the child is required to testify in open court.¹⁴⁶ When the traditional guarantees of reliability built into hearsay exceptions are merged with individualized determinations of trauma, the guarantees of the confrontation clause are firmly in place.¹⁴⁷ If properly applied, the psychological unavailability exception poses no greater threat to the truth-seeking purpose of the confrontation clause than

138. *Id.* at 2809 (Blackmun, J., dissenting); *Bourjaily v. United States*, 483 U.S. 171, 183-84 (1987); *Roberts*, 448 U.S. at 66.

139. *See Bourjaily*, 483 U.S. at 183-84; *see also United States v. Inadi*, 475 U.S. 387, 400 (1986). *See generally Jonakait*, *supra* note 49, at 571-74.

140. *See supra* note 130 and accompanying text.

141. *See generally Graham*, *supra* note 45, at 531-37. In applying the residual hearsay exceptions, courts consider whether the evidence sought to be admitted demonstrates guarantees of trustworthiness equivalent to those of statements admitted under other hearsay exceptions, is offered as evidence of a material fact, is more probative than other evidence which could reasonably be obtained, is in accord with the general purposes of the rules of evidence, and whether the proponent of the hearsay has given adequate notice.

142. *See id.* Some of the relevant circumstances are corroborating facts such as physical evidence, inconsistent facts, and the assessed credibility of the declarant, as well as factors examined under the residual hearsay rule that reduce the likelihood of fabrication. *See supra* note 141.

143. 400 U.S. 74 (1970).

144. *Id.* at 89.

145. *Id.* at 88-89.

146. *See Amicus Brief*, *supra* note 1, at 1a-18a; *Graham*, *supra* note 45, at 558-59.

147. *Contra Graham*, *supra* note 45, at 567.

any other hearsay exception.

B. State Interests

The Supreme Court consistently has acknowledged that the right to confrontation is not absolute¹⁴⁸ and that the preference for face-to-face confrontation¹⁴⁹ may be overcome by compelling competing interests.¹⁵⁰ If it is necessary to further an important public policy, face-to-face confrontation may be substituted with some other equally effective means of ascertaining the truth.¹⁵¹

Proponents of child shield laws argue that the states have a compelling interest in the protection of child witnesses in sexual abuse trials that is sufficient to justify modified procedures.¹⁵² In addition to many psychological professionals and judicial officers, at least four Justices in *Coy* recognized the protection of child witnesses as an important public policy.¹⁵³ While the Court noted that constitutional protections have costs,¹⁵⁴ two Justices concurred separately to underscore the need for judicial flexibility in the highly traumatic realm of testimony by child sexual abuse victims.¹⁵⁵ They referred merely to the stipulation of an ad hoc determination of necessity before instituting protective procedures.¹⁵⁶

Substantial authority recognizes a legitimate state interest in the use of alternative courtroom procedures for child witnesses. Both the sheer number of sexual abuse cases¹⁵⁷ and the trauma experienced by children as they are forced to testify about sexual assaults often hamper the efficient and effective prosecution of offenders.¹⁵⁸ This trauma can not only harm the child's emotional health¹⁵⁹ but also impair the qual-

148. See, e.g., *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973).

149. See, e.g., *Mattox v. United States*, 156 U.S. 237, 242 (1895).

150. See, e.g., *Ohio v. Roberts*, 448 U.S. 56, 64 (1980); *Chambers*, 410 U.S. at 295.

151. See, e.g., *Coy*, 108 S. Ct. at 2805 (O'Connor, J., concurring).

152. See, e.g., *State v. Sheppard*, 197 N.J. Super. 411, 484 A.2d 1330 (Law Div. 1984); Coyle, *Application of Confrontation Clause: A Difficult Issue in Child Abuse Cases*, NAT'L L.J., Nov. 2 1987, at 10; *supra* notes 13-15 and accompanying text.

153. *Coy*, 108 S. Ct. at 2803 (O'Connor, J., concurring, joined by White, J.); *id.* at 2805 (Blackmun, J., dissenting, joined by Rehnquist, C.J.).

154. *Id.* at 2802.

155. *Id.* at 2803-05 (O'Connor, J., concurring).

156. *Id.* at 2805. The majority opinion, in fact, may be read to imply the same standard, but it seems potentially to require a greater degree of need than would either the concurring or the dissenting opinion. See *id.* at 2803.

157. Between 1976 and 1985, the number of reported incidents of child maltreatment rose from .67 million to over 1.9 million (11.7% of the 1985 cases alleged sexual abuse). See AM. ASS'N FOR PROTECTING CHILDREN, *supra* note 3, 18.

158. See CHILD VICTIM ISSUES, *supra* note 11, at 17-18.

159. See Amicus Brief, *supra* note 1, at 9 (citing British Psychological Ass'n, The Emotional Effects of Criminal Court Testimony on Child Sexual Assault Victims, Proceedings from the Inter-

ity of the child's testimony.¹⁶⁰ Some authorities have even stated that mitigation of anxiety through protective procedures would enhance the reliability of a child victim's testimony, thus advancing the truth-seeking objective of the trial process.¹⁶¹

The State's right to alter criminal procedures was not challenged in *Coy*. Instead, the Court sought to restrict the application of that right. Therefore, although *Coy* did increase the degree of trauma necessary to justify the use of protective procedures,¹⁶² it did not proscribe them altogether. Now, states may alter procedures only upon a specific finding of debilitating trauma on a case-by-case basis.¹⁶³

C. Preserving the Constitutionality of Child Shield Statutes

Other child shield laws have yet to be tested against this new definition of confrontation. Most existing statutes, while not necessarily requiring a finding that the child is unavailable, require the court to find that some degree of emotional trauma would result if the child were required to testify in open court.¹⁶⁴ These requirements suggest that the ad hoc determination required by the *Coy* Court is already in place in most states implementing protective measures. Thus, *Coy* may only heighten the level of trauma required to justify modified measures of confrontation.

The Court's reluctance to identify specific exceptions to its rule of face-to-face confrontation¹⁶⁵ makes the impact of *Coy* on the future implementation of these statutes somewhat speculative. The language of the opinion, however, suggests that the case legitimately could be construed to require merely particularized findings of trauma in each case.¹⁶⁶ Under that interpretation, the impact of the case would be rela-

national Conference on Child Witnesses: Do the Courts Abuse Children? (in press)).

160. See *State v. Sheppard*, 197 N.J. Super 411, 416, 484 A.2d 1330, 1332 (Law Div. 1984); see also MacFarlane, *Diagnostic Evaluations and the Use of Videotapes in Child Sexual Abuse Cases*, 40 U. MIAMI L. REV. 135, 136 (1985).

161. See *Coy*, 108 S. Ct. at 2809 (Blackmun, J., dissenting); MacFarlane, *supra* note 160, at 136.

162. See *Coy*, 108 S. Ct. at 2803. The Court explained:

The State maintains that such necessity is established here by the statute, which creates a legislatively imposed presumption of trauma. Our cases suggest, however, that even as to exceptions from the normal implications of the Confrontation Clause, as opposed to its most literal application, something *more than the type of generalized finding* is needed when the exception is not "firmly . . . rooted in our jurisprudence."

Id. (emphasis added) (quoting *Bourjaily v. United States*, 483 U.S. 171, 183 (1987)).

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

164. See Note, *supra* note 9, at 291.

165. See *Coy*, 108 S. Ct. at 2803.

166. See *id.* The Court explained its finding by noting, "The exception created by the Iowa statute, which was passed in 1985, could hardly be viewed as firmly rooted. Since there have been no individualized findings that these particular witnesses needed special protection, the judgment

tively slight because particularized finding requirements are already in place in most states.¹⁶⁷

Significantly, the Iowa statute is the only child shield law authorizing the use of a screen like the one employed in *Coy*.¹⁶⁸ If the Court's opinion is interpreted to prohibit only devices that block the witness's view of the defendant at trial, many child shield laws would remain unaffected. The majority of these laws provide for closed-circuit transmission of testimony, require the child to be present for face-to-face cross-examination, or allow these measures to be used only in pretrial procedures.¹⁶⁹ If courts construe *Coy* as requiring a child to testify in open court before the defendant, the judge, and the jury, however, most of these statutes necessarily would be unconstitutional.¹⁷⁰

A reasoned view of *Coy* argues against this result. Both the plurality opinion and the concurrence merely seem to require more stringent measures to guarantee that the protection of child witnesses does not result in the abuse of protective procedures or unnecessary infringement of the defendant's rights to confrontation.¹⁷¹ Under this reading, child shield legislation that provides a system to protect the defendant against exaggerated claims of emotional trauma should be able to meet the test of *Coy*.

V. CONCLUSION

The *Coy* interpretation that the confrontation clause guarantees defendants a right to face-to-face confrontation expands the right as it has existed in the past. *Coy*, however, does not make this right absolute and recognizes the possibility of exceptions in the face of important public policies. The growing number of child abuse reports and prosecutions has made the protection of child witnesses an increasingly important policy. Nevertheless, legislatures must be careful to guard the constitutional rights of defendants in these cases as well as to protect the interests of child witnesses.

The Court's decision in *Coy* left the constitutionality of other child shield measures open. The case does seem to suggest, however, that procedures sufficient to provide particularized findings of substantial trauma in a child witness would be adequate to justify an exception to the rule of face-to-face confrontation. Thus, future legislative efforts to

here could not be sustained by any conceivable exception." *Id.*

167. See Note, *supra* note 9, at 291.

168. See Recent Development, *supra* note 2, at 226.

169. See *supra* note 75 and accompanying text. See generally Recent Development, *supra* note 2, at 226.

170. See Recent Development, *supra* note 2, at 226.

171. See *Coy*, 108 S. Ct. at 2798.

protect child victims of sexual abuse must attempt to provide criteria for ad hoc determinations of psychological trauma resulting from testifying in open court or face-to-face with the defendant.

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